

From Red to Green Flags

The corporate responsibility to respect human rights in high-risk countries

The Institute for Human Rights and Business is dedicated to being a global centre of excellence and expertise on the relationship between business and internationally proclaimed human rights standards. The Institute works to raise corporate standards and strengthen public policy to ensure that the activities of companies do not contribute to human rights abuses, and in fact lead to positive outcomes.

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Executive summary

Context

Human rights¹ are universal, but not universally protected or respected. The worst abuses occur in the midst of violent conflict but conflict is itself only a manifestation of a much deeper malaise. The source of the problem lies in illegitimate, repressive, dysfunctional or merely weak States. Poor governance provides the environment in which human rights abuses occur either through direct State abuse or through the State's inability to provide protection against the abuses of others. Poor governance ultimately defines high-risk countries.

A country is "high-risk" when

- The State lacks the authority to protect its citizens from violence of various kinds; or
- The State fails to ensure that all citizens have access to basic services; or
- The State has only limited support among the people. Typically such States are not democratic, and their governments are often military or are supported and dominated by military interests.

Adapted from: Frances Stewart and Graham Brown, *Fragile States*, Centre for Research on Inequality, Human Security and Ethnicity (CRISE), Working Paper No 51, January 2009.

Such places can offer business opportunities. For some, investment is driven by need – the resources are where they are; for others, by the prospect of untapped markets. For all, they offer severe operational, legal and reputational risks. The combination of foreign investment and high-risk countries has proved explosive: violent protests and fierce opposition locally, condemnation and campaigns internationally. Non-existent, weak or poorly enforced legislation against a backdrop of violence, social tension, poverty and corruption may prove a blessing for the unscrupulous but for the majority of companies, it offers a minefield of extremely complex management issues through which they are ill-prepared to navigate.

This is beginning to change with the emergence of the UN 'Protect, Respect, Remedy' framework, developed by UN Special Representative for Business and Human Rights, John Ruggie, and endorsed in 2008 by the UN Human Rights Council. The 'Protect, Respect, Remedy' framework and the Guiding Principles for its implementation, including the concept of human rights due diligence, provide for the first time a shared approach to the problems high-risk countries present.

¹ Human Rights are understood in this report as encompassing all rights as laid out in the Universal Declaration of Human Rights, International Covenant on Civil and Political Rights, International Covenant on Economic, Social and Cultural Rights, and ILO core conventions.

The challenges now are to decide:

- What specific steps companies should take to ensure that their operations are consistent with their responsibility to respect human rights;
- Whether companies that work in extreme conditions have additional responsibilities and, if so, what these might entail; and
- How companies can act in a manner that ensures respect for human rights when other actors (notably States) do not fulfil their obligations.

About this report

This report is not another methodology. It strives to use knowledge that exists to provide an overview of good practice, informed by a human rights framework.² It builds on significant work in this area, including the Institute's own *State of Play Report of Human Rights Due Diligence: Anticipating the Next Five Years*, a study of due diligence practices of 23 large corporations. It is written primarily for managers and staff of companies that operate in high-risk countries, but we hope it will be relevant to all those working on business and human rights.

It is divided into two parts. The first examines challenges and specific responsibilities associated with them. The second explores more generic company responses.

Contents

Part one: The Challenge

Law: national, international and "soft" law.

People: government, communities, armed groups, gender, and international cooperation.

Issues: shadow economies, labour, security, the environment, land & water, dealing with the past.

Part two: The Response

Company: policies, structure, staff, integration, reporting.

Process: understanding risk, building relationships and providing remedy.

Impacts: distinguishing high-risk from more stable countries

² See the bibliography at the end of this report for a select list of resources.

Part one: The challenge

A company investing in a high-risk country operates with few certainties. The law may be weak and poorly enforced or easily circumvented. The State may not fully control its territory or may exercise control by repression. Security may not be provided or it may protect assets but not people. Water, health, transport, and education may be functionally absent or may benefit some but not others. Opportunities for employment may not exist or may be determined by ethnicity or patronage. Some groups in the society may believe that their aspirations can only be met through violence.

Critical dilemmas

How can a company respect human rights when the State does not fulfil its obligations?

How can a company avoid infringing the rights of others when some impacts are outside its control?

How does a company mitigate negative impacts when it cannot do so alone?

The challenges are not just unfamiliar; they threaten the elaborate system of checks and balances that societies have constructed to balance the profit motive of companies, the rights of people, and the needs of the State. Moreover, they differ from one country to another. They can be broken down in terms of law, relations between people, and issues:

Law

Companies are familiar with the challenges of legal compliance. They are less accustomed to contexts in which the law provides poor or contradictory guidance on a company's duties.

International law (notably human rights and humanitarian law) sanctions the worst abuses, but it does not replace sound domestic legislation. The weaknesses of domestic and international law, especially with regard to enforcement, explain the emergence of many 'soft law' instruments, such as corporate voluntary initiatives. These aim to compensate for deficiencies in formal ("hard") law, but have themselves been criticised.

Do national, international and soft law collectively provide instruments that enable companies to meet their responsibilities under the 'Respect' framework? Probably not. Though companies should not break the law, they can (and often should) go beyond it when national governance is weak or corrupt. Where national laws positively obstruct adherence to the 'Respect' framework (by restricting public meetings, or formation of trades unions, for example), companies need to circumvent the law creatively.

At the same time, mere adherence to corporate voluntary initiatives will not fulfil a company's responsibility to respect human rights. The 'Respect' framework focuses on impacts – on the *effects* of a company's activities and relationships: voluntary initiatives are a means, not the end.

International best practice, even properly implemented, cannot fully compensate for weaknesses of the law or the State either. Companies will face difficulties because their ability to ensure respect for human rights depends partly on the actions of others. This means that their responsibility is not absolute; the quality of effort, and process, matter.

Enhanced due diligence

Companies should:

- Exceed national legislation where it falls short of best practice (on environmental or labour standards, for example).
- Advocate for reform of domestic legislation that conflicts with international standards.
- Work creatively to respect best practice, where domestic legislation is constraining (for example, representation for employees).
- Address risks of human rights abuse and issues of complicity in contracts with host governments and associates.
- Give attention to, and report on, implementation of soft law guidelines.
- Harness the potential of multi-stakeholder initiatives to lobby host governments on relevant human rights matters.

People

Government

When States fail to protect rights, they facilitate corporate malpractice. When they fail to respect or fulfil rights, they undermine corporate good practice. It is therefore critical to understand the role of States, notably:

- Legislative inconsistencies.
- Capacity gaps.
- Issues of authority and legitimacy.
- Political will.

A company may find itself in breach of its human rights responsibilities because of government action or inaction. A company's liability in such cases has limits; but its

responsibilities are independent of those of government and remain. For this reason, where governance is weak, companies need to enhance their due diligence procedures.

State failure to fulfil its obligations increases the pressure on companies to assume additional responsibilities, to mitigate impacts or access to rights (such as health for example). Companies therefore have a responsibility and an incentive to strengthen State capacity and effectiveness.

Enhanced due diligence

- Assess government capacity, authority, legitimacy and will as part of due diligence.
- Consider risks associated with deficiencies of government.
- Provide technical support to increase government capacity, particularly at local level.
- Advocate for a strong state role in socio-economic development.
- Identify partnerships and alliances with international organisations to support and encourage the government.
- Be transparent when it is possible; when it is not, discuss measures confidentially.

Communities³

The relationship between companies and communities is central to many allegations that companies abuse human rights.

International human rights frameworks may be a useful guide to a company's responsibilities in high-risk countries, but for two reasons they need to be contextualised. First, because local communities may not articulate their 'rights' in terms of *international* human rights law; and second, because the responsibilities of States are central to human rights law and many communities are suspicious of government.

With regard to communities, a company's human rights responsibilities are about *showing respect* and *meeting expectations*. The importance of the first is poorly recognised. Managers must juggle many competing priorities in high-risk countries, but sincere engagement with communities is one of the most crucial. Failure to engage, or be seen to engage, remains a frequent problem and an abiding source of community resentment.

A company has no duty to fulfil the functions of government. But communities are more interested in getting services to which they are entitled than in who provides them. A company may therefore fulfil the letter of its human rights responsibilities but still face protests at its front gates.

³ This section draws on *Community Perspectives on the Business Responsibility to Respect Human Rights in High-Risk Countries*, CDA Collaborative Learning Projects and IHRB, 2011.

This highlights the importance of delivering the benefits that companies are competent to provide. Broadly, this means long-term jobs for local people and evidence that some of the company's revenue, paid to government, returns to improve services and infrastructure. If a company delivers the first and shows that it works for the second, it is likely to earn the community's respect.

Enhanced due diligence

- Understand differences in perception of rights.
- Clarify expectations, including the limits of company responsibility.
- Form genuine relationships with communities (see *Building relationships* in Part two).
- Maximise core benefits (jobs and broader economic development).

Armed groups

Non-state armed groups vary enormously in terms of their size, reach, motivation, support base, and sources of revenue. These factors condition the risks they pose to a company and to its ability to operate responsibly. Equally, a company's characteristics – its size, location, function, workforce, community relations, even nationality – will influence those risks too.

A company's role with regard to armed groups is dictated by the extent to which its impacts increase their desire and capacity to harm the company or adjacent communities.

Human Rights due diligence procedures help to predict harmful impacts and also identify ways to reduce and mitigate threats and harm. Faced by the risks posed by armed groups, companies need to think laterally.

Security is clearly one priority. A company achieves security by reducing an armed group's capacity and/or motivation to do harm. State (or private) security forces that are repressive or violate rights may reduce an armed group's capacity but at the cost of increasing its motive to harm. Companies therefore need to consider all the ways in which they can insist, encourage, prompt, and assist governments and their security forces to fulfil their human rights obligations.

Ignorance, or disregard of the motives of armed groups, will also fuel resentment, heighten risk, and compromise a company's ability to respect human rights. It is important to understand and acknowledge grievances, though this does not imply giving way to demands. The intersection between the responsibilities companies have, and the concerns of local populations, needs to be explored, just as it does in other contexts.

Enhanced due diligence

- Analyse the company's impacts.
- Understand the agenda of armed groups.
- Suspend or postpone investment if its impacts might credibly lead to grave human rights abuses.
- Avoid paying off or otherwise benefiting armed groups (as far as possible).
- Enhance company security measures to include protection of local communities (as necessary and as far as possible).
- Support the capacity of state forces in line with best practice guidance (and with an understanding of potential risks).
- Develop joint approaches with other companies.
- Address grievances related to company impacts and in so far as they intersect with local community concerns.
- Partner and support organisations working to address grievances.
- Advocate confidentially, with host or home governments or international organisations.
- Discuss risks and mitigation measures with trusted international bodies.

Gender

The term 'gender' takes account of the social, economic, and political differences, not just the physical ones, between men and women. Gender matters because men and women experience the impact of a company's activity differently, and a company cannot meet its responsibilities to respect human rights if it does not properly understand this. (It needs to be similarly sensitive to the impact of its activities on all individuals and groups who are likely to suffer discrimination.)

Differences of experience notably occur in the area of: livelihood, resources, services, security, and health.

Companies are not agents of social change: it is not their mandate to address deep-rooted societal injustices, nor do they possess the required expertise. Companies do *bring* social change, however, and they have responsibility for its impact. The claim that companies should not involve themselves in socio-cultural questions, such as the position of women, is sustainable only to the extent that their presence neither sustains nor worsens discrimination on grounds of gender.

Enhanced due diligence

- Include gender analysis in risk assessment processes.
- Ensure that women (and other disadvantaged groups) are properly included.
- Assess how company impacts will affect groups differently.
- Develop tailored strategies for mitigating negative impacts.

International cooperation

Cooperation between governments, multi-lateral organisations, civil society and business has increased enormously in recent years. The contribution businesses can make to reducing poverty through trade and investment has been recognised – and in parallel the risks of corporate abuse in developing countries have also attracted growing attention.

Multi-stakeholder cooperation suffers from incoherence, nevertheless. Governments, business and civil society each need one another if they are to achieve their goals. For companies, benefits of cooperation include:

- **Protection.** Because of their sensitivity, companies find it difficult (or inadvisable) to raise certain issues with host governments. This can often be done more easily through their home governments, multi-lateral agencies or in multi-stakeholder forums.
- **Advice.** When companies face the very complex dilemmas that arise in high-risk societies, governments or other actors may be able to suggest alternative solutions, and work with companies to implement them.
- **Knowledge.** Companies cannot, and should not be expected, to know everything. Even comprehensive due diligence will leave gaps. Companies need other institutions, with different forms of experience, to supplement their own analysis and capacity.
- **Support.** Companies often need support to address negative impacts.
- **Level playing field.** Bad practice in a company undermines the work and reputation of other companies. This is not simply a matter of competitive advantage or guilt by association. Companies that ignore human rights increase risk for others. Cooperation, between companies and with other institutions, helps to raise standards.
- **Transparency.** Companies need to show they are doing what they can to protect rights and behave responsibly. This is their main defence against a range of risks. Transparency takes many forms and is not necessarily about public declaration. Cooperation with other institutions, including governments and civil society organisations, can assist companies to build public and private trust.

Issues

Shadow economies

Though criminality exists everywhere, State-controlled or State-sanctioned criminality is largely specific to high-risk countries, some of which are also characterised by 'uncontrolled' criminality, in which States are unable (for lack of control) or unwilling (from political expediency) to prevent, investigate or prosecute large-scale criminal activities.

Shadow economies present three important challenges for companies:

- **Resource curse.** Mismanagement of national revenues is beyond company responsibility, but local impact is relevant. Companies need to ensure the benefit of their presence is felt locally. There is no better risk mitigation strategy.
- **Corruption.** Corruption is incompatible with the corporate responsibility to respect, but is unlikely to disappear. A company's responsibilities need to be framed in terms of the impact of corruption (its gravity) and the company's efforts to avoid and mitigate it. In countries where corruption is unavoidable, it is not enough to institute a strictly enforced policy; companies need to support initiatives that combat bribery.
- **Partners and Suppliers.** Many companies invest in partnership with State-owned enterprises. Many, though not all such enterprises will be engaged in corruption. The same will be true of private enterprises. A similarly acute problem confronts companies that source their products from high-risk countries, particularly from areas of conflict. Companies need to work with other businesses, home and host governments, and civil society organisations, to develop a collective response and strategy.

Enhanced due diligence

- Argue that resources should be allocated fairly to and within the company's operating region.
- Support efforts to strengthen local government institutions.
- Partner with local government on service provision and infrastructure.
- Communicate and disseminate information about tax and royalty payments locally.
- Support media and civil society efforts to hold local government accountable.
- Support anti-bribery initiatives, particularly at local level.
- Participate in multi-stakeholder initiatives to monitor products sourced from high-risk countries.
- Develop a shared strategy to address sourcing problems; in extreme cases, change source.

Labour

Companies are responsible for the treatment and recruitment of their employees. In principle, they are wholly responsible but in high-risk countries their authority is conditioned by the legal framework and wider socio-economic and political context.

Jobs are valuable commodities in countries where unemployment is high. Their allocation can be a source of tension and competition. To meet its responsibilities and mitigate risks, a company needs to ensure:

- Its recruitment criteria are non-discriminatory and based on merit.
- It employs local people in a representative manner.
- Its workforce is religiously, ethnically, linguistically representative.
- The local economy is vibrant (the company is not the sole employer).

Enhanced due diligence

- Alternative mechanisms of staff representation.
- Affirmative action for disadvantaged groups (women, ethnic and religious minorities).
- Allocation of local jobs on the basis of impacts.
- Targets for local recruitment.
- Educational support (schools, scholarships).
- Long-term training to raise skills.
- Maximise use of local suppliers, including support to build local business capacity.
- Advocate and support improvements in the business environment.

Security

High-risk countries present many forms of security risk. Beyond the standard threats of theft, vandalism and sabotage, companies may have to contend with armed groups, unreliable State security forces, inadequate justice systems, high expectations in the local community, and a host of endemic social, economic and political tensions. These can create explosive combinations. Companies need to ensure that the risks do not include the security providers themselves (private and public).

Company engagement with public or private security is increasingly shaped by guidelines set out in The Voluntary Principles on Security and Human Rights (VPs). The VPs offer excellent guidance, but a company needs to remember that its impact, rather than adherence to principles, determines its human rights responsibilities.

Prevention and accountability are the two key elements of a company's responsibilities. With regard to their private security employees, companies should enforce appropriate

standards and ensure strong local representation (including women) and the right kind of training. With regard to public security forces, wherever possible a company should avoid situations requiring their intervention, should ensure that any intervention is appropriate (non-offensive), and should exercise influence to promote responsible and accountable behaviour by State security forces.

Enhanced due diligence

- Contracts with host government addresses risks.
- Local representation, including women.
- Training in people and crisis management skills.
- Good links between Security and Community Relations.
- Avoid using public security forces if possible.
- Assistance to public security should be conditional.
- Training for public security.

Environment

For many people their environment is at the heart of their quality of life. Environmental impacts are therefore a frequent cause of conflict with local communities, certainly for large-scale projects.

Companies cannot avoid or wholly mitigate their environmental impact. Their responsibilities are therefore defined by what they do to reduce and compensate for adverse impacts.

This requires companies to step beyond technical standards to a more holistic assessment of their impact on individuals.

Enhanced due diligence

- Disclose actual or expected environmental impacts.
- Minimise impacts during operations and, as far as possible, restore or improve pre-investment environment following closure.
- Ensure independent monitoring of impacts (air and water quality, land contamination, etc.).
- Understand people's perceptions and experience of impact from a human rights perspective.
- Negotiate and agree compensation having regard to impacts rather than standards.

Land and water

Land and water raise fundamental issues:

- **Survival.** Access to land and water is essential to existence. Degrade or expropriate either and survival is at risk.
- **Scarcity.** Scarcity increases the value and competition for land and water, which is heightened by alternative uses.
- **Sanctity.** Land in particular is not an economic asset. It represents history, place, culture, religion and identity.

Companies should:

- **Minimise disruption.** To the extent that it can do so, a company should work around existing communities.
- **Maximise benefits.** When assessing benefits, a company should consider all the issues that shape an individual's quality of life: housing, services, livelihoods and community.
- **Manage government.** A company should avoid state intervention in areas such as land clearance but promote involvement in service provision, land registry, health etc.

Enhanced due diligence

- Clarify government responsibilities.
- Disclose and discuss impacts, whether they are single or iterative.
- Determine direct and indirect impacts on quality of life.
- Minimise impacts.
- Take time to design compensation measures.
- Give communities a stake in the project.
- Lobby and support government to meet its responsibilities.
- Ensure land clearance is legal and independently monitored.

Dealing with the past

High-risk countries have a history of conflict, neglect, inequality and poverty which bequeaths a complex legacy of suspicion and self-sufficiency.

How are companies to respect human rights where rights have never been respected or protected in the past? This question is even harder to answer when the company itself has a controversial history.

Company responsibilities centre on understanding these legacies and promoting consensual solutions. In many cases, this will be necessary even when a company is new to a country.

Enhanced due diligence

- Prior to operations, conduct a baseline assessment to determine the existing condition of impacted communities.
- Negotiate a division of responsibilities with local and national government.
- Consider historical inequality and discrimination in employment and social investment strategies.
- Focus on impacts, not just law, when dealing with past grievances.
- Identify non-judicial forms of remedy and resolution.
- Recognise and as necessary address the legacy of other companies.

Part two: The response

Faced by the challenges explored in Part One, companies have sometimes chosen to stay away or to disinvest.⁴ When they invest, they have three options. They can adapt downwards, by exploiting the advantages that weak regulation and poor governance can offer; they can adapt upwards (and thereby potentially differentiate themselves from their peers) by introducing policies and approaches that deal with the challenges; or they can try a bit of both. The first is risky, the second difficult, the third risky and difficult.

From a company perspective, reacting to events has proved to be just as time-consuming and resource intensive over the long-term, and has compartmentalised standards and policies, which are added on rather than properly integrated and consolidated. From the perspective of communities and the wider society, a reactive approach conveys the impression that companies are dragging their feet, are not genuinely concerned by their impacts on people, and can only be influenced by protest and criticism. For governments, it sends mixed signals about a company's intent and the seriousness of its commitment to respecting human rights throughout its operations.

The challenges may be complex but, in broad terms, they are predictable; companies do not need to act blindly and hope for the best. They can put in place the fundamental elements of good practice that will enable them to anticipate and address problems before they become critical. Over time, doing so will save money, strengthen reputation, and support a more stable business environment. Policies should:

- Configure internal **company** systems, structures and attitudes.
- Design effective **processes** for understanding risk, building relationships and providing remedy.
- Provide mechanisms and resources for preventing and mitigating negative **impacts**.

Company⁵

A cross-section of businesses has broadly accepted the 'Protect, Respect, Remedy' framework, answering the question as to *whether* companies have a responsibility to respect human rights. The challenge now is *how* to implement the framework, especially in high-risk countries where human rights risks are more acute, more complex and less familiar.

A company cannot respect human rights, least of all in high-risk countries, if it does not address its own structures and systems. Five aspects need to be considered: policies, structures, staff, integration, and reporting.

⁴ For example, some oil companies chose not to invest in Sudan and some have divested in view of the ongoing conflict.

⁵ This section draws on Edward Bickham, *Human Rights: the internal management challenges*, IHRB, 2011.

Company: key considerations

Ensure policies are aligned with international human rights standards.

Consolidate individual policies into an overarching human rights statement.

Refine corporate-wide policies to meet the needs of specific country operations.

Create structures at headquarters and site levels that promote a 'whole of company' approach to anticipating and addressing human rights issues.

Recruit and train staff in the policies and their implementation.

Provide incentives via bonus and promotion schemes that reward excellent social and human rights performance.

Integrate social reporting within a human rights framework.

Focus external reporting and accountability on those impacted by the project.

Process

As with any activity that requires the efforts of many, business is essentially about cooperation: with staff, customers, partners, suppliers, and with governments and local communities. Cooperation makes business possible but introduces an element of risk. Cooperation is therefore about *risk management*, and risks can only be managed if they are understood properly. Understanding risk is a process.

Cooperation implies a *relationship*, the nature of which will depend on the form of cooperation – in brief, on what each party wants from the other. Building relationships is also a process.

Cooperation further presumes *mutual satisfaction*. If this is not achieved, mechanisms are required to address disagreements between the parties. Resolving these and providing remedy is a process too.

Managing relationships is complex everywhere, but particularly in high-risk societies, where business relationships may be influenced by compelling personal or political factors and the law is open to manipulation.

The 3 'Rs'

1. Understand **Risk**.
2. Build **Relationships**.
3. Provide **Remedy**.

Understanding risk

Risk assessment is standard practice for most companies. The 'Respect' framework simply expands its scope. Risk assessments need to encompass human rights risks to others and human rights risks posed by others, specifically those with whom companies have a relationship.

Human rights risk and impact assessments: key considerations

Continuous. Assessment should continue through the life of a project. Fixed-point assessments are important milestones but should not replace continuous monitoring.

Integrated. Human rights considerations should be a core feature of assessment processes, not a separate process.

Devolved. Individual departments (security, human resources, contracts, external relations, etc.) should have responsibility for assessing human rights risks in their domain.

Harmonised. Their separate analyses should be brought together and integrated (for example through a Risk Task Force).

Baseline. To properly identify their impact, companies should establish a baseline description of conditions. This will also help to define and communicate responsibilities (of the company, of government, etc.).

Process-orientated. Include intangible outcomes. Values like trust and respect are important; risk assessments should reflect this in their design and implementation.

Accessible. Those implementing an assessment and those who are consulted should be at ease with its framework and language. If formal human rights language is unhelpful, do not use it. What matters is identifying the problems, not how they are described.

Inclusive. Speak to all relevant constituencies. Where this is genuinely not possible (women in some situations, critics of government in others) identify third parties who can access them or representatives who can speak for them.

Comprehensive. Examine all issues and relationships; include external parties.

Focus on impacts. Understanding impacts is the main purpose of assessments. Make sure the terms of reference are appropriate.

Validate. Be transparent whenever possible, respect confidentiality where necessary. Reflect back the findings of assessment to those who were consulted and have an interest.

Building relationships

Strong relationships are not a requirement under the 'Respect' framework. It is not necessary to get along with an institution, group or individual in order to respect rights. Positive relationships do nevertheless make many things easier, and negative ones can have damaging consequences.

Companies need no advice on managing their business relationships. No company will last long without proven strategies for working with its partners, contractors and suppliers, and clients and customers. Companies also recognise the importance of political relationships in high-risk countries. Social relationships are more problematic, however. Companies are driven by economic imperatives and this is at the heart of their often contentious relationship with local communities. Many companies find it hard to conceive of their relationships except in terms of mutual economic advantage, and do not easily make the leap from contract to rights.

Yet companies need to understand the nature of their relationship with communities. It is not just another negotiated contract; communities are not a non-profit form of business partner. This is partly due to the character and culture of each community but primarily to the fact that large projects have a profound impact on the lives of communities they affect, and these impacts are not only economic but cultural. They bear on relationships, personal security, livelihoods and status.

Companies need to approach communities with the respect due to those whose lives they are fundamentally changing. This is relevant also to social investment strategies, which can help to mitigate harmful impacts.

Building relationships: key considerations

Recognise the social character of a company's relationship with surrounding communities. Respecting human rights is as much about 'how' as 'what'.

Commit to an open-ended process. Relationships need to last as long as the project, not just until 'consent' is obtained.

Recruit staff with appropriate skills, attitudes and ethnic, religious, linguistic balance.

Design a process that is *inclusive* (all impacted groups), *fair* in terms of benefits (judged by impact), culturally *appropriate*, and *open* (regular and transparent communication).

Focus on winning trust.

Align social investment strategies with impact mitigation responsibilities.

Providing remedy

Rigorous risk assessment and strong local relationships will do much to limit grievances, but will not eliminate them. Legitimate grievances need to be resolved and even unsubstantiated grievances can benefit from being expressed. Ensuring that people both inside and outside a company have proper access to remedy for harm done to them is an increasingly understood to be part of a company's responsibility to respect human rights.

The main focus in this respect has been on the development of grievance mechanisms. These are useful but bring complications as well. In high-risk countries many people do not have access to justice and a company grievance mechanism may be the only means of remedy available. In so far as a complaint is against the company, this is straightforward; it is less so when the complaint is not against the company but a third party with whom the company has an association. In such circumstances, companies may find themselves drawn into disputes from which they have no clear exit.

Providing remedy: key considerations

Establish a grievance mechanism according to best practice principles.

Encourage staff and local communities to raise concerns through the grievance mechanism.

Resolve genuine complaints against the company through negotiation, apology or compensation (as appropriate).

Pressure partners and suppliers to investigate and address complaints directed at them and keep informed of progress and resolution.

Take appropriate action against partners and suppliers (including possible termination of contract) according to severity of allegation, balance of evidence and weight of cumulative allegations.

Assess the integrity and effectiveness of judicial mechanisms.

Monitor the progress and outcome of complaints addressed through judicial mechanisms.

Avoid using judicial mechanisms (if possible) where there is a credible risk of official abuse.

Impacts

A company's responsibility for harm caused by its activities is relatively straightforward in principle, but not necessarily in practice. Assessment of a company's record of implementing rights depends firstly on legal compliance (which, if achieved, may be sufficient), then on the application of international best practice guidelines, and finally on mitigation measures should negative impacts prove unavoidable.

In high-risk countries, the situation is complicated by weaknesses in the rule of law. If a company cannot depend on the law to impose standards, it is dependent on its own standards, themselves vulnerable because the integrity of law affects all its relationships. If a company cannot trust those with whom it associates to be subject to law, including those responsible for protecting and administering the law, it is exposed to risk from many directions.

This lack of control is characteristic of high-risk countries. Companies cannot always impose their own standards, which may be obstructed by domestic law or government pressure. They are not in control of all their impacts, which are shaped by the actions of others – associates, communities, officials, and other external actors. They do not even control their mitigation efforts, many of which will not be effective in the absence of official or community cooperation.

None of this absolves companies of their responsibilities; but it complicates them. A company should still be judged on its behaviour but the nature of the external environment both compounds a company's responsibilities and reduces the degree to which its performance can be assessed in absolute or simple terms, without regard for surrounding conditions.

Addressing impacts: key considerations

Comply. Establish whether the application of domestic and international law and best practice guidelines will be adequate to address actual or potential impacts.

Promote an enabling environment. If the context is problematic, work to change it. The company has the responsibility to respect human rights whether or not other actors act responsibly. A company needs to do what it can to promote an enabling environment.

Be iterative and incremental. Over the life of a project, a company can control many but not all of its impacts.

Sequence. Based on severity, probability and capacity, companies will need to prioritise some impacts compared with others.

Collaborate. Collaborate with other companies, with host and other governments, and with NGOs. This is part about meeting responsibilities, but also because a company cannot engineer changes in the larger environment without cooperation with other actors.

Be transparent. A company should discuss dilemmas openly and show what it is doing to meet its responsibility to respect human rights. A transparent approach is not always declaratory, but silence and secretiveness breed suspicion.

Address perceptions. Attitudes are based on what people *feel* is being done. Companies must consider what they will do and how they will do it. Bad process can destroy a company's credibility and its claim to respect human rights.

Conclusion

For the majority of companies operating around the world, respecting human rights is a question of will. Companies have access to the resources, the instruments, the tools and the external support to enable them to meet their responsibilities – if they decide to use them. In high-risk countries, it is not so simple. Companies may adhere to the law and follow best practice and still find themselves struggling to meet their commitments.

Companies are dependent on the environment in which they operate. The corporate responsibility to respect human rights may exist independently of the state's duty to protect, respect and fulfil but a company's ability to meet that responsibility will be heavily influenced by state behaviour. If government cannot or will not meet its human rights responsibilities, then nor can a company at least not with any certainty and across the full range of its impacts. This is firstly because the State is among any company's core relationships, and under the 'Protect, Respect, Remedy' framework this confers some responsibility on companies for the impacts of certain government actions. Secondly, State failure to regulate and control the activities of third parties means that even the most diligent companies will inevitably find themselves working with or alongside businesses and other institutions that are breaching human rights responsibilities. Finally, government neglect (or worse) of its citizens' civil and political and social, economic and cultural rights will exacerbate any harmful impacts of a company's activities and simultaneously prevent the company concerned from acting effectively to mitigate them.

For all these reasons, high-risk countries are defined by the nature of the State. A predatory or ineffective government will pose risks *to* a company but, equally importantly, will increase the risks posed *by* a company. Some will interpret this to mean that companies have an escape clause. Others will conclude that companies should withdraw from such societies.

Neither is true. High-risk countries demand from companies a higher level of rigour, creativity and sensitivity than elsewhere. At the same time, high-risk countries need responsible investment more than elsewhere. The economic, social and political benefits companies can bring to such societies should not obscure, or be obscured by, the economic, social and political harms that companies can inflict – and in some cases have inflicted.

Companies operating in a high-risk environment have a particular responsibility to influence that environment, within the bounds of their own impacts. This is the additional requirement which the decision to invest in such countries places upon companies. Drawing upon the UN Special Representative's analysis, this supplementary requirement includes the duty to *know, do* and *show*. A company needs to fully understand the direct and indirect risks that arise from poor governance, and needs to act on that understanding by managing and supporting appropriate state interventions as necessary.

Finally, it needs to be transparent (in so far as this is possible) by explaining the dilemmas it faces and discussing the measures it is taking to address them. Together, these three forms of response will reduce risks and enable a company to meet its responsibility to respect human rights in high-risk countries.

From Red to Green Flags: The corporate responsibility to respect human rights in high-risk countries explores precisely how a company's responsibility translates into specific actions across some of the key challenges it faces in such contexts. The ideas presented are neither definitive nor exhaustive. However, by building on the platform provided by the 'Protect, Respect, Remedy' framework, this report suggests how a stronger consensus might develop around the framework's application in high-risk countries.

Without this kind of consensus, many of the important advances captured by the framework may be lost. If agreement can be achieved, by contrast, companies, NGOs, governments and other parties can refine and put to use a set of tools that can not only guide company actions but enable objective assessments to be made of the progress companies make in meeting their responsibilities. As work on corporate responsibility goes forward, this must surely be a priority.

Introduction

The worst abuses of human rights are likely to occur in the context of violent conflict.¹ However, conflicts are not simple events: they are the product of underlying social, economic and political stresses, and are associated with illegitimate, repressive, dysfunctional or merely weak States. Poor governance creates an environment conducive to human rights abuses, either directly as a result of actions by the State or indirectly because the State fails to protect people for whom it is responsible from abuses by others. Ultimately high-risk countries are defined by poor governance.

Such places can offer business opportunities. For some, investment is driven by need – for example demand for rare resources. In others, the driver is opportunity, such as the presence of untapped markets. In all cases, however, investment in these contexts generates severe operational, legal and reputational risks. It is not surprising that foreign investment in high-risk countries has proved explosive: violent protests and fierce opposition locally, condemnation and campaigns internationally.

A few unscrupulous companies flourish in environments of non-existent, weak or poorly enforced legislation. However, the vast majority of companies dislike and are ill-equipped to address the numerous and extremely complex management challenges that exist in societies facing violence, social tension, poverty and corruption. These conditions will inevitably change only slowly, yet companies do not have the luxury of time. As a result, many efforts are being made, by non-governmental organisations (NGOs), States, and businesses themselves, to equip companies to operate responsibly in such societies.

A common framework ...

Establishing with clarity the extent and limits of company responsibility remains a core problem. Whilst a minority may thrive on uncertainty and exploit the possibilities for profit generated by instability, most companies operate best within a clear regulatory framework. In high-risk countries, no such clarity exists, particularly in respect of human rights. Companies are confronted by problems and dilemmas that fall far outside their traditional competence and mandate.

This is beginning to change with the emergence of the ‘Protect, Respect, Remedy’ framework,² developed by the UN Special Representative for Business and Human Rights, John Ruggie, and endorsed in 2008 by the UN Human Rights Council. The Special Representative has additionally elaborated Guiding Principles which recognise that businesses operating in conflict zones create and face specific problems.³ The work of the Special Representative has been welcomed by companies, in part because it

1 Human Rights are understood in this report to include all the rights set out in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and ILO core conventions.

2 At: <http://198.170.85.29/Ruggie-protect-respect-remedy-framework.pdf>.

3 UN Doc A/HRC/17/31, “Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework”. At: www.business-humanrights.org/SpecialRepPortal/Home/Protect-Respect-Remedy-Framework/GuidingPrinciples.

attempts to clarify the relationship between business and human rights, balancing the profit-making rationale of the private sector with the imperative to operate in a way consistent with the letter of the law and the spirit of fundamental values. It has been welcomed by many outside the private sector because it ends a long-running debate about *whether* companies should respect human rights. They should – because anything less is unacceptable. The outstanding question is *how*.

Core elements of the corporate responsibility to respect human rights

- The responsibility to respect is a standard of expected conduct recognised by virtually every voluntary and soft law initiative.
- To “respect” implies that companies should not infringe the rights of others and should address adverse impacts of their activity.
- The scope of a company’s responsibility is determined by its actual and potential impacts, due to its activities or its relationships (with business partners, governments, customers). These vary and must be assessed in context.
- The corporate responsibility to respect applies to all internationally recognised human rights, as set out in the International Bill of Rights and the ILO Core Conventions. It is a baseline responsibility, which means it cannot be offset.
- A human rights harm that occurs must be addressed and cannot be balanced or offset against actions that have positive human rights effects elsewhere or at another time.

The ‘Protect, Respect, Remedy’ framework therefore provides a broadly agreed approach. The challenges now are:

- To understand what specific steps companies should take to ensure that their operations are consistent with their responsibilities;
- To decide whether companies that work in extreme conditions have additional responsibilities and, if so, what these might entail; and
- To explore how companies can act in a manner that ensures respect for human rights when other actors (notably States) do not fulfil their obligations.

... a common understanding

Numerous terms have been employed to describe societies that are politically and socially unstable: terms include 'fragile', 'failing', or 'failed', 'weak governance' or 'low-income under stress', 'turbulent' or 'complex', 'conflict-prone' or 'conflict-threatened', 'post-conflict' or 'transition'.

The plethora of titles should not disguise the degree to which they share defining features (see below). This report prefers the term 'high-risk', because it focuses attention on four kinds of risk associated with corporate investment in these contexts:⁴

- Risks to the profits, reputation, and staff of the company.
- Risks to individuals and communities, whose security, livelihoods and resources may be affected by company operations.
- Risks for society, through increased corruption and inequality.
- Risks for the State which is expected to manage the economic, environmental and social effects of investment, as well as political criticism.

Not all company operations generate or face such risks, of course. Numerous factors influence the nature and extent of risk, including the size and footprint of the investment, its location and industry sector, the size of the workforce and the project's revenue, the resources it requires and its security needs. The quality of the company's due diligence and its policies for managing risk will also be significant. In addition, the context is crucial: the presence and severity of violence, the legitimacy and authority of the government and the degree to which affected populations have serious grievances and can articulate them.

⁴ See also Fafo/International Alert, *Red Flags: Liability Risks for Companies Operating in High-Risk Zones*, 2008. At: www.redflags.info.

Characteristics of high-risk countries⁵

Authority failures:

Where a State lacks the authority to protect those under its jurisdiction from violence of various kinds.

- Organised political violence is significant (e.g. Iraq, Afghanistan, Colombia).
- State authority does not extend to all parts of the country (e.g. Côte d'Ivoire, Somalia, Afghanistan).
- Political or communal violence periodically causes deaths and destruction (e.g. Nigeria).
- High levels of criminality are not controlled either by the State or the justice system (e.g. Haiti).

Service failures:

Where a State fails to ensure that those under its jurisdiction have access to basic services.

Inadequate delivery of:

- Health services.
- Basic education.
- Water and sanitation.
- Poor transport and energy infrastructure.
- Failure to reduce income poverty.

Legitimacy failures:

Where a State has only limited support among the people. Typically such States are not democratic, and their governments are often military or are supported and dominated by military interests.

- No democracy (i.e. no free, fair and regular elections).
- Military influence in government.
- Acquisition of power by force.
- Suppression of opposition.
- Government controls the media.
- Significant sections of the people excluded from power.
- Denial of civil and political liberties, arbitrary arrest, denial of free speech, etc.

⁵ Frances Stewart and Graham Brown, *Fragile States*, Centre for Research on Inequality, Human Security and Ethnicity (CRISE), Working Paper No 51: January 2009.

... and a common approach

Companies do not suffer from lack of advice. A huge amount of literature describes every aspect of corporate operations – from management systems to stakeholder reporting via human rights, revenue transparency, security provision, conflict prevention, community engagement, government relations, and environmental impact.⁶

Prompted both by criticism and the emergence of numerous voluntary initiatives (see *Section One* below), many companies seek to position themselves as, or transform themselves into, socially responsible actors. Efforts to cast the private sector as an agent of poverty reduction as well as economic growth add yet another layer to this.⁷

In short, companies become all things to all people. To human rights organisations, they are sometime abusers but also potential human rights defenders; to development specialists, they are resource curse culprits but also Millennium Development Goal champions; to conflict experts, they drive violence but can also create conditions for peace.

Companies do of course exercise many kinds of influence. For policy-making, the problem is rather that a dizzying variety of issues, terminologies, methodologies, principles and guidelines are all in play, each pertinent but reflecting the interests of a specific group.

The result is more management – management of management tools, of stakeholder groups, of networks and associations, of reporting requirements. Solutions tend to divide, box and categorise when the more important need is to consolidate good practice.

About this report

This report attempts to address that challenge. It is not another methodology, and does not offer ground-breaking insights. Much of what needs to be known is already described.⁸ It strives instead to use the knowledge that exists to provide an overview of good practice, informed by human rights principles. It is written primarily for managers and staff of companies that operate in high-risk countries, but we hope it will be relevant to all those working on business and human rights.

Conceptually, the report builds on earlier work that was undertaken when developing the 'Red Flags' guidelines.⁹ Where 'Red Flags' established a list of things that companies *should not do* when investing in high-risk areas, this report attempts to establish a clearer sense of what companies *should do*. It draws primarily on existing literature supplemented by five commissioned background papers. Its analysis has also benefited

⁶ The Business and Human Rights Resource Centre provides an extensive listing. At: www.business-humanrights.org/Categories/Links/LinksPublications.

⁷ See, for example, the work of Global Witness (www.globalwitness.org).

⁸ See the bibliography at the end of this report for a select list of resources.

⁹ Red Flags, 2008. At: www.redflags.info.

from two round tables (held in Bogota, Colombia and Johannesburg, South Africa) and comments and feedback from company, NGO and government representatives.

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The report is divided into two main parts. The first examines the challenges and specific responsibilities that are associated with them. The second explores more generic company responses.

Part one: The challenge

When a company invests in a developed economy, it is guided by regulations that dictate what it can and cannot do. By and large, these regulations are monitored and enforced by State agencies (health and safety, environment, tax collection) and independent bodies (trades unions, the media, NGOs, etc). When disputes arise, formal and informal procedures and processes are applied, supported by an accountable justice system, ensuring their resolution. Beyond the boundaries of company property, the State provides security, delivers basic services, and assumes primary responsibility for meeting the socio-economic and political aspirations of the society. No doubt the system does not function perfectly in any developed society; it nevertheless provides a business environment in which rules are clear, and in which entrepreneurialism is generally rewarded and abuses are often punished. The traditional business model has evolved within and been shaped by this culture. Adapting to a new country is relatively straightforward.

A company investing in a high-risk country can rely on few of these certainties. Some of the elements mentioned above may be in place but institutions may be weak and procedures poorly enforced or easily circumvented. Other elements may be absent or very different in form. The State may not fully control its territory or may exercise control by repression. Security may not be provided or it may protect assets but not people. Water, health, transport, and education may be functionally absent or may benefit some but not others. Opportunities for employment may not exist or may be determined by ethnicity or patronage. Some groups in the society may believe that their aspirations can only be met through violence.

Critical dilemmas

- How can a company respect human rights when the state does not fulfil its obligations?
- How can a company avoid infringing the rights of others when some impacts are outside its control?
- How does a company mitigate negative impacts when it cannot do so alone?

These challenges are not simply unfamiliar to companies. They threaten the elaborate system of checks and balances that promote equilibrium between the profit motive of companies, the rights of people, and the needs of the State. In addition, the challenges differ from one country to another. The traditional business model was not designed for this.

The problem can be put simply (even if the answer cannot). If a company can operate responsibly in Australia, why should it struggle to maintain similar standards in the Democratic Republic of Congo? Are differences of context responsible, or do companies change their behaviour? Or is the interaction between context and company responsible for differences of performance? Evidently, changes of context do allow companies to take advantage of administrative or legal loopholes, corruption or maladministration. Yet even those committed to responsible behaviour struggle to maintain their standards in high risk environments.

High-risk countries differ from more stable environments in three key areas:

1. **Law:** in terms of national, international and “soft” law.
2. **People:** in terms of the institutions of government but also community organisation, armed groups, gender relations and international cooperation.
3. **Issues:** in terms of the formal and informal economy, employment practices, security, management of the environment, allocation of land and access to water, and justice and dealing with the past.

Going in and getting out

Companies have traditionally made 'go' or 'no go' decisions based on rates of return, and their calculation of technical and political risks to the company and its assets. Human rights risks were not necessarily considered because they were unfamiliar, unrecognised, or held to be a government responsibility or one that local executives should manage. (Edward Bickham, *Human Rights; the internal management challenges*. IHRB, 2011.)

The Corporate Responsibility to Respect positions human rights at the core of company operations. The ability to ensure that rights will be respected becomes an explicit consideration in company decision-making. In reality today, human rights risks are likely to determine decisions in rather few circumstances. Where international sanctions are in place, investment is likely to be illegal anyway; this may also be so in cases of credible risk of complicity in grave human rights abuses (see www.redflags.info). In many other cases, however, human rights considerations should be prominent:

- Where the state is unable to provide security for the local population or the company, or where it is undesirable to allow the state to provide security.
- Where a company's presence attracts or is likely to attract armed groups.
- Where local opposition to an investment is strong.
- Where an investment will have an impact on others (e.g. major resettlement).
- Where a company clearly cannot operate in line with business principles (e.g. it has to pay bribes to operate, or domestic legislation or official practices make it impossible to apply best practice standards).

If an investment proceeds, the companies involved need to plan mitigation strategies. Contracts should take account of identified risks; groups that will be affected should be consulted. Human rights risks merit at least as much attention as other forms of risk, and the more serious the risks are, the more attention they require.

Chapter one: Law

International companies are familiar with the challenges of legal compliance. They may chafe at bureaucracy and may seek to amend or influence legislation to favour their core interests, but most recognise the value of sound legislation in establishing equality of opportunity and predictable rules.

Challenges

- Deficient national legislation.
- Deficient international law.
- Ineffective soft law.

Companies are less familiar with contexts in which the law provides minimal or contradictory guidance regarding corporate obligations. In such situations, companies that allow local legislation to shape their approach can find themselves facing complaints, protests and campaigns by individuals and groups who feel their basic rights have not been respected. Arguing that the company has respected local law may provide a legal defence but will further fuel resentment.

In some cases, international law (notably human rights and humanitarian law) sanctions the worst abuses; but it is rarely able to replace the function of sound domestic legislation. The weaknesses of both domestic and international law explain the emergence of numerous 'soft law' arrangements. These voluntary initiatives cover a range of issues from transparency and security, to environmental impacts and the protection of people who have been forcibly displaced. However, while they can mitigate deficiencies in formal (or 'hard') law, their own weaknesses, notably with regard to enforcement, have also been criticised.

The question is whether, taken together, the three 'legislative' pillars (national, international, and 'soft' law) enable companies to meet their responsibilities under the 'Respect' framework. The largest international business associations have been unequivocal in their own analysis of this question.

All companies have the same responsibilities in weak governance zones as they do elsewhere. They are expected to obey the law, even if it is not enforced, and to respect the principles of relevant international instruments where national law is absent.¹⁰

This does not entirely address the dilemmas, however. Do international instruments supersede national law when the latter falls short of international standards? Do they (and

¹⁰ International Organisation of Employers, International Chamber of Commerce, and Business and Industry Advisory Committee to the OECD, *Business proposals for effective ways of addressing dilemma situations in weak governance zones*, 2006. Quoted in Ruggie, 2010. At: www.reports-and-materials.org/Role-of-Business-in-Weak-Governance-Zones-Dec-2006.pdf.

can they) do so if national laws conflict with international standards? Are international instruments adequate to replace gaps or deficiencies in national law?

National law

In developed countries, regulations covering the full spectrum of company activity have evolved over many years: tax legislation; labour, health and safety guidelines; competition law; environmental standards; procedures governing interaction with local communities. Specific legislation varies from one country to another but, broadly speaking, a relatively clear (if constantly debated) framework is in place that strikes a balance between profitability and responsibility. Crucially, it is based on or informed by international human rights standards.

Where this framework exists, legislation is the principal instrument by which governments fulfil their obligations to protect people from human rights abuses by third parties; and legal compliance is the principal means by which companies meet their responsibilities to respect human rights. Human rights are enshrined in legislation and infringing the rights of others will usually entail a breach of the law. In high-risk countries, by contrast, this framework is not in place. Domestic legislation may not exist in key areas; where it exists it may be inconsistent with international human rights standards; where it is consistent, it may not adequately safeguard rights, or may be unenforceable due to weak capacity, or may simply be ignored by officials and those with means to bribe. Or all of the above.

Companies that are not motivated to operate responsibly have every opportunity to exploit and abuse – behaviour that can be permanently curtailed only by exposure to legal sanctions and strong national and international laws. Weak domestic legislation permits companies with a lukewarm commitment to rights to justify a minimalist approach which may still infringe rights (though such justifications can no longer be sustained under the Special Representative's 'Respect' framework). At the other end of the spectrum, weak or corrupt legal institutions and poorly framed laws seriously obstruct the efforts of companies that do want to respect human rights.

A first complicating factor is cultural. Companies based in developed countries have evolved in contexts where the law determines standards. Anything beyond the law is additional to their core responsibilities and is undertaken for philanthropic, ethical, competitive or presentational reasons. In high-risk countries, by contrast, the law is a beginning not an end. Compliance matters but is unlikely to be sufficient and may sometimes be problematic. This needs to be recognised and incorporated in due diligence processes. Gaps in domestic legislation need to be identified and addressed through internal company policies. For example, if sexual harassment in the workplace is not unlawful, companies need to make clear to their staff that such behaviour will not be tolerated.¹¹

¹¹ For the case of Guatemala: see *Human Rights Assessment of Goldcorp's Marlin Mine*, On Common Ground Consultants, May 2010. At: www.hria-guatemala.com/en/MarlinHumanRights.htm.

The same rule applies to laws that do not meet international standards of good practice. In many cases, this should not present a problem. If a country's environmental standards are weaker than those prevailing internationally, companies will usually need to apply the more rigorous standard. Likewise, where minimum wage levels do not provide a living wage, companies should strive for adequate pay scales. In such instances, where it has control, a company can exercise its responsibilities by applying international standards.

This becomes harder to do when national law restricts companies' ability to follow internationally accepted practice. For example, restrictions may be placed on consultation with local communities. States may unjustifiably limit the rights to information, freedom of association and freedom of expression. Gender equality may not be legally protected or may be interdicted in law.¹² This is a recurring dilemma for companies in high-risk countries: the impact of their activities may infringe the rights of others but their ability to address those impacts depends on cooperation with others, especially the State.

Where laws are framed badly, such that they could harm human rights, companies should seek to change them. Bilaterally or through associations or chambers of commerce, companies usually lobby enthusiastically to influence policies that affect their core interests. Respect for human rights ought to be understood as a core interest. Changing the law is a lengthy process, nevertheless, which underlines again the point that protection of rights is a long-term (and collaborative) endeavour. Companies also need to explore creative ways to obey the letter of the law while adhering to international values. For example, some companies that faced restrictions on workers' freedom of association have successfully established alternative mechanisms of representation.¹³

Such approaches presume that the State is willing to consider legal reform or alternative solutions. In some high-risk countries, the opposite may be true: companies may come under pressure to operate in ways that conflict with international principles and undermine good practice. Not all governments wish to promote public consultation or fair recruitment practices. Their primary concern may be to complete the project, extract revenue from it, or secure employment for political allies. Caught between such conflicts of interest, many companies will cooperate with government demands, especially if these coincide with a certain view of the company's self-interest.

This issue becomes even more acute if local associates are involved. In many cases, a foreign company operates a project, or provides finance or expertise, but is not the majority shareholder. Even when it is the principal owner, it may depend on local partners to secure approvals and access to officials. Persuading local partners to adopt standards that conflict with national laws is a hard sell, especially if the partner is State-owned. Similar dilemmas arise with regard to suppliers and sub-contractors.

There is no easy solution. Clearly, if the impacts are such that they might lead to credible accusations of complicity in international crimes (see below), then companies would have

¹² Ruggie, 2009, para. 68.

¹³ Ruggie, 2009.

to sever their involvement. Such situations are uncommon, however. A straightforward response can be expected too when projects are publicly funded by international donors: this is frequently true of infrastructure projects. Though it is not clear how actively bilateral donors monitor the human rights performance of private sub-contractors, public and private external investors can clearly exercise influence by insisting that certain standards are met, which may be higher than those envisaged in domestic legislation. Indeed, such interventions by donors are implied by the State duty to protect human rights.

The influence that financial bodies can exercise depends on a number of factors, including the presence of alternative bidders, with less exacting standards, and the extent to which State or public officials care whether the project goes ahead (in the absence of significant private benefit). In high-risk countries, even the most well-intentioned companies will continue to find themselves caught between the inadequacies of national law and the expectations of international practice.

International law¹⁴

Ideally, international law would offer an alternative recourse wherever national law is weak. This is only partially the case. Though deficiencies in national legislation and cases of abuse in high-risk countries have prompted advocates to argue that the legal accountability of international companies operating in such countries should be strengthened, international law (including home or third country law) remains an inadequate substitute for sound, properly enforced domestic legislation.

In a number of areas, nevertheless, companies do face the risk of prosecution (see box). Many of the cases which have been brought allege complicity in abuse rather than direct involvement.¹⁵

The prevalence of cases that involve allegations of complicity has great significance for companies. While few companies are known to have directly violated international law (relative to the number of corporations worldwide), virtually any enterprise operating in a high-risk country could potentially find itself accused of complicity – though the actual risk a company runs will vary, according to its involvement, the context, and the nature of its investment.

Many countries have a recent history of abusing the rights of their citizens. The list is even longer if countries suffering from endemic corruption are included. Not all companies operating in high risk societies appreciate the degree to which it is potentially possible under international law to prosecute on grounds of complicity. This is likely to become an increasingly salient question if the ‘web of liability’¹⁶ expands further to include less egregious abuses of human rights.

14 For a more detailed analysis of this subject, see Heloise Dumont, *Corporations and International Human Rights and Humanitarian Law*; paper commissioned by and for the Institute for Human Rights and Business, 2011. At: www.institutehrb.org.

15 Various defined, a widely accepted definition of complicity is “knowingly providing practical assistance or encouragement that has a substantial effect on the commission of a crime”. See Ruggie, 2010.

16 *Red Flags*, 2008.

The principal point to make about complicity is the obvious one: the actual abuse is committed by someone else. The best that can be said of companies against whom credible allegations of complicity have been made is that they are guilty of astonishing naivety. Three incorrect assumptions are often made: that companies commit no crime if they are not themselves the main perpetrator; that the actions of a sovereign government are for the government and the government alone to determine; and that actions by government (or another party) cannot implicate the company. Legally speaking, complicity explodes these assumptions. With regard to their operations and the impacts of their operations, companies have a responsibility to manage and take account of the behaviour of others. The extent to which they can do this (or might need to do so) should be considered when investment decisions are made.

The emergence of several voluntary initiatives (see below) suggests that the importance of the notion of complicity is beginning to be recognised. Nevertheless, companies remain extremely reluctant to involve themselves in matters they consider to lie outside their territory. But what is their territory? Companies negotiate the financial, technical and legal aspects of their investments as a matter of course. Their contracts with governments and other partners detail each party's responsibilities.

To what extent is the potential for complicity in the crimes of others understood as an aspect of legal compliance? In areas that are considered directly relevant to a company's core functions (such as corruption and illicit payments), contracts are very likely to include clauses that prohibit both parties from engaging in the practice. On a range of other issues that companies judge to be central to their operational effectiveness (such as health and safety, security within company perimeters, employee relations) contracts will also detail responsibilities.

Can the same be said of issues that concern individuals external to the company and groups of people impacted by the company's operations? Taking account of liability risks, do contracts specify that co-signatories and agencies under their control are not to engage in actions that might leave the company open to allegations of complicity under international law? This might imply negotiating with host governments an explicit agreement that engagements with affected and potentially affected communities will be conducted in accordance with international best practice, especially with regard to resettlement, labour issues and matters of security. Though these are sensitive issues which touch on national sovereignty; complicity nevertheless needs to be understood as a legal risk and treated as such.

Contracts and other agreements can provide some protection from risk, but not guarantees. Avoiding abuses by other parties also means avoiding situations that give rise to the possibility of abuse. Popular opposition to an investment and protests around particular grievances provide precisely the conditions under which abuses are likely to occur.

Liability risks for companies¹⁷

1. Expelling people from their communities

The threat or use of violence to force people out of their communities can be a crime under international law. A company may face liability for forced displacement if it has gained access to the site of its operations, or where it builds its infrastructure or explores for natural resources, by means of forced displacement.

2. Forcing people to work

Companies making use of people who are obliged to work against their will, as a result of threats or use of violence, may face liability. The use of such labour by a joint venture partner or State security forces may also pose a liability risk.

3. Handling questionable assets

Receiving funds which may have been associated with criminal activities exposes companies and individuals to legal risks. Holding, managing or hiding such funds, including funnelling suspicious funds into legitimate financial channels, may result in prosecution and lawsuits.

4. Making illicit payments

Any significant off-the-book financial transactions may create legal liabilities under laws against corruption or bribery. Charges may be brought outside the country where the transaction occurs. Even if corruption is a common occurrence, a liability risk remains.

5. Engaging abusive security forces

The use of disproportionate force by government or private security forces acting on behalf of a company can create liabilities for the company. These may arise even where the actions of the

security forces (e.g. killing, beating, abduction, rape) were not ordered or intended by the company. Legal risks may be greater where security forces have a history of abusive conduct.

6. Trading goods in violation of international sanctions

A company may be held liable for buying, selling or transporting products, commodities or assets originating from or going to a country, group or individual under international sanctions. The most common embargo is on arms, but sanctions are increasingly imposed on commodities, such as diamonds and timber, and financial assets.

7. Providing the means to kill

Businesses may be liable if they provide weapons or dual-use equipment to governments or armed groups who employ those products to commit atrocities. This may be the case even where import and export regulations are fully respected.

8. Allowing use of company assets for abuses

Use of company facilities and equipment in the commission of international crimes can create liability for the company, even if it did not authorise or intend such use.

9. Financing international crimes

Providing financial resources to those who commit international crimes may result in liability, if those resources substantially contribute to those crimes being committed. The risk of liability increases if the company persists in doing business with the violators, particularly once the violations are common knowledge.

¹⁷ Red Flags, 2008.

Under conditions where the rule of law is strongly established, a company can rely on the State (if all else fails) to uphold its right to develop a legally approved project while respecting the right of people to protest peacefully. Adopting such a course in high-risk countries can prove disastrous. State intervention to manage opposition may be the last thing a company should seek. Yet to what extent can a company avoid or moderate State intervention under the pressures of its own deadlines and an impatient or intolerant government? These are matters that can be addressed partly through a company's due diligence procedures and partly by building strong relationships with surrounding communities. Both are discussed later. Ultimately, however, risks cannot be avoided entirely. The abuses that are likely to occur are primarily a product of the political and social environment. So long as the context remains unreformed, abuses will persist. This does not mean the situation is hopeless or that companies are helpless. The choices a company makes and the actions it takes can have a direct bearing on the incidence of abuse and its severity.

Soft law

The multiplication of "soft law" initiatives has been a significant recent development. Designed to fill the gap between the limitations of international law and the inconsistencies of national legislation, these mechanisms provide guidelines and principles which, while not legally binding, have force by virtue of the consent that governments, companies, and other civil society actors accord them. In certain cases, as with the International Finance Corporation guidelines, they are pre-conditions for securing loans and loan guarantees.¹⁸

Soft law guidelines cover a wide spectrum of approaches and issues. Some, like the UN Global Compact,¹⁹ set out broad principles, while others, like the Extractive Industries Transparency Initiative,²⁰ the Voluntary Principles on Security and Human Rights (VPSHR),²¹ and the Global Network Initiative (GNI),²² target specific problems. Advocates and sceptics continue to debate the benefits of such approaches. Supporters argue that they raise awareness and help to raise standards; critics counter that they do not provide adequate accountability, are often vague and aspirational, and can be abused as public relations tools.

The UN 'Protect, Respect, Remedy' framework will potentially change the terms on which these and future initiatives of their kind will be judged. Though they emerged to fill gaps in international and national law, the proliferation of voluntary initiatives is

¹⁸ "To be eligible for IFC funding...the project must... be environmentally and socially sound, satisfying IFC environmental and social standards as well as those of the host country." See www.ifc.org/ifcext/about.nsf/content/About_IFC_Financing.

¹⁹ At: www.unglobalcompact.org.

²⁰ At: www.eitransparency.org.

²¹ At: www.voluntaryprinciples.org.

²² At: www.globalnetworkinitiative.org.

due in significant part to the absence of a single, overarching framework of corporate responsibility. In some cases, this has led to a 'pick and mix' response, in which companies can sign up to one of several standards according to their interests. This has mostly benefited companies with a minimalist approach: adoption of a code can be presented as evidence of social responsibility without substantive reform. Companies with a genuine commitment to human rights have struggled to differentiate themselves. The plethora of codes has also created a reporting nightmare in which companies with multiple commitments are obliged to report many times.

The Special Representative's 'Respect' framework has the potential to supersede other codes and create a single body of corporate benchmarks. Companies, certainly large international ones, will struggle to justify a decision not to subscribe to the framework. In the future, the value of voluntary initiatives will lie in the extent to which they enable or support operationalisation of the framework. Those which merely provide a less ambitious alternative are likely to become irrelevant. This suggests that such initiatives will need either to provide a *forum* for sharing experiences and best practice and promoting collaborative approaches; or provide practical and specific guidance.

Do voluntary initiatives fulfil these functions and especially in high-risk countries? The answer is yes, at least in some cases and in theory. Multi-company and multi-stakeholder initiatives facilitate co-ordinated efforts to address the challenges of operating in high-risk countries. They provide mechanisms for establishing common standards of conduct on specific issues. More important still, perhaps, they provide a platform for tackling the most difficult challenge: influencing the behaviour of other actors, notably the State.

But voluntary initiatives, even the most ambitious and pertinent such as EITI, VPSHR and GNI, suffer from important limitations too. They are necessarily generic which means that in some respects they are vague. And verification of implementation is not always required or clearly defined. Though many initiatives include guidance on implementation, in most cases companies are entitled to exercise discretion in how far they go – and many (though by no means all) unsurprisingly go no further than is absolutely necessary.

This is most apparent with regard to advocacy. Several voluntary initiatives, including the VPSHR and GNI, explicitly encourage companies to seek changes in the behaviour of the State or State agencies. However, it is difficult to measure intent – how seriously a company argues for reform. As international diplomacy has shown, it is hard to distinguish a rhetorical intervention on human rights from one that is purposeful. In other words, whilst the principles that frame many voluntary initiatives are impressively formulated, the practice can be underwhelming.

These initiatives also suffer from being predominantly reactive. They are responses to a problem, but do not necessarily address the problem itself. It is not a criticism of EITI to state that it does not reform corrupt States, or of the Voluntary Principles to say that they do not correct the behaviour of abusive security forces. Such transformations are obviously beyond the scope of any single initiative, voluntary or otherwise. The point

needs to be made, nevertheless, that companies and affected communities will continue to be at risk while the problems which gave rise to the initiatives remain unaddressed.

Similar points can be made about process-orientated guidelines such as the IFC Performance Standards and the social management tools produced by the International Council on Minerals and Metals (ICMM).²³ These offer semi-binding guidance to companies on such complex issues as resettlement, consultation, and community development. This work is complemented by the additional guidance that NGOs and academic institutions have developed for companies. All these initiatives help to raise standards and encourage responsible business practice. At best, they provide a road map for respecting human rights that companies can apply. They cannot be a complete answer, nonetheless, since companies do not entirely control their social and political environment and therefore cannot control all the impacts of their activities.

Responsibilities

What conclusions can be drawn? First, while companies should comply with the law, they may often need to exceed it by introducing higher standards. In certain situations where laws restrict or prohibit international standards, it may be appropriate to circumvent them.

Second, simple adherence to voluntary initiatives does not constitute fulfilment of a company's responsibility to respect human rights. The 'Respect' framework offers a new and more ambitious baseline with regard to corporate responsibility. The value of voluntary initiatives should lie in whether they help create a forum for the development of good practice, or provide companies with specific and practical guidance.

Finally, international best practice cannot fully compensate for deficiencies in national law or State conduct. Companies will always struggle to fulfil their responsibilities to respect human rights for the simple reason that their ability to do so depends, in part, on the conduct of others. In this case, the responsibility to respect is not an absolute but a process. Companies will therefore need to be transparent about the steps they are taking as evidence of their commitment.

²³ www.icmm.com.

Enhanced due diligence

Companies should:

- Exceed national legislation where it falls short of best practice (on environmental or labour standards, for example).
- Advocate for reform of domestic legislation that conflicts with international standards.
- Work creatively to respect best practice, where domestic legislation is constraining (for example, alternative representation for employees).
- Address risks of human rights abuse and issues of complicity in contracts with host governments and associates.
- Report transparently on implementation of soft law guidelines.
- Harness the potential of multi-stakeholder initiatives to lobby host governments on relevant human rights matters.

Chapter two: People

Government

When States fail to protect individuals against human rights abuses, opportunities for corporate malpractice are facilitated. When State policies fail to respect and fulfil human rights, they undermine corporate good practice and indeed corporate interests. This makes understanding the nature of the State's role and contribution of critical importance.

In the last decade, donor agencies have wrestled with this issue. Despite significant and sustained injections of aid, why do high risk societies so often fail to develop? Some donors have focused on capacity and willingness, where the government 'cannot or will not deliver core functions to the majority of its people, including the poor'.²⁴ Others have adopted a more expansive definition and describe high risk States as those which 'lack the functional authority to provide basic security within their borders, the institutional capacity to provide basic social needs for their populations, and/or the political legitimacy to effectively represent their citizens at home or abroad'.²⁵

Challenges

- Weak State capacity.
- Contested political legitimacy.
- Limited State authority.
- Absence of government will.

Definitional distinctions matter less than the broad conclusions. Governments in high-risk countries vary considerably and engagement strategies need to adapt accordingly. Even more important, perhaps, the nature and capacity of the State are key determinants of development. Unfortunately, donor agencies have tended to ignore the effect of companies' interactions with the State; they have tended to focus exclusively on the private sector's economic potential. For their part, corporate activists from all sides of the argument have neglected the impact on companies of the State's interactions with the private sector. Yet this goes to the heart of the good and the bad of what companies do.

In the context of their due diligence procedures, companies need to understand how government conducts itself (at local and national levels) and also how it is perceived by different elements in the society. Both these factors have an influence on corporate relations with government and with other non-State groups. The traditional reluctance of business leaders to 'interfere' in politics has obstructed the development of more textured analysis. Companies focus on how a State's capacity and behaviour may affect

²⁴ Department for International Development, *Reducing poverty by tackling social exclusion. A DFID Policy Paper*, London, 2005.

²⁵ Country Indicators for Foreign Policy, *Fragile states: Monitoring and assessment, the way forward*, Carleton, Ottawa, 2006. Quoted in Stewart and Brown, 2009.

their projects technically, legally and financially. They think much less deeply about the State's performance outside these narrow parameters – yet it is in that wider space that the line between State duties and corporate responsibilities begins to blur and where human rights risks are likely to be acute.

In terms of due diligence, companies need to consider four areas of risk, in order of gravity:

- Poorly drafted and inconsistent legislation (discussed above).
- Gaps and weaknesses in capacity.
- Contested State authority or legitimacy.
- Failures of political will.

Deficiencies in State capacity will have significant direct and indirect effects on a company's ability to manage its human rights impacts. When the government fails to deliver services or maintain essential infrastructure, the public will expect large companies to provide what the State cannot. This expectation will be expressed primarily by people affected by the company's activities and the absence of services, but may also come from government. Poor capacity, in addition, means that such States do not manage their revenue well, facilitating corruption and waste and deepening the problem of poor service provision. Somewhat perversely, given the tax and royalty payments they make, this has the effect of increasing the pressure on companies to take responsibility for delivering core services to local people.

These problems will be compounded where the State's authority is weak or its legitimacy is disputed. Aside from the possible threat posed by armed groups or criminal gangs, when government is functionally absent or contested, companies are more isolated, compounding their security risks and the weight of public expectation. A question discussed earlier then arises: if a State cannot or will not protect and uphold the rights of those within its jurisdiction, because it is not trusted or is absent, does the responsibility fall on others? If so, what is the extent of a company's responsibility?

The most problematic environments are those where the State simply does not care or cares only about its revenues. In such contexts, the notion of the 'State' as commonly understood can be misleading. Government may be little more than an extended family business, exercising control through a combination of repression and patronage, fuelled by money.

For companies, such extreme contexts are doubly difficult. State authorities will not fulfil their obligations because it is not in their interest to do so. Keeping people poor may be a strategic choice, designed to maintain the ruling élite in power; encouraging the development of a region will only promote an alternative and therefore unwelcome power base. At the same time, the income from large projects helps to perpetuate the system, enabling the régime to resist international or local pressure to reform, and stripping the international community of much of its leverage.

All the above situations are characteristic of high-risk societies. Due diligence processes need absolutely to consider them. Failure to do so blinds a company to a multitude of risks, including human rights ones. Since much investment revolves around sound risk management, it is also poor business practice.

What needs to be done beyond due diligence? The debate surrounding company-government relations has evolved. As mentioned above, many multi-stakeholder initiatives are developing possible advocacy strategies for companies. In its recent publication *Responsible Business in Conflict-affected and High-Risk Areas*, the UN Global Compact encourages companies “to explore all opportunities for constructive corporate engagement with government...”.²⁶ Industry bodies, such as the International Council on Mining and Metals (ICMM), refer to the “legitimate influence” that companies can exert.²⁷ Nevertheless, the language is invariably cautious and deliberately ill-defined. ‘Encourage’, ‘promote’, ‘legitimate’ are all concepts with escape clauses attached. This was appropriate while respect for human rights remained a desirable goal rather than a responsibility. For the first time, the ‘Respect’ imperative sets a clear and also more demanding objective.

Locally, two kinds of State behaviour tend to undermine or complicate a company’s responsibilities: neglect and abuse. Government neglect has a particularly significant impact on social, economic and cultural rights, most obviously the rights to health, education and an adequate standard of living. Company activities clearly often impact directly and negatively on these rights. Large-scale extractive, infrastructure or agricultural projects may require resettlement of communities, which removes them from existing schools and clinics. Livelihoods may be disrupted or become untenable. Access to basic services may be impeded if a project requires roads to be absorbed or re-routed, or stringent security measures are imposed.

Because these impacts are evident, so is company responsibility, at least in theory. Companies should take all measures necessary to mitigate adverse impacts and ensure that those affected are no worse off than before. This might involve negotiation with impacted groups, or might require building or relocating schools, clinics and roads. At this point, however, company responsibilities begin to merge with government duties, requiring them to co-operate if they are to provide an effective response and protect rights adequately. In practice, however, local governments may plead insufficient resources. Staff may not be available. The government may favour certain population groups, award building contracts on a less than transparent basis, or make little provision for ongoing maintenance and running costs.

In-migration is a complicating factor too. Large projects attract workers, opportunistic entrepreneurs, and the unemployed. Over time, the incidence of crime rises, as does the

²⁶ See: www.unglobalcompact.org/Issues/conflict_prevention/guidance_material.html.

²⁷ International Council on Mining and Metals (ICMM), *Human Rights in the Mining and Metals Industry; Overview, Management Approach and Issues*, 2009.

price of food and housing. The influx of outsiders can disturb traditional customs and put pressure on health, education and other services. Local populations, who might have welcomed the project initially, may find themselves, or feel themselves to be, severely disadvantaged. These are company impacts but, many would argue, primarily State duties.

The people from these caserios (towns near the camps of the company) know that if they open a bar there is going to be lots of money, but that is not good and brings degradation to the area.²⁸

Sometimes, resentment triggers protest. In practice, it is not relevant whether the company or the government is the target. Mistrust or a pragmatic assessment of who is most likely to respond to pressure may determine that. If State security forces intervene aggressively to quell protest, or arrest demonstrators, the company will certainly face criticism. The point is that, if government is neglectful of its duty, the company will be drawn into public controversy, even when it is willing to act responsibly.

These are extreme illustrations but any company that invests in high-risk countries is likely to face this kind of problem. The dilemma for companies is this: if they fail in their responsibilities, the State may well be in a position to sanction them or force compliance; but if the State is irresponsible, the reverse is not true. Where does this leave the company? Because a company can be held to be in breach of its responsibilities even when the State is at fault, companies have little option but to engage with governments on these issues. Dialogue with government is not optional or desirable or recommended. It constitutes a part of companies' responsibility to respect human rights.

Responsibilities

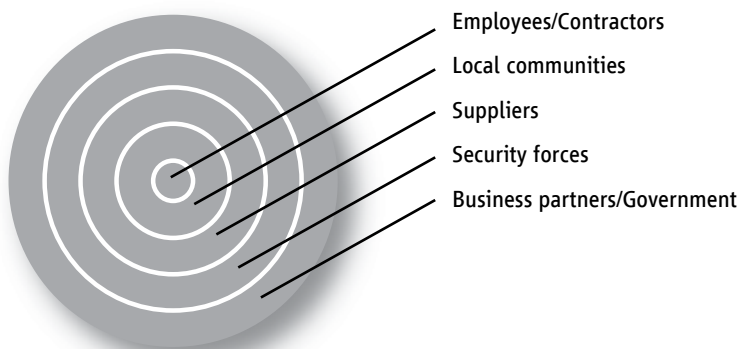
The issue then is the form and extent of engagement. In the past, company responsibility was framed in terms of influence. A company's roles and responsibilities were defined by the relative influence it had over other actors. For example, because a company can directly influence the behaviour of its suppliers but not to the same extent the behaviour of government, a company's responsibilities in relation to the State were deemed to be that much less.

"Companies cannot be held responsible for the human rights impacts of every entity over which they may have some influence, because this would include cases in which they were not a causal agent, direct or indirect, of the harm in question. Nor is it desirable to have companies act whenever they have influence, particularly over governments. Asking companies to support human rights voluntarily where they have influence is one thing; but attributing responsibility to them on that basis alone is quite another."²⁹

28 Regional religious leader, Colombia, in *Community Perspectives on the Business Responsibility to Respect Human Rights in High-Risk Countries*, CDA Collaborative Learning Projects and Institute for Human Rights and Business (IHRB), 2011.

29 In *Community Perspectives on the Business Responsibility to Respect Human Rights in High-Risk Countries*, CDA Collaborative Learning Projects and Institute for Human Rights and Business (IHRB), 2011.

The UN Special Representative has highlighted the shortcomings of the ‘spheres of influence’ model (see diagram³⁰), compared to an impact model, for determining responsibility (see box).³¹ Yet in high-risk countries, where the dividing line between State duties and company responsibilities is most blurred, the model does provide a useful tool for framing a company’s *ability* to affect the behaviour of other actors on whom it partly depends for the fulfilment of its own responsibilities. A company’s responsibilities do not diminish as the circles expand away from the company, but its capacity to ensure that others play their part does. Therefore, to the degree that a company’s impacts are determined by actions of government, its responsibility to respect must be judged not in absolute terms but by whether it takes all reasonable measures to influence the government. The same will apply to other external actors.

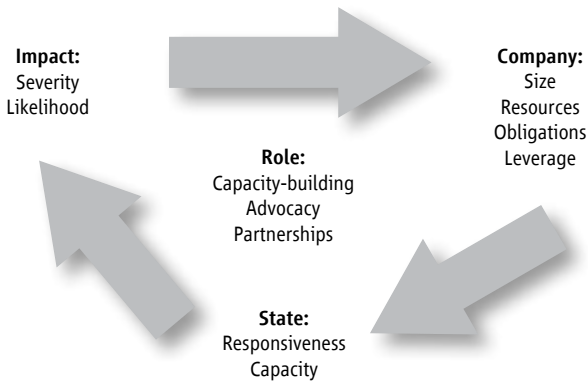


What constitute ‘reasonable measures’ will depend on three principal factors: the nature of the company’s impacts, the nature of the company, and the nature of the government. Direct impacts are likely to require more urgent attention from companies than indirect or potential impacts. The severity of the impact will also influence the nature of a company’s response. So will its capacity and its legal obligations: its financial and technical resources, contractual obligations, and political leverage. Finally, the State’s capacity and responsiveness (including responsiveness to company requests for action) condition what is expected of a company. For obvious reasons, the more responsive a government is, the more companies can expect – and be expected – to fulfil their human rights responsibilities effectively.

³⁰ Adapted from the Business & Human Rights Initiative, *How to Do Business with Respect for Human Rights: A Guidance Tool for Companies*, Global Compact Network Netherlands, The Hague, 2010. Note that the diagram illustrates pre-Ruggie thinking on this question.

³¹ Ruggie, 2008.

Engagement with government has two principal dimensions: capacity-building and advocacy. A third can be added: partnership with others to strengthen the first two. In most high-risk countries, government agencies lack information, expertise and experience in critical areas. This is even more true of local government offices. This lack of capacity undermines a company's own capacity to meet its responsibilities. Management of in-migration, for example, requires forward-planning, appropriate policing, investment in services, and the establishment of regulatory bodies and procedures to monitor and enforce standards for suppliers and contractors. To address deficiencies in these areas, companies may be required to invest staff or financial resources, or involve themselves in lobbying. They may need to solicit the involvement of other parties, to provide technical capacity, deal with sensitive issues, or increase political access. Once again, the central point to make is that, when States fail to fulfil their functions, companies are exposed to a range of risks and to a set of demands they cannot usually meet and should not necessarily be expected to meet. Conversely, when a government fulfils its duties, it becomes much easier for a company to define its own duties and fulfil them.³² Companies therefore have both a responsibility and an incentive to strengthen State capacity and effectiveness.



This kind of model provides only a partial answer. Companies can only do so much and what they can do depends on a host of variables. In certain cases, the government may simply not allow companies to act in accordance with international best practice, controlling interaction with employees and restricting or denying engagement with external groups. In other instances, the opposite: the State may abdicate all responsibility for the socio-economic rights of affected people.

³² Frynas, 2009, makes a similar point in respect of social investment.

³³ Ruggie, 2009.

These are challenges for which there is only one response: to exit (or never enter). External calls for summary withdrawal are only realistic, however, when a company is credibly accused of complicity in egregious human rights abuses or when its presence unavoidably or deliberately worsens the situation of those within its sphere of impact. In the overwhelming majority of cases, even in high-risk countries, the situation is far more complex.

This emphasises the importance of what Special Representative Ruggie has termed ‘knowing and showing’.³³ Although the corporate responsibility to respect distinguishes more clearly what companies ought to do from what they might usefully do and what they cannot be expected to do, these distinctions will often be blurred at the edges. Companies need to be honest about their dilemmas and open about their efforts to address them. They can only achieve these goals by co-operating with and seeking the advice of others, a point discussed below (see *international cooperation*).

Enhanced due diligence

- Assess government’s capacity, authority, legitimacy and will in the course of due diligence.
- Consider risks associated with deficiencies of government.
- Provide technical support to increase government capacity, particularly at local level.
- Advocate for a strong state role in socio-economic development.
- Identify partnerships and alliances with international organisations to support and encourage the government.
- Be transparent when it is possible; when it is not, discuss measures confidentially.

Communities³⁴

If all roads pass through the State, many start in communities. Difficult relationships between companies and communities often lie at the heart of human rights abuses or allegations of abuse.

Challenges

- Different perspectives on rights.
- Limited understanding in communities of international human rights frameworks.
- Inter- and intra-community tensions.
- Expectations, including that the company will fulfil state responsibilities.

³⁴ This section draws on *Community Perspectives on the Business Responsibility to Respect Human Rights in High-Risk Countries*, a report produced for this project by CDA Collaborative Learning Projects in partnership with the Institute for Business and Human Rights. The paper is based on field-based interviews with local community members and representatives in Afghanistan, Colombia, the Philippines and Sudan.

Companies and communities often interpret the meaning and reach of human rights differently and bring different assumptions to discussions of corporate accountability and a company's responsibilities. Many company-community disputes arise from these differences of understanding. Disagreements may also occur about whether certain rights are being protected, respected and fulfilled; and about who is responsible.

It is not surprising or controversial to find that human rights questions are perceived differently by the 'impacter' and the 'impactee', but identifying and understanding such differences of perception is essential to the success of any strategy to respect human rights. While companies tend to describe their responsibilities in terms of standards, for example, many communities will describe them in terms of values and traditions.

Zakat, Afghanistan

"There is an expectation by many communities that the company will understand and follow local cultural or religious beliefs in regards to rights and benefits-sharing. In Afghanistan, expectation of corporate respect of "rights" is founded in religious and cultural beliefs, including an obligatory charitable contribution by those better off to those less fortunate. People reaching a certain threshold of capital are expected to pay Zakat, the fourth pillar of Islam, and most companies making a profit are considered to fall within such a threshold. Hospitality and generosity on the part of all entities are also integral parts of Afghan culture." CDA Collaborative Learning Projects and Institute for Human Rights and Business, *"Community Perspectives on the Business Responsibility to Respect Human Rights in High-Risk Countries"*

At: www.institutehrb.org.

Difficulties of communication are often compounded by a limited knowledge of the international human rights framework. Insofar as people have an understanding of human rights, it is likely to be shaped by their experience and context. In some countries, that experience is dominated by a history of armed conflict; in others by land disputes or the effects of major infrastructure projects, or demands for education and health services, or for freedom of expression and association, etc. In many parts of the world, and notably in rural areas, people will have little or no sense of human rights as formal, legal entitlements. What is true in general of human rights is even more true of human rights in the context of business.

This has implications. Can a company respect the human rights of individuals if the latter are not familiar with their rights as the international community understands them? Technically the answer is yes, but the same differences of perception may mean that the company's actions and objectives will not be understood either, and may not be regarded as adequate by the individuals in question. A gap may open between what they want or expect, and what the company considers its (internationally agreed) responsibilities to

be. The 'fit' between the two may determine whether their problems are addressed to their satisfaction.

There has been only noise about human rights, nothing practical has been done. Our people have suffered and they need good deeds and honesty. Instead we have words written on ice and put to the sun. **Villager in Aynak, Logar, Afghanistan**

From a community perspective, therefore, a company's human rights responsibilities can be understood in terms of *showing respect* and *meeting expectations*. The latter challenge is well appreciated by all companies, but the importance of the first is poorly recognised. Sincere engagement with communities is one of the most valuable things a company can do. Yet lack of engagement remains a constant source of community resentment.

Engagement matters for four reasons:

- It demonstrates respect for the community.
- It is a means of providing information to the community.
- It enables concerns to be raised by the community.
- It helps both sides to understand needs and expectations.

Engagement is often seen as mostly about consultation; but consultation is only one element. It is equally important to form an understanding of the local cultures and traditions, enabling people to communicate their ideas and concerns in their own terms, and to show simple courtesy.

One thing that bothers companies is being compelled to respond to people with whom they have no labour-related relationship. If the companies think about what is the least I can do for my workers, my people, then there is a no way of seeing people as a whole. **NGO leader, Meta, Colombia**

When engagement is genuine, companies will also find it easier to manage expectations. Company managers can be frustrated, understandably, by what they see as a never-ending series of demands. Equally understandably, communities can be frustrated by perceived unmet promises against a backdrop of real needs. While companies must obviously avoid making promises they cannot keep, they also need to discuss what they can and cannot do; to do what can be done properly, and explain the limits of their responsibilities.

Most of the things a company cannot or should not do (such as service provision or infrastructure) are a State responsibility; but many communities in high-risk countries have learned to view the government with suspicion or outright hostility, and expect little or nothing from it. Where this is so, communities will turn for assistance to those who are at hand. As discussed above, companies must therefore manage public expectations and may be held responsible for failures of delivery where they consider other actors should be faulted. Unless it manages its relationships well, a company can quickly trigger a cycle of claim and counter-claim that may turn violent and may endanger its reputation. If the government steps in at that point, the situation can worsen further.

*I look to them [the company] because of the influence they have on the government ... they have weight ... they should speak because they are the ones doing the damage. **Community leader, Pompeya, Colombia***

Responsibilities

What does this mean for a company's responsibilities? The international human rights framework may provide the best generic guide to a company's approach, but in high-risk countries it may well prove an inconsistent vehicle for managing relationships with local communities, for two reasons: firstly, because how local communities articulate and understand 'rights' will likely differ from the specifics of international law; and secondly, because the primacy of government (central to implementation of the human rights framework) is a largely meaningless concept to many on the ground. A company is not responsible for fulfilling the functions of the State but, where government does not function, it will often be expected to do so. The difficulty of building a genuine relationship with local communities should not be underestimated, but doing so can bring significant benefits both to the company and the community. It is vital for companies to explain reiteratively what services they can and cannot provide, and avoid mismatches of expectation which can generate mistrust.

Respecting human rights is not just a technical process. Companies must consider how they can create the conditions of trust in which rights can be respected. If a community does not feel that its rights are being respected, then, to all intents and purposes, they are not. This does not mean that companies have unlimited obligations to the community; but they need to develop an understanding of 'Respect' that combines genuine engagement with long-term benefits.

The most valuable and valued benefits flow directly from a company's core function: economic activity. Companies create jobs, and pay taxes and royalties to the State. Communities in high-risk countries want long-term jobs for local people and evidence that some of the income is used to create better services and infrastructure. If a company can deliver the first and show that it is encouraging and supporting the second, it will go a long way towards winning respect for itself.

Enhanced due diligence

- Understand differing perceptions of rights.
- Clarify expectations, including the limits of company responsibility.
- Develop a genuine relationship with affected communities (see also *building relationships* in Part two).
- Focus on maximising core benefits (jobs and broader economic development).

Armed groups

Non-State armed groups and militias pose very serious risks to a company. The presence of organised armed groups in the vicinity of company operations, which most commonly occurs in the extractive, timber or agricultural sectors, multiplies those risks. Risks are to the company itself; to its staff, its property, and its income; to neighbouring communities and the company's relations with them; to officials and the company's relations with government. More generally, armed conflict affects the country's wider political, social and economic evolution.

Armed groups vary enormously in terms of their size, reach, motivations, support base and sources of revenue. These factors are all critical to understanding the risks they pose to a company and to its ability to operate responsibly. Equally, the characteristics of the company itself – size, location, sector, workforce, community relations, even nationality – have a bearing on the extent and nature of those risks.

Challenges

- Absence of State control; lawlessness.
- Potential for abuse by non-State and State forces.
- Risk of being accused of complicity in such abuses.
- Risk of becoming a target or opportunity; exposure to threats of sabotage, kidnapping, extortion, blackmail.
- Threats to surrounding communities.
- Obstacle to sound and transparent community consultation and engagement.

People fight for reasons, which may be clear-cut, complex or disputed, but which matter to those involved. Labelling armed groups (as “terrorists,” “bandits” or “freedom fighters”) is not usually productive. The motives that inspire individuals and groups to take up arms include history, discrimination, exclusion, fear, desperation, poverty, greed, and political interest. For a company that operates in the vicinity of armed groups, local motives and grievances will influence its interaction with the State and its armed forces, with the armed group(s) themselves, and with surrounding communities, and should be included in any risk mitigation strategy.

Businesses are uncomfortable with the idea that they should understand the motivations of armed groups, let alone address their grievances. Most companies tend to consider that they are politically neutral, and regard a conflict as none of their concern and unrelated to their own presence. This view might be viable if armed groups shared the same perspective. In general, however, armed groups regard businesses as assets of the State, with which they sign partnership agreements, to which they pay taxes and royalties, and which provides them with security, including military protection where it is necessary.

Companies cannot avoid this risk: armed groups will see companies as either a threat or an opportunity and in both cases as a target. They may be a threat because their presence increases the strategic value of the region in which they operate. A company's arrival is a promise of future wealth generation, and more immediately jobs. It is likely to generate new transport infrastructure, which may improve military access to the area. The taxes it pays resource the State's counter-insurgency operations. Sabotage of company infrastructure becomes an obvious strategic option for armed groups seeking to disrupt economic activity and divert or prevent the movement of military personnel and hardware. Companies face enormous challenges and the cost of maintaining security, safeguarding staff and protecting assets in the face of repeated attacks is extremely high.

Business and international humanitarian law

In addition to the risk of becoming a military target, business enterprises operating in conflict zones are exposed to the surrounding conflict dynamics. Not only their operations, but also their personnel, products or services may become part of the ongoing conflict. In the worst-case scenario, any of these could result in or facilitate violations of international humanitarian law.

Business enterprises therefore run legal risks, whether based on criminal responsibility for the commission of or complicity in war crimes or on civil liability for damages. The nature, implications and extent of these risks are of particular importance to business enterprises operating in conflict zones.

Business and International Humanitarian Law, International Committee of the Red Cross, 2006.

Companies also represent opportunity. Armed groups can find many ways to profit from a company's presence. Sabotage or abductions, or the threat of them, may be used to extort money. Armed groups may control suppliers, recruit fighters or sympathisers among the company's workforce, or drain the local economy by extorting money from surrounding communities and businesses, or diverting funds allocated to social projects. In some areas, armed groups levy taxes, including taxes on companies.

Company managers therefore face not only the physical threat of attack but the possibility that they may finance an armed group's activities. This brings legal risks: most armed groups are proscribed or banned under domestic legislation and a company may face official sanctions if it is seen to have collaborated with enemies of the State.³⁵ Moreover, the company exposes itself to the risk that it might be considered complicit in human rights abuses if senior managers are aware (or should be aware) that company funds are being diverted to fund armed groups. Buying armed groups off or turning a blind

³⁵ See, for example, www.ag.gov.au/www/agd.

eye to their fundraising activities may bring short-term relief, but will rebound in the long-term. Equally, not paying may also trigger acts of violence, and may also endanger company staff and neighbouring communities. How should companies address these legal, financial, operational, and reputational risks?

Where green field sites are being considered, the risk of being caught in such a situation ought to be sufficient to raise alarm bells about the project's viability. For projects that are already developed, armed groups may become an issue in several ways. They may be attracted into the area by the project. They may expand or withdraw into the territory, or may emerge within the region over a period of time.

Withdrawing (permanently or temporarily) is one option (at least for foreign companies). But withdrawal is not cost-free. Even discounting financial losses to the company, local employees, suppliers and communities will all suffer. If the government opposes the decision, in addition, it might constitute a breach of contract or another company could be awarded the concession. Nor does withdrawal address the core problem: armed groups are unlikely to stop their activity because a company leaves.

A classic response is to boost security and sub-contract responsibility for it to a private security firm, military units, or armed police. This approach too carries risks. Police and military units often commit human rights abuses themselves, perhaps especially frequently when they are combating a guerrilla force that blends in with the environment or the surrounding communities and enjoys local support. When security forces commit abuses while acting on behalf of a company, the company may be liable whether or not it ordered or intended the intervention in question (see *security*).³⁶ Even if no legal problems arise and no abuse occurs, a highly securitised response to the risks the company faces is likely to harm its reputation and its local relationships.

Community support is indispensable, but an immense challenge, since the company's ability to engage with surrounding communities is compromised both by the violence and the security measures that are taken in response; visiting communities in the company of armed guards, for example, can be threatening. Local attitudes will largely be dictated by two factors:

- The behaviour of the company and its approach both to security and the conflict; and
- The level of community support for the armed group.

If an armed movement draws its strength from local grievances, it is evidently more likely to attract local support (for its aims if not its methods). In such a case, a company's links to government or its use (or tolerance) of State security forces will tend to create mistrust or contentious relations with surrounding communities. If an armed group does not represent local interests or has alienated people by its behaviour, on the other hand, communities may welcome the arrival of a company that might provide some protection as well as economic opportunities.

³⁶ *Red Flags*, 2008.

On the ground, it is likely that the situation will be less clear than either of these scenarios. The closer local people are to the combatants, the more they can exercise influence over them. If a company can build a relationship of trust with the community, their support will provide the best protection against threats of sabotage, kidnapping or extortion. The reverse is also true: where armed groups are not reliant on local support, they will worry less about community opinion. This underlines the importance of understanding the political chemistry that exists between armed groups and surrounding communities.

The one constant is that communities are *always* at the greatest risk, caught as they are between the State on one side and armed insurgents on the other; and their exposure is amplified by the presence of a large economic project. Both their lives and their livelihood are threatened. They are frequently in danger of being killed, wounded, imprisoned or tortured, and threats to their quality of life are only marginally less severe. Local populations are likely to develop ways to cope with the presence of armed groups and security forces in their area, by providing active or passive support, paying unofficial taxes to buy 'protection', and balancing, however uncomfortably and at whatever cost, the demands of both sides.

The introduction of another variable – the company – raises the stakes and changes the dynamic, not necessarily for the worse but not always for the better either. Any increase in violence will threaten the community's security and liberty, while the security response, as well as the project itself, may threaten other rights. A company will need to consider both aspects, in an environment where both the main protagonists may not consider either. The fact that human rights were not being respected before a company's arrival does not dissolve its responsibilities.

Responsibilities

A company is not helpless if armed activity occurs in the vicinity of its projects. When determining a strategy, three interrelated factors should be considered.

- The character of the government; support for it; its failure to manage tensions within the society.
- The nature of the armed group; support for it; its character and grievances.
- The company's own impact on local communities and both of the above.

The first two considerations provide the elements of an analysis. The third contextualises the company's strategy. Companies need to recognise that they have an impact and are an element in the conflict. Addressing negative impacts lies at the heart of the 'Respect' framework, and provides the key to mitigating risk. In most cases, raising the barricade and declaring political neutrality, or stating that the company will not have contacts with (illegal) armed groups, will merely create further difficulties for those on the ground who are usually obliged to deal with both insurgents and government forces when these seek favours, information, resources or compliance: detailed guidance is needed.

Armed groups dissolve because they have no more reason to fight or no more capability. A company's role in relation to armed groups is dictated by the extent to which its own impacts increase these groups' motivation and capacity to inflict harm on the company or on surrounding communities. These can be limited or substantial. In certain cases, particularly in the extractive sector, the production process and its side effects may be so closely bound up with a conflict that the companies involved are perceived to be parties to it.

The people can manage their life, we do not need these oil companies here. They are the reason for our disaster, why there was war... Look at this place: everybody has a gun and we are always afraid of the unknown.

Chief of Mentang sub tribe, South Sudan

It is critical to understand these impacts and to integrate them in a company's due diligence process, because their extent and character determine the nature of a company's responsibilities. Substantial impacts may justify the suspension or postponement of operations, and closure may be the only choice where a company's presence or arrival might provoke grave human rights abuses. This might be the case, for example, if a company were seen to be a threat to an armed group, causing it to target employees or associates. If impacts are less substantial, a company still has a responsibility to do what it can to mitigate them, and it is unlikely that they can be fully mitigated while armed groups operate in close proximity.

Paying off armed groups to avoid attacks increases both their motivation and capacity and should be avoided where possible. Indirect income generation by armed groups is likely to be inevitable; but companies should inform themselves about the different methods that might be used, and should take steps to curtail opportunities for it. This is particularly so in areas that companies control directly, such as recruitment, sub-contracting, purchasing contracts, and social investment projects. In order to avoid potential complicity in abuses that can occur, companies should not recruit known insurgents or active sympathisers, should not source goods or services from firms known to be controlled by armed groups, and should ensure that their projects do not facilitate the activities of armed groups.

This is easier said than done. In practice each of these issues is fraught with difficulty. No due diligence process will provide guarantees and, in cases of kidnapping or extortion, companies may have no choice or control. Evidence of effort to achieve these outcomes is nevertheless important.

Acute dilemmas also arise where the State is unable to provide security for supply routes or safe access to ports and other critical infrastructure. These may be controlled by non-state groups, including criminal gangs. In lawless environments, companies may have to pay 'protection' to ensure their products are shipped safely. Such payments are almost always illegal and are therefore made 'off-budget'. If a company cannot avoid such payments, it nevertheless has a duty to mitigate their harmful consequences.

Doing nothing is not acceptable. Companies confronted with this problem should either withdraw or take alternative steps. The obvious options are to address the problem, or discuss it.

Human rights due diligence is a matter of reducing threats and mitigating harm, as well as prediction. In matters of security, companies need to consider all the ways in which they can insist, encourage, prompt and assist governments to fulfil their responsibilities in a manner consistent with their human rights obligations. Similarly, companies need to inform themselves about the underlying political grievances that fuel a conflict, though this does not mean accepting every demand. Ignorance and poor understanding will fuel resentment, sharpen risk and compromise companies' ability to respect human rights.

Enhanced due diligence

- Analyse the company's impacts.
- Understand the agendas of armed groups.
- Suspend or postpone investment if impacts might credibly lead to grave human rights abuses.
- Avoid paying off or otherwise benefiting armed groups (as far as possible).
- Enhance company security measures to include protection of local communities (as necessary and as far as possible).
- Support the capacity of State forces in line with best practice guidance (and with an understanding of potential risks).
- Develop joint approaches with other companies.
- Address grievances related to company impacts and in so far as they intersect with local community concerns.
- Partner and support organisations working to address grievances.
- Advocate confidentially, with host and/or home governments and/or international organisations.
- Discuss risks and mitigation measures with trusted international bodies.

Gender³⁷

Sex is about the physical differences between men and women, gender about their social, economic and political differences. Both are covered under the 'responsibility to respect'. The first is relatively straightforward; physical differences tend to be easier to spot and are less culturally specific. Identifying social, economic and political differences requires analysis and will vary from country to country, within countries and even in families. Avoiding infringements of rights on grounds of sex is about treating men and women equally: avoiding infringing rights on the basis of gender is as likely to be about treating men and women differently.

Challenges

- Difficulty of exploring socio-economic and political inequalities.
- Obstacles to engaging with women in certain cultural contexts.
- Sensitivity of measures to strengthen the capacity and role of women.

This is not because company responsibilities differ in regard to men and women, or because women have different rights, though some aspects of rights are specifically relevant to women, and not all issues relevant to women (such as reproductive rights and domestic violence) are adequately reflected in the international human rights framework.³⁸ It is because men and women experience the impacts of company activities in different ways. Insofar as men and women have different roles and needs in society, they will be affected differently by any change in their situation. The conditions in high-risk countries tend to exaggerate differences at every level. This is clearly evident in five areas: livelihoods, resources, services, security, and health.

Addressing gender is not straightforward in practice. First of all, companies (along with many other kinds of institution) typically do not recognise its importance, although a company cannot meet its responsibility to respect human rights if it does not monitor gender impacts.

Second, to incorporate a gender perspective companies must evidently engage with women as well as men, and in many cases with women in the absence of men. In some contexts, this may require imagination. Third, women's voices must be listened to: often, women's perspectives are unheard or never raised, creating an impression that their opinions coincide with those of men; or consultation with women may be discouraged or blocked. In such situations, a company will need to respond creatively, by drawing on outside help or consulting informally (for example, through health workers or at schools).

³⁷ This section is informed by a specially commissioned background paper by Kathryn Dovey, *Business and Conflict: Integrating a Gender Perspective*, IHRB, 2010.

³⁸ See, for example, Christine Chinkin, Shelley Wright and Hilary Charlesworth, *Feminist Approaches to International Law: Reflections from Another Century*, in *International Law – Modern Feminist Approaches*, 2005.

Finally, gender and women's empowerment need to be addressed as distinct issues. Gender is primarily an tool of analysis that illuminates differences and inequality of treatment between men and women in society. By contrast, women's empowerment builds on the insights of gender analysis. For companies, the first is an integral element of due diligence and therefore a responsibility; the second is not (except in certain circumstances).

It is helpful to keep this distinction in mind because confusion between them is a principal cause of resistance to the concept of gender. The status and role of women within society is often a culturally sensitive issue which companies have traditionally been reluctant to confront. Yet women are frequently twice disadvantaged – by political régimes that infringe the rights of all members of their society, and by social and cultural norms that prescribe a lower status for women and discriminate against them.

Integrating gender: key areas

Livelihoods

Sources of income may differ. Women are more likely to operate in the informal sector and their income-generating activities will tend to be less visible. Companies need to understand the different ways in which households generate income. The company's activities may have impacts on the access of women and men to markets or raw materials.

Resources

Men and women may make different use of natural resources such as land and water, or different responsibilities with regard to water, food or fuel. When essential resources are limited this can particularly affect the time that women have available to generate income. In many places, women are less likely to have formal title to land, though they may have a recognised right to use land. This can have effects in situations of relocation and compensation.

Services

Women and men may need and use services such as health, education and transport differently.

Security

Women's perceptions and experience of security will differ from those of men. Women are at much greater risk of sexual violence, men at higher risk of arrest, extrajudicial killing or physical intimidation by security forces.

Health

Women may be drawn into sex work around company sites where the agglomeration of workers can increase the incidence of HIV/Aids. Specific needs in relation to reproductive health need to be considered.

Responsibilities

Companies are not agents of social change and it is not in their mandate to address deep-rooted societal injustices. At the same time, companies do induce social change and the claim that companies should not involve themselves in socio-cultural issues, such as gender discrimination, can be justified only to the degree that companies are not themselves responsible for sustaining or worsening injustice.

Companies become complicit in gender discrimination most obviously when they fail to consult women, thereby effectively denying them a voice in matters that concern them – be it their right to economic, social and cultural resources or to participate in public affairs. Consultation with women, and taking heed of their views and needs, is an essential dimension of empowerment. In this sense, companies should consider empowerment as a straightforward expression of their responsibilities, not an exceptional kind of intervention.

Preventing or mitigating negative impacts may require capacity-building, for women as for any other group that suffers harm or disadvantage. Because women face discrimination on a range of levels as a result of gender differences, they are also likely to suffer disproportionately from any negative impacts of company activity, and this is a further reason why companies should monitor gender when they seek to mitigate or compensate for such harms.

Enhanced due diligence

- Include gender analysis in risk assessment processes.
- Ensure that women (and other disadvantaged groups) are properly included.
- Assess how company impacts will affect groups differently.
- Develop tailored strategies for mitigating negative impacts.

International cooperation

Cooperation between governments, multilaterals, civil society and business has increased in recent years. Development policies emphasise the contributions that business can make through investments in developing countries while the risks of abuse in the context of that same investment have focused attention on corporate behaviour. In parallel, businesses and governments have continued to promote international investment, which generates profits, employment and tax receipts.

In theory, all these agendas are mutually reinforcing. Companies are encouraged to invest responsibly; responsible investment creates jobs and stimulates growth; this contributes to development, to improved living standards, better services and more stable government, which are the keys to social stability and improved governance,

and these create an environment that encourages more companies to invest, further stimulating growth – and so on in an expanding circle of virtue.

The logic is compelling, the reality less so. Companies are encouraged to invest and investment creates jobs; but too often the tax revenues are captured by élites which misappropriate the funds, while corruption and malpractice obstruct development (and undermine the impact of development assistance), entrenching poor governance, deterring further investment – and so on.

The reasons why the model does not work are much debated.³⁹ However, the key weakness seems to be the fragile connection between investment (or aid) and improved governance. Until recently, this connection was largely taken for granted (but see box). Recently, however, donor agencies have put more of their money into strengthening institutions, with the aim of building a more responsive State.

*Security, law and justice, and financial and macroeconomic management are essential for States if they are to govern their territories and operate at the most basic level. States also need a minimum level of administrative capacity to deliver their functions... Support to security, law and justice should include working with both State and non-State actors as appropriate.*⁴⁰

Stronger institutions operating within more responsive States are also of great benefit to companies because they raise standards, inhibit corruption and lift public expectations.

Yet there is scraggy evidence of progress in this direction. Initiatives such as the Kimberley Process, EITI, and to a lesser degree the Voluntary Principles, do bring home and host governments together with companies (and civil society) on issues of governance. They set an important precedent; but they only scratch the surface of what needs to be done.

The vast majority of home governments lack a coherent strategy for harnessing the economic, developmental and human rights potential of business. This has many consequences, not least of which is policy incoherence (see box).

*The most prevalent cause of legal and policy incoherence is that departments and agencies which directly shape business practices – including corporate law and securities regulation, investment, export credit and insurance, and trade – typically work in isolation from, and uninformed by, their Government's own human rights obligations and agencies.*⁴¹

³⁹ See, for example, Paul Collier, *The Bottom Billion: Why the Poorest Countries are Failing and What Can Be Done About It*, Oxford University Press, 2007. For contrasting perspectives, see Jeffrey Sachs, *The End of Poverty*, Penguin Books, 2005; and William Easterly, *The White Man's Burden*, Penguin Press, 2006.

⁴⁰ DFID, *Building Peaceful States and Societies*, DFID Practice Paper, 2010.

⁴¹ Ruggie, 2010.

Policy incoherence is not an accident. Most governments have always been more concerned with investment than with responsible investment. While governments have made encouraging noises about the business and development and business and human rights agendas, this has not changed. The problem is not simply that different agencies within governments work in isolation but that the departments responsible for development and human rights policy have little influence over those that shape business practice.

Corporate Social Responsibility policies (CSR) and Export Credit Agencies (ECAs) illustrate this clearly. CSR guidelines are weak from a human rights perspective (see below for an exception),⁴² and the terms under which ECAs provide insurance and loan guarantees to companies investing in high-risk markets have largely failed to keep pace with evolving human rights norms and expectations. In some cases, Export Credit Agencies and their clients have been criticised in similar terms.⁴³

This white paper is based on the premise that Norwegian companies should be among the best at practising CSR, thereby helping to strengthen the status of human rights, create decent working conditions, protect the environment and combat corruption. In the Government's view, active corporate involvement in these areas will positively impact both the companies and society at large.⁴⁴

The 'Respect' framework requires *all* companies to undertake due diligence, and the State's explicit duty to protect also applies to government agencies that lend or provide services to companies. ECAs ought routinely and explicitly integrate human rights in their due diligence procedures and mitigation policies. The responsibilities of ECAs should be no less, and perhaps greater, than those of private institutions.

Export Development Canada

EDC's Political Risk Assessment Department routinely conducts country- and project-level political risk assessments that include an analysis of factors that influence human rights conditions in host countries. An additional layer of due diligence will be undertaken for investment projects and countries assessed to have a higher potential for human rights issues. This supplementary analysis may include an examination of factors such as the country's socio-economic dynamics, history of conflict and site-specific issues such as security, location and relations with local communities.⁴⁵

42 Ruggie, 2010.

43 See, for example, Dr Susan Hawley, *Turning a Blind Eye: Corruption and the UK Exports Credit Guarantee Department*, The Corner House, 2003.

44 Ministry of Foreign Affairs, *Corporate Social Responsibility in a Global Economy*, Report No 10 to the Storting, Norway, 2009.

45 At: www.edc.ca/english/social_15113.htm.

Governments need to give clearer direction about what they expect of companies. At the same time, development and human rights departments could affirm more than they do the value of working closely with companies on matters of governance. Business departments are isolated too. Governments will not persuasively claim to be defenders of human rights abroad while they lack procedures that ensure investments they support are made in a responsible manner; nor will policies to promote the developmental potential of business make progress while government structures are not aligned with them.

Cooperation between government and business has, as a result, been patchy and inconsistent. Crucially, this means these issues have little traction back on the ground, within Embassies and the country offices of donor agencies.

This highlights a wider problem. Insofar as there has been progress on multi-stakeholder cooperation, it has mostly been made at international level. Translating policy initiatives into practical cooperation at country level has proved elusive, despite some encouraging examples.⁴⁶ This is partly due to an (understandable) perception that such initiatives are company-focused. There could nevertheless be significant potential benefits in linking company efforts to apply the 'Respect' framework with efforts to strengthen governance, on development and human rights grounds. Governments need to do much more to exploit such links, and to develop strategies for their practical implementation at national level.

Department for International Development: Private Sector Development Strategy

DFID's objective is to leverage the maximum impact from the private sector on the MDGs. This means responsible businesses operating in a healthy investment climate, producing not only growth and jobs, but also innovative solutions to development challenges. DFID expects companies to be responsible for the social, environmental and economic risks in their areas of operation, and will work with them to achieve this. This is particularly true in sectors such as mining and construction where companies have a large social and environmental 'footprint'. DFID will work to ensure that business concerns on the investment climate are reflected in the national plans of developing countries.⁴⁷

Policy incoherence occurs within companies too, and largely for the same reason – tension between standard and responsible business practice. Like governments, businesses tend to consider social responsibility issues a secondary priority. So, for example, participation in multi-stakeholder initiatives is shaped more by reputational concerns than by a company's core agenda. This is not meant to imply the motivation is merely *presentational* (although

46 See, for example, Voluntary Principles, Colombia Case Study. At: www.voluntaryprinciples.org/files/vp_columbia_case_study.pdf.

47 DFID, *Private Sector Development Strategy*, DFID, 2009.

that may be the case); but it has the effect that companies are not extracting the benefit they could from such initiatives. In reality, companies need policy support in a range of areas, and cooperation with governments and NGOs on issues of governance could be very helpful.

The case for cooperation

Protection. Because of their sensitivity, companies find it difficult (or inadvisable) to raise certain issues with host governments. This can often be done more easily through their home governments, multi-lateral agencies or in multi-stakeholder forums.

Advice. When companies face the very complex dilemmas that arise in high-risk societies, governments or other actors may be able to suggest alternative solutions, and work with companies to implement them.

Knowledge. Companies cannot, and should not be expected, to know everything. Even very comprehensive due diligence will leave gaps. Companies need other institutions, with different forms of experience, to supplement their own analysis and capacity.

Support. Companies often need assistance when they address negative impacts.

Level playing field. Bad practice in a company undermines the work and reputation of other companies. This is not simply a matter of competitive advantage or guilt by association. Companies that ignore human rights increase risk for others. Cooperation, between companies and with other institutions, can help to raise standards.

Transparency. Companies need to show they are doing what they can to protect rights and behave responsibly. This is their main defence against a range of risks. Transparency takes many forms and is not necessarily about public declaration. Cooperation with other institutions, including governments and civil society organisations, can assist companies to build public and private trust.

Similar points can be made regarding the third main pillar of multi-stakeholder initiatives: civil society. Civil society institutions are seen to behave incoherently partly because they are so diverse – their primary strength. The range of their mandates, capacity and expertise constrain the development of multi-stakeholder initiatives. Many civil society organisations simply do not want to cooperate with companies; and those that are prepared to do so have many motives.

The absence of an agreed framework defining company responsibilities has made cooperation much harder. Most NGOs first engage with business to address problems that arise: few start with the assumption that businesses can be allies in social reform.

Particularly in high risk countries, where social, political and economic challenges are deeply entrenched, this is often too narrow a starting point. It is essential to establish benchmarks and standards but this alone will not create societies in which all people are free to enjoy their rights. The social reform that NGOs seek requires a strategy that does not confine itself to restraining company behaviour.

The consequences of this narrow approach are evident in civil society approaches to multi-stakeholder initiatives. Typically they view these as mechanisms for regulating corporate behaviour rather than addressing wider governance problems. Partly as a result, NGOs have been very effective in bringing these initiatives into being and much less effective in giving them strategic direction. While companies can do much in areas they control, they do not exist in a bubble and their impact is shaped by the environment around them as much as by their own choices. This echoes an earlier point about complicity. Is the policy or advocacy objective to prevent a company's involvement in human rights abuses or to prevent human rights abuses more broadly? It *must* be both because the first is often a product of the second. On this ground, it makes sense for NGOs to adopt a more expansive approach to multi-stakeholder initiatives.

Internal marginalisation is also an issue. Those who work on these issues in NGOs are often relatively isolated within their own organisations – no doubt because the issues are not considered core to the organisation's mandate. The 'Respect' framework provides a new baseline round which most NGOs can now gather. In high-risk countries in particular, it can link programmes and advocacy on company responsibilities with programmes and advocacy on wider issues of governance reform, creating space for more strategic and more ambitious forms of action and collaboration. Companies need the help of governments and NGOs to meet their responsibilities; and governments and NGOs cannot achieve their social, economic and political objectives without an appropriate contribution from business.

Chapter three: Issues

Shadow economies

Criminality exists everywhere, but criminality controlled or sanctioned by the State is largely specific to high-risk countries. To these can be added uncontrolled criminality, when the State is unable (from weakness or loss of authority) or unwilling (for reasons of political interest) to prevent, investigate and prosecute criminal activity.

Money everywhere underpins power. However, high-risk countries are often distinctive in the way they raise and use resources. Government capture of revenues is the most obvious form of State-controlled criminality. Political leaders exploit their power to siphon off the nation's wealth to enrich themselves, their families and associates. This wealth fuels a patronage system which buys the support of military, ethnic or tribal groups, other key constituencies, and ordinary voters. At the extreme, such systems individualise rather than nationalise the economy: State ownership of businesses expands the web of control to the entire economy, at once entrenching the status quo and denying potential opponents access to wealth.

Challenges

- Revenue mismanagement.
- State-sanctioned criminality.
- Systemic corruption.
- Patronage.
- Ethnic or religious or gender discrimination.
- 'Conflict' minerals.

States may also subcontract ownership to loyal individuals or groups – family members, regional politicians, senior military or police officers. In many cases, legitimate business activities provide cover for smuggling, counterfeiting, drug trading, or prostitution. Even when a business is wholly legal, its operations may not be subject to domestic or international regulation. State-sanctioned criminality marginalises those who pose a threat to its interest – or co-opts them. Criminal interests that are useful to the regime operate with impunity.

Not all States can exercise this level of control. Their authority may not extend to certain parts of their territory, or they may lack the resources to capture and prosecute criminal gangs, or elements within the State may protect them. The presence of armed groups is often a symptom of the State's limited authority. Particularly in regions that are rich in resources (minerals, timber) the line between political resistance and crime may blur. In less extreme cases, the State does not exercise a monopoly of force, and may lose control of infrastructure or supply routes, particularly in remote locations, to armed groups whose motivation is purely economic.

This rather bleak description illustrates the risks that companies face in high-risk countries. The problem is not about managing unintended social effects, but the company's ability to fulfil its core economic function without feeding an abusive system. The risks begin with the integrity of companies' own operations in a context where bribery and corruption are systemic; they extend to the management of sub-contractors and suppliers; and finally include investors and companies who source their products from abroad.

The resource curse

Much has been made of the 'resource curse', that condemns countries rich in natural resources to political mismanagement, economic underdevelopment and military conflict.⁴⁸ Governments that receive large incomes from oil, gas, mining and timber have less incentive to expand their tax base through broad economic growth. This widens the gap between State and society and entrenches inequality. Having access to an independent source of income, governments are less accountable to their citizens and feel little obligation to provide proper services. Thus the social contract which binds societies together is weakened or lost, and the likelihood of violent conflict increases as different groups compete for their share of resources or for overall control.

Assuming a company's payments to the government are legitimate, it cannot be held responsible for the fact of their misuse. The 'resource curse' is not inevitable, as the example of Botswana illustrates.⁴⁹ It is the result of macro political and economic choices, and companies cannot be held responsible for the choices a government makes at this level. This is not to say that companies shouldn't seek to address the problem, however, and it is in their interest to do so. Aside from the obvious reputational, security and financial risks inherent in investing in such countries, poor and weak governance, high rates of poverty and inequality and violent instability will have serious implications at operational level, where companies do have responsibility.

Companies also suffer by association. Internationally, the main risk is to reputation; but locally a company may be adjudged to be supporting an illegitimate regime and its crimes, or to be a proxy for the State. It may be targeted for criticism or physical attack, putting staff and assets at risk and distancing the company from the community around it.

Responses to this problem, certainly in the extractive sector where these issues are felt most acutely, have focused on transparency. Full company disclosure of payments to governments (and full government disclosure of revenues from oil, gas and mining) are key features of the Extractive Industries Transparency Initiative (EITI), a multi-stakeholder process that includes host and home governments, oil, gas and mining companies, and civil society organisations.

⁴⁸ Frynas (2009). See Paul Collier and Anke Hoeffler, *On the economic causes of civil war*, Oxford Academic Papers, 1998; and Terry Lynn Karl, *The Paradox of Plenty: Oil Booms and Petro-States*, University of California Press, 1997.

⁴⁹ See *Avoiding the Resource Curse: What can we learn from the case of Botswana*, Transparency International. Paper given at a conference organised by the European Association of Development Research and Training Institutes (EADI), 2005. At: http://eadi.org/gc2005/confweb/papersps/Peter_Eigen.pdf.

EITI provides evidence that participating companies are not making corrupt payments, and provides verifiable information on the income derived from natural resource exploitation. Its difficulty is that it does not examine the misuse of revenues, which drives many of the human rights challenges that companies face. Though transparency increases accountability, the effect is not necessarily immediate; and outcomes are influenced more by how governments spend than raise their income.⁵⁰ Governments are not corrupt because they are secretive, but secretive because this is sensible if you are corrupt. EITI is more effective in addressing symptoms than causes.

EITI has considerable value and its limitations simply show that companies have more to do if they are to fulfil their responsibility to respect. While they may not be in a position to address national mismanagement of revenue, local impacts of that mismanagement do concern them. First, State neglect of services and infrastructure may be expensive for the company because it raises production costs. The company may also be expected to provide services in lieu of the State (see *Government* and *Communities*). Further, local people are likely to hold a company responsible for the effects of State mismanagement. Whether this is fair is largely irrelevant: it creates substantial risks. Finally, large scale financial abuse by the State is likely to be accompanied by abuse in other areas, creating instability, resentment and opposition to the State and the company, possibly resulting in violence.

Companies need to ensure that the full benefits of their presence are felt locally. There are few better risk mitigation strategies. If contracts or policies do not allocate a percentage of royalty and tax payments to the producing region, companies should argue for such a provision. This can be done during the negotiation of contracts; if the subject is too sensitive, it can be done indirectly through multi-lateral and bi-lateral agencies. At regional level, companies can provide, or arrange for, technical expertise to support local government; or partner local government on specific projects. They can encourage and support local communities, NGOs and the media to take up issues of revenue. These are all potentially delicate subjects, but companies need to explore how they might contribute, directly or through partnerships, to making sure that local communities enjoy fully the benefits of their investment.

Corruption

Corruption at the highest level shapes and reflects the culture at every level. The largest multinationals are better placed to shield themselves from politicians' and officials' solicitous advances but smaller companies may well only have a choice between paying up or staying away. The argument has been made that bribery is expected practice in many contexts and may be a price worth paying for the positive economic benefits that derive from foreign investment. The first is a distortion of cultural relativism, the second a

⁵⁰ See Jędrzej George Frynas, *Beyond Corporate Social Responsibility; Oil Multinationals and Social Challenges*, Cambridge University Press, 2009.

wilful misunderstanding of the impact of corruption.⁵¹ From a human rights perspective, bribery is wrong because it potentially infringes a whole range of rights, labour related and broader.⁵² It is therefore incompatible with the corporate responsibility to respect.

Many people are afraid to talk about it, because this is a big problem.

Puerto Gaitán religious leader, Colombia

Corruption is unlikely to disappear, however, and there is little practical value in simply stating that it is wrong. A company's responsibilities need to be understood in relation to the gravity of its impact, and measures that companies can take to avoid and mitigate that impact. There can never be a justification for initiating or soliciting a bribe – or using a third party to do so. Paying a bribe in order to win a contract is also unacceptable. Companies that bribe incur a clear risk of legal action, possibly in their home countries or in third countries where they have substantial investments.

While some forms of bribery are clearly worse than others, there can also never be a check-list of 'acceptable' bribes. Bribery may be common in many places but it is illegal everywhere. In countries where it cannot be avoided completely, the adoption of a strict policy, strictly enforced, is an essential step. But companies need also to support initiatives combating bribery, for example legislation requiring financial transparency, or monitoring by the media and civil society.

Partners and suppliers

Relations with partners, customers, sub-contractors and suppliers present a complex challenge. The issue is not whether companies should make themselves aware of malpractice in the circle of their relationships – this is required by due diligence – but what they should do when they meet it. International best practice is quite clear: with respect to joint ventures and consortia, companies should take appropriate action to ensure that their partners develop programmes to counter bribery that are consistent with their own, and if necessary should take steps to correct deficiencies, apply sanctions, or terminate the relationship.⁵³

Many companies that invest in high-risk countries do so in partnership with State-owned enterprises. Not all such enterprises will be corrupt but many will be. The same will be true of private enterprises that companies might want to engage as sub-contractors or suppliers. International best practice is clear here too. Beyond due diligence, companies should have a 'right of termination' if their suppliers or contractors pay bribes or act in

51 See Transparency International, at: www.transparency.org/news_room/faq/corruption_faq.

52 See Michael Wright, *A Survey of the Pattern and Scope of Alleged Corporate-Related Human Rights Abuse: Study conducted for John G Ruggie*, John F Kennedy School of Government, Harvard University, 2008. See also: International Council on Human Rights Policy, *Corruption and Human Rights: Making the Connection*, ICHRP and Transparency International, 2009.

53 Transparency International, *Business Principles for Countering Bribery*. At: www.transparency.org/global_private_sector/business_principles.

a manner that conflicts with the company's policies.⁵⁴ Similar guidelines apply to many standards, including labour rights, freedom of association, non-discrimination, and environmental practices, many of which local companies might struggle to comply with.

By entering into business dealings with these enterprises, companies may well facilitate activities that compromise their responsibilities to avoid human rights harm. Two options are available: terminate the contract and find another partner or contractor, or assist the enterprise to improve its standards. The second option is particularly relevant where alternative partners may not be available and where suppliers and contractors may struggle to match even minimum expectations for political or personal rather than technical reasons.

Through economic development, companies help create conditions in which human rights can be respected and fulfilled. Their investment creates employment and stimulates the growth of local business. A specific problem in some high-risk countries is that the local economy is intimately tied to the political system. Separating the two is almost impossible. Any reasonable sized business will depend on, and support, political, ethnic or tribal relationships, patronage and bribery. Directly or indirectly, foreign companies investing in these contexts will feed this system too, even if they manage to avoid corruption and other forms of malpractice in their own operations.

Should companies stay away or withdraw, or try to assist partners and suppliers to meet minimum standards knowing that the obstacles to improvement are not primarily technical but governance-related, and therefore much harder for companies to address?

Where State authority is weak or non-existent the problem of suppliers is more complex still. Sophisticated technology is not required to exploit accessible natural resources, such as timber, diamonds and tin. Access to labour, basic infrastructure and equipment suffice. This means that people living in the areas from which such products are sourced are particularly vulnerable to unscrupulous companies, criminal gangs, armed groups, or State officials. International companies are not usually directly involved in such operations, but concern has focused on the sourcing and importing of such products.

Companies have to ensure that their due diligence processes establish the source of products they use, and the extent to which suppliers along the supply chain engage in corrupt practices or contribute to human rights abuse. This is a basic requirement of the 'Respect' approach, though evidently it is not always easy to do. What then should a company do if it suspects that key resources are being exploited illegally, or by illegal, abusive or corrupt means?

International best practice provides the same choice. Companies should change their supplier, or improve the current supplier's standards. Where the same product can be sourced legally, the answer may be straightforward. If the new supplier is in another

⁵⁴ Transparency International, *ibid.*

country, both financial and development issues may arise. The price may be higher; more importantly from a human rights perspective, withdrawal is likely to impact workers' livelihoods.

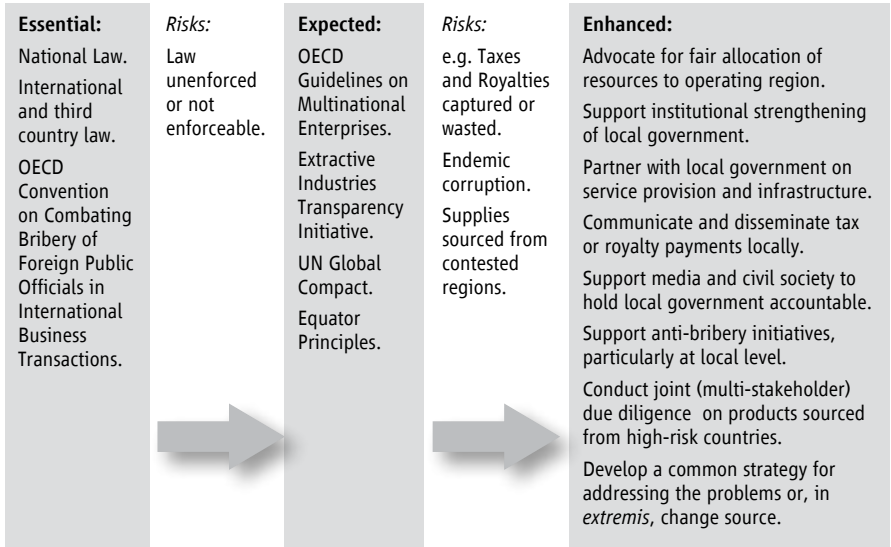
This raises difficult questions, notably regarding artisanal mining. Manufacturing sweatshops are organised exploitative businesses and sourcing companies have a responsibility to improve conditions rapidly or shun them. The same is true of other forms of enterprise that abuse employees' rights. But artisanal mining is organised differently. In most cases, miners are paid a fee (almost certainly not a fair market rate) for the minerals they extract. Those who purchase the minerals are not their employers and the subsequent supply chain can involve many official and less official businesses.

Professionalising this sector and its supply chain has become a well recognised development objective, supported by governments, inter-governmental organisations, companies and civil society.⁵⁵ Successful reform would bring social, economic and environmental benefits for the miners, their communities, and their governments. However, it depends on the surrounding political and security context, and will remain difficult to achieve in areas controlled or occupied by armed groups, or by official forces acting outside government control or with the State's tacit support.

It may be argued simply that companies should not source raw materials from regions where the rule of law is absent. On the other hand, withdrawal is unlikely to end such trade, while official sanctions are difficult to enforce and would have a severe impact on the livelihoods of miners, their families and many others who depend indirectly on the mining economy.

Companies cannot operate in isolation on this issue, nor turn a blind eye. The only way in which a company can fulfil its responsibilities in such contexts is to work closely with other businesses, with home and host governments, and with civil society organisations to develop a collective response and strategy that will address the issue holistically, including security and issues of governance.

⁵⁵ See, for example, *Communities and Small Scale Mining*. At: www.artisanalmining.org.



Labour

Companies need to employ staff. They are responsible for how they treat, recruit and remunerate them. These responsibilities are encapsulated in the Universal Declaration of Human Rights and further elaborated in the International Labour Organisation's Declaration on Fundamental Principles and Rights at Work.

Rights

- Right not to be subjected to slavery, servitude or forced labour.
- Rights of protection for the child.
- Right to work.
- Right to enjoy just and favourable conditions of work.
- Right to form trade unions and join the trade union, and the right to strike.

In principle, these responsibilities are absolute. A company sets pay scales, defines terms of employment, provides facilities, institutes health and safety policies in accordance with regulations, establishes procedures for recruitment, and facilitates employee representation bodies. It has control. If it fails to meet its responsibilities, it risks discontent amongst its workforce, national and international criticism, and legal action. In addition, it can insist that its suppliers and contractors adopt or move towards the same standards and can support them to do so and exert pressure on them to comply.

In high-risk countries, a company's ability to implement fair policies is frequently disabled by the environment. The legal framework and the wider socio-economic and political context are both responsible. As seen in the *Law* section, companies may need to complement or bypass legislation that does not guarantee or conflicts with human rights standards.

It is also difficult to operate amidst poverty, inequality, ethnic tension and corruption. The employment opportunities generated by investment are the single most significant contribution companies can make to the fulfilment of human rights and by extension the development and prosperity of society as a whole, but the power to create employment generates its own problems.

Jobs are valuable commodities. How they are provided and distributed becomes a source of tension and competition, most acutely in the extractive, agricultural and construction industries which tend to operate in rural areas. Technically, a company's principal responsibility is to avoid discrimination, which essentially requires an appointment process that is public, accessible and merit-based. In practice, even though it is in a company's interest to hire qualified people, in high risk societies other compelling pressures will be in play.

Specifically, companies may feel obliged to offer positions to individuals or groups favoured by the State. Recruiting well-connected individuals into the company has advantages: it strengthens relations with government and improves access to decision-makers. For certain functions, it may even be appropriate; connections are a form of qualification. The risks of nepotism are nevertheless evident.

In a situation of ethnic, religious, tribal or regional tension, who represents the company, and in which positions, is an issue of utmost importance. When expatriate managers fail to take this into account, their decisions can approve recruitment patterns that are deeply unrepresentative. Because élites are disproportionately represented in higher education institutions, an appointment system based only on qualifications may generate a staff roster in which politically privileged minorities occupy most of the better paid posts. Marginalised communities, and especially women from such communities, are particularly vulnerable to exclusion.

In certain circumstances, it is acceptable for companies to take 'affirmative action' – positive steps taken to help a particular group that has suffered serious long-term discrimination in order to reverse that trend. These measures may sometimes entail 'positive' or 'reverse' discrimination.⁵⁶

This can be an external as well as an internal issue. If most of the (key) staff in a company belong to an élite, it may undermine efforts to build relations with local communities.

⁵⁶ Monash University and International Business Leaders Forum, *Human Rights Translated: A Business Reference Guide*, Office of the United Nations High Commissioner for Human Rights and the United Nations Global Compact Office, 2008.

The composition of a company's external relations, contracts and security teams are especially sensitive in this regard.

It is particularly difficult for companies to staff critical departments in a manner that is balanced and impartial when individuals feel obliged to provide jobs to members of their extended family or ethnic group. Such cases require strong management and a proper understanding of local and national dynamics, conferring on the Human Resources Department a political as well as administrative function.⁵⁷

Local communities are a second source of pressure. Companies probably do not have a formal responsibility to provide jobs to local people but in practice the benefits of doing so far outweigh other considerations. Making jobs available to local people helps to address some of the risks described earlier. It does not guarantee strong local relationships, but not providing jobs will invite criticism or worse.

Successful implementation is not simple here either. The type, longevity and distribution of jobs matter. Most communities will understand that they do not have the qualifications required for certain positions⁵⁸ and on these grounds will accept recruitment from outside (internationally or nationally), if this is clearly explained. However, recruiting external labour to fill positions for which local people are well qualified may infringe their right to work or cause resentment. Where most locals are offered relatively unskilled posts, a new risk arises: the appearance of a classic management/worker divide in which the best paid jobs are occupied by a national (and international) élite. Manageable for a while, such arrangements are likely to create serious long-term problems.

Lately, they have decreased the number of men they hire as workers and watchmen. We were quite angry because we were counting on these jobs. They promised that the workers we can provide would not even be enough for their needs. But now they only hire a few.

Woman entrepreneur, Zamboanga del Norte, Mindanao

This is particularly true if the unskilled jobs are temporary. The construction phase of a large extractive project may provide employment but for a short time. When the project becomes operational, temporary jobs disappear and many local individuals are returned to their former lives having become accustomed to a higher income. This is a substantial risk if the company does not plan well in advance.

The question of *who* gets jobs can also present challenges, especially where tensions exist between communities. Since jobs can be understood as benefits, one criterion for allocation is the differential impact on different communities: those most affected are offered more jobs.

57 For a vivid illustration of the risks, see: *Nigeria: Ten years on: injustice and violence haunt the oil Delta*, Amnesty International, 2005 (Index Number: AFR 44/022/2005).

58 Luc Zandvliet and Mary. B. Anderson, *Getting it Right: Making Corporate-Community Relations Work*, CDA Collaborative Learning Projects, Greenleaf Publishing, 2009.

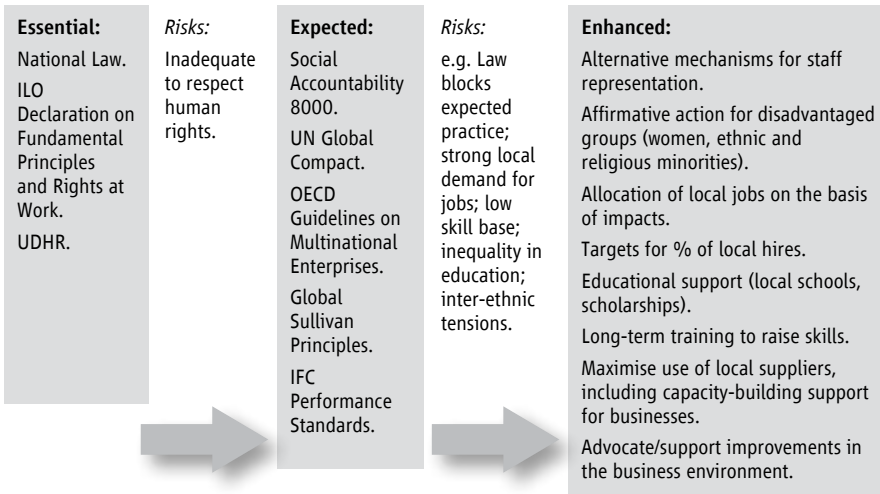
Responsibilities

In principle, even in high-risk countries, a company can exert sufficient control over employment to ensure it respects its human rights responsibilities. This is (mostly) true with regard to treatment of staff. Job distribution is a more complicated matter: because jobs are such a valuable commodity, they become a source of competition which can expose fault lines within society.

Here, a company's responsibility is not so clear-cut. Its primary responsibility is to ensure it does not discriminate but (as noted) positive discrimination may sometimes be necessary. Where historic and continuing discrimination exist within society, coupled with high levels of inequality, a company is likely to need to engage in affirmative action (within the limits of the law) if it is to ensure that its workforce is representative.

The composition of the company's workforce, and the economic benefits that flow from employment, are of such importance that it may have to explore a variety of approaches. The political dimensions of employment should be properly appreciated and employment strategies should take account of risk. Some risks may be managed by respecting national legislation; others will require the application of best practice standards. Larger projects operating in rural areas may need to do more. Three priorities may be borne in mind:

- Long-term local representation.
- Balanced representation (outward-looking functions in particular).
- A vibrant local economy (relieving the company of the sole burden of employment).



Security

Security is about protection, deterrence and avoidance. Unsurprisingly, security risks take many forms in high-risk countries. Beyond the standard threats of theft, vandalism and sabotage, companies may have to contend with armed groups, unreliable State security forces, inadequate justice systems, expectant local populations and numerous social, economic and political tensions.

Rights

- Right to life, liberty and security of the person.
- Freedom from cruel, inhuman and degrading treatment.
- The right to peaceful assembly and freedom of association.
- Right to just and favourable working conditions.
- Right to privacy.

The companies that have avoided the worst problems have been able to take account of, and address these factors (with perhaps also a dose of good fortune), whereas those that consider security as a matter of fences, gates and guards tend to be the ones accused of complicity in human rights abuse.

Underlying this difference is an issue that confronts all companies in high-risk countries: their influence over the behaviour of others. It determines their ability to manage risk and, by extension, meet their human rights responsibilities. With respect to security, companies need to influence two groups: those who provide security, and those who threaten it.

Security providers

Security staff may be private or public. Private security is mostly concerned with what happens on-site, whereas public security is responsible for what happens outside company property (and for criminal offences on company property). In practice, the distinction is not always clear-cut. Companies sometimes need private guards to provide security to staff off-site, and certain governments insist that public agencies should deal with incidents that occur on company property. Experience suggests that both forms of security present significant risks. The point is to ensure that those risks do not include the security providers themselves.

Private security

With regard to private security, the company controls who is awarded contracts and can normally therefore insist that those it employs meet its standards and that security personnel are screened for any history of abuse. It can also insist that they are signatories

to the International Code of Conduct for Private Security Service Providers.⁵⁹ Failure to respect standards, or abuse, can be made subject to investigation, disciplinary action and, if appropriate, termination of contract. This is a matter of properly designed and communicated policies, strong management oversight and effective training.

International Code of Conduct for Private Security Service Providers

Signatory companies affirm that they have a responsibility to respect the human rights of, and fulfil humanitarian responsibilities towards, all those affected by their business activities, including personnel, clients, suppliers, shareholders, and the population of the area in which services are provided. Signatory companies also recognize the importance of respecting the cultures they encounter in their work, as well as the individuals they come into contact with as a result of those activities.

Private security is about protecting, but also engaging with people. Attending to one but not the other lies behind many of the complaints directed at security guards. Intimidation or harassment of employees or local communities, and aggressive response to protests, are the most frequent allegations. These are about people and crisis-management skills more than the ability to patrol fences or monitor CCTV cameras. Yet this critical aspect of security, particularly private security, is given less attention than more traditional requirements of the job.

The two most important factors in this respect are the composition of personnel and the training they receive. It is increasingly recognised that the appointment of local people to security positions can bring benefits, not only in terms of employment, but as a means of reassuring local communities and strengthening relationships with them. It carries risks as well, of favouritism on one hand and prejudice on the other. Nevertheless, it is advisable to ensure that the guard force is representative of local populations (see *Labour* above).

It follows that women should be appointed. Security is perhaps the most important gender issue. How men and women perceive and understand security can differ enormously. Where a man presumes a guard is providing protection, a woman might see him as a potential threat. This is generally true but is particularly relevant in high-risk countries where women are more likely to have been victims of abuse. It is a company's responsibility to provide security in a manner that reassures rather than intimidates.

This objective can also be achieved through training. Human rights is increasingly a feature of training programmes for security personnel, partly under the influence of the Voluntary Principles on Security and Human Rights (VPSHR). As always, however, the practical effect of training is what matters. Human rights training can be a technocratic exercise that does not influence behaviour. There is little value in merely communicating

⁵⁹ International Code of Conduct for Private Security Service Providers. At: www.news.admin.ch/NSBSubscriber/message/attachments/21143.pdf.

the core provisions of the UDHR, for example, since the language of human rights may be unfamiliar and even alienating. Teaching security staff how to treat people with respect and react calmly under pressure, by contrast, reduces risk significantly. Companies therefore need to ensure that contractors provide training to employees before they start work and on the job, and that the training they receive actually prepares individuals to engage with people appropriately.

Public security

In an ideal world, the police or military would carry out their functions in accordance with national law, and inappropriate or abusive behaviour would be sanctioned by the force concerned or through the domestic legal system. Accountability would lie firmly with the relevant authorities.

High-risk countries are far from ideal, yet some companies continue to behave as though they were. Assuming that State forces will always respect international standards (or national law) is a mistake that has cost lives. Assuming that perpetrators will be held solely responsible for abuses has cost some companies their reputations as well as a great deal of money.

There was a time when the army headquarters was put up near our houses. I really talked to them to stay away from us. We do not want to be caught in a cross fire if ever they will have encounters with other groups. They should have asked our permission first. They cannot put up any encampment near us without our consent.

Indigenous farmer, Zamboanga del Norte, Mindanao

The very gravest abuses occur rarely, even in high-risk countries; but they are of such severity that they should be at the forefront of any company's risk analysis. Such abuses do not come from nowhere. Careful study of a country's recent human rights history will reveal the extent of risk. A company needs to prepare accordingly.

Clearly, a company is not responsible for any and all abuses committed by State forces, but it bears some responsibility for those committed by forces acting to 'protect' or 'secure' the company's people or its (existing or future) assets. This is true if a company called in the army or police, but also true if it did not; true if the company intended the abuses to happen, but true if it did not; and true if the company provided material support to the security forces, and if it did not. The degree to which it was complicit will influence the extent of a company's legal liability, but will not absolve it altogether from responsibility.

This is not an argument for a hands-off approach. State security forces vary widely in their behaviour, even within high-risk countries. Abuses are as likely to be committed in a moment of panic as they are by design. In countries facing armed insurgency, the pressure on individual commanders and soldiers is also intense. Nevertheless, companies need to try to ensure that abuses are avoided and punished when they occur. Prevention and accountability are the two key elements of company policy with regard to State security forces. Both demand a hands-on approach.

Security risks

Security is achieved most effectively when interventions are not required. In terms of preventing human rights risks, a key objective should be to avoid provoking anger or resentment in local populations.

This goal has long been recognised, at least by larger projects, but is not always achieved. The reason is partly structural. Security providers have a duty to protect company staff and assets. Their focus is therefore on physical measures underpinned by good intelligence; the priorities are deterrence, vigilance and defence. This approach is effective in places where the main security risks are theft or vandalism. In high-risk countries, however, the threats are greater and also more diverse. The arrangements become more stringent – fences, guards, restrictions on freedom of movement – but do not always translate into a more holistic view of security.

Other aspects are left to the community relations department, which is often isolated from the company's core operations. Functionally this is understandable: community relations staff do not wish usually to be associated with security; and security personnel do not think their responsibilities include community development. The separation is less understandable conceptually. Strong community relations play a fundamental role in reducing risks to the company's people and assets and, more indirectly, risks of abuse associated with complaints or protest. Moreover, softer and less visible security arrangements assist a company to create a relationship of trust with local communities, who are likely to perceive high walls and thick gates as intimidating and indicative of mistrust.

The company has so many check points. They make us pour all our produce on the road for them to meticulously check. We feel harassed. Sometimes we were forced to take another route to town in order to avoid them.

IP Tribe Secretary, Zamboanga del Norte, Mindanao

The two functions are interdependent and figure as well in a wide range of company policies, especially in relation to employment. This is not an argument for merging the two, but highlights the importance of recognising the linkages between them. These begin with sharing analysis and continue with complementary mitigation strategies. Understanding local communities as security risks may not be considered the most appropriate starting point but this is largely because security itself is so often understood in a narrow sense. Poor community engagement, and poorly executed social investment, heighten risk, which good community engagement reduces. The differences in approach between the two functions should not disguise their similarities of objective.

Responsibilities

The nature of companies' engagement with public and private security is increasingly shaped by the Voluntary Principles on Security and Human Rights (otherwise known as the VPs). The VPs focus on the extractive industry but have begun to spawn peer guidelines in non-extractive sectors.⁶⁰

Voluntary Principles on Security and Human Rights

Established in 2000, the Voluntary Principles on Security and Human Rights – an initiative by governments, NGOs, and companies – provides guidance to extractives companies on maintaining the safety and security of their operations within an operating framework that ensures respect for human rights and fundamental freedoms.

Voluntary Principles on Security and Human Rights Fact Sheet.
At: www.voluntaryprinciples.org/resources.

The VPs emphasise the importance of risk assessment to anticipate and avert security threats, and outline steps a company can take to promote appropriate behaviour, both its own and that of private and public security forces. As the name suggests, the VPs are voluntary – but perhaps are less so when considered in the context of the 'Respect' agenda. Their value should be appreciated, but also their limitations.

First of all, they provide no guarantees. This point is worth making because soft law initiatives are of value to the extent that they are effective in a given situation. Adherence to the VPs does not ensure that any rights are respected and does not provide hard evidence of a company's commitment. Its substantive responsibility is to prevent abuse by security forces, not adhere to the VPs. The latter offer useful guidance, but the 'responsibility to respect' is focused on *outcomes* (the prevention and mitigation of harm to human rights) rather than policy commitments.

In this sense, by conflating means and ends, the VPs could have a distorting effect. In addition, the Principles – which everyone can adopt and implement – are sometimes confused with the Plenary mechanism, which is a semi-exclusive club of governments (most not from high-risk countries⁶¹), extractive industry companies and NGOs. An unintentional side-effect of this arrangement is that membership of the Plenary may assume greater importance than implementation of the Principles. It is distorting in another way. By largely excluding the governments of high-risk countries, whose contribution to the prevention of abuse by security forces is fundamental, the VPs reinforce a perception that *companies* are the problem *and* the solution, while doing little to encourage governments of high-risk countries to eliminate abuse or impunity for abuse.

⁶⁰ www.reports-and-materials.org/Guias-Colombia-14-jul-2010.doc.

⁶¹ Colombia is the exception. Other member states are Canada, the United States, the United Kingdom, Norway, the Netherlands, and Switzerland.

At national level, nevertheless, encouraging governments to take action is a core feature of the VPs' in-country processes. Slow to develop, these programmes offer an important space for discussion of security arrangements. They should include the three 'pillars' – government, company and NGO – but are clearly weakened if there is not strong government leadership. This creates a somewhat awkward situation in which the government's contribution, essential nationally, is blocked internationally: it strengthens a perception that the VPs are a foreign and largely Western imposition rather than a collaborative effort to address security problems.

There are legitimate reasons for setting entry criteria for membership of any network or association, including the need to provide a baseline for all participants and set an incentive to improve standards. It is understandable that the VPs' Plenary is reluctant to 'reward' malpractice by conferring the prestige of membership on governments whose record is flawed. However, these arguments are questionable because membership of the Plenary is not the principal issue. Too much attention has been devoted to membership and too much of what happens on the ground determined through the narrow prism of 'implementing the VPs' (thereby perversely encouraging companies to do the minimum possible). The Principles provide excellent guidance but whether that guidance is needed or whether it should be exceeded is dictated by risk.

The worst abuses occur because, in some countries, governments and their security forces wilfully or unintentionally overstep the boundaries of acceptable behaviour. No company exercises sufficient influence over the State to stop this from happening in every instance. To meet its responsibilities, a company therefore needs to consider three factors:

- Opportunity
- Assistance
- Influence

Abuses by State security forces most commonly happen in the context of another event, for example an attack on, a protest against, or a refusal to vacate land appropriated by, the company.⁶² Prevent those things from happening and companies will avoid giving State security forces an opportunity to intervene. This underlines the importance of measures that companies take to ensure their actions do not provoke opposition.

When incidents do occur, the priority should again be manage them, as far as possible, without involving the State's security forces. Summoning the military or police should be the last rather than the first resort. Companies need to ensure their own private security is capable of calming rather than escalating incidents and have in place a range of options for resolving disputes peacefully. These might include a trusted intermediary or an independent organisation able to mediate. The point is that the response to a protest, even one which physically obstructs or delays company operations, may well be far more damaging to the company (and indeed the protesters) than the protest itself.

⁶² Options in relation to armed groups are discussed under *Armed Groups*.

Sometimes there may not be an option, because the protest has turned violent or public security has been ordered in regardless of the company's wishes. In such situations, the company has effectively ceded control. It still needs to ensure that its representatives are on hand to urge restraint and monitor what happens. As far as possible, the company should also try to arrange or permit independent monitoring. This may be impossible in an emergency but would be important if the issue is one of eviction from company property (see *Land* below).

How such situations play out can depend on what steps a company has taken to promote human rights standards among security forces. Companies are in a difficult position. Under intense pressure to provide financial and material assistance to support the presence of army or police units in the vicinity of their operations, companies are also aware that abuses can lead to allegations of complicity.

Clearly, companies should not provide forms of support that might be used in offensive operations: weapons, but also transportation such as helicopters and vehicles, and access to company infrastructure such as bridges or airstrips. In practice, the line is not easily drawn. Vehicles are necessary for many legitimate purposes, and bridges may be indispensable to development and security initiatives. Nevertheless, the principle remains: to the extent that it can, a company should limit its assistance to basic equipment and material. It should also record the assistance it provides and do what it can to monitor its use.

A strong argument can be made that companies should provide substantial (non-offensive) support. Companies benefit enormously from a secure environment. Making assistance conditional is an obvious means by which companies can increase their influence. Assistance and influence can be exercised in many different areas, including:

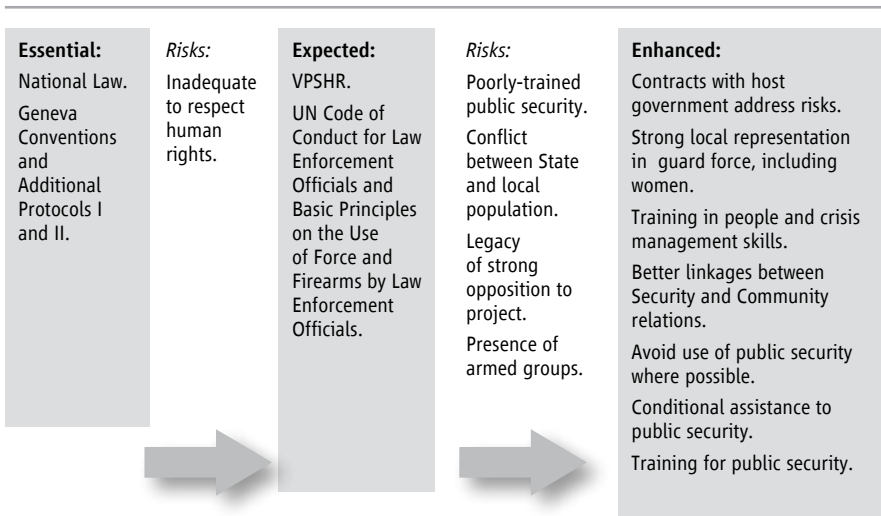
- **Contracts.** Inserting human rights clauses into contracts with host governments can be a valuable, if not watertight safeguard. Contracts might include the VPs or individual assurances, for example regarding adherence to minimum UN standards on the use of force, and the deployment of army or police units with 'clean' backgrounds.
- **Agreements** with security forces. It can be useful to agree principles that will govern public security forces that affect company operations. Such agreements should permit monitoring and prior notice of State security interventions on land evictions or other matters that relate to company operations.
- **Training.** Provide or support training for public security forces.
- **Dialogue.** Regular meetings between company executives and local commanders can be helpful, with local community representatives, if feasible.
- **Transparency.** As far as possible, publish details of any agreements.

Assistance and influence should extend to the investigation of alleged abuses. A harmful impact needs to be mitigated. Companies should press for investigation, monitor its progress, and employ their influence to ensure a fair outcome. Even if an impartial hearing is impossible (not unlikely), companies should call for accountability (where persuasive evidence of abuse exists): the demotion or transfer of guilty officers sends a signal that abuses are unacceptable.

A different approach may be appropriate to deal with crimes committed by individuals critical of the company. Reporting and prosecuting alleged offenders may lead to abusive treatment of the accused, torture or mistreatment, an unfair trial or disproportionate punishment. Generally speaking, companies are more eager to prosecute people who commit crimes against them than to press for investigation of those who commit offences 'on their behalf' (even without the company's knowledge). In high-risk countries, this logic might need to be inverted.

Criminalising protestors is obviously inappropriate when protests are peaceful and merely irritating to the company, but may also be so when they are disruptive (for example, blockading roads); and will not necessarily be justified in some circumstances even when protests turn violent. The reality is that companies may need to avoid the justice system as well as security forces. The dilemma is real: if companies do not prosecute, it may be inferred that company property can be damaged and company employees assaulted with impunity. In essence it is a judgement call, balancing the seriousness of the offence against the likelihood of mistreatment or injustice.

In conclusion, a company's responsibility to prevent security-related human rights abuses, and hold offenders accountable when they occur, requires a package of measures. A company's direct responsibility is clearer in the case of private security staff that it employs. In the case of State forces, much will depend on how grave the company believes the risks are of security-related abuse, and how determined it is to mitigate them. It is easy enough for a company to pay lip-service to many of its responsibilities but, if it does, it cannot complain if it is dragged through the courts of legal or public opinion. The onus is therefore on companies to be as transparent and as careful as they can be.



Environment

For many people, their environment is at the heart of their quality of life. This is largely why environmental impacts are a significant cause of conflict with local communities. This is certainly true of large projects, notably in the extractive industries. An oil project in a remote location will never enhance air quality; a mining company cannot claim that a hole in the ground improves what was there before. To a greater or lesser extent, this is true of most sectors.

Rights

- Right to health.
- Right to food.
- Right to an adequate standard of living.
- Right to security of the person.
- Right to life.

It is beyond the scope of this report to analyse how companies can balance the threat of environmental damage and the need for economic development. From a human rights perspective, what matters is the impact of company operations on enjoyment of rights. These impacts are a matter of fact but also perception. The effects are tangible: health risks, dust, noise pollution, water pollution. At the same time a community's understanding of their relationship with the land and the wider ecosystem is philosophical and emotional.

Companies can neither avoid nor wholly mitigate these impacts. Their responsibility is to reduce the impacts and take measures to compensate for them. The first is largely a technical matter and consequently relatively easy to define; the second is more problematic.

Environmental standards have been high on the corporate agenda for many years. Partly this is because public awareness has grown and partly because improving environmental performance saves costs.⁶³ Environmental impact provides perhaps the clearest example of business interests merging with human rights concerns. This is not to say the merger has been entirely harmonious. One problem has been a failure to distinguish between standards and impacts, or an assumption that standards address impacts. This has been most evident in high-risk countries where government regulation is weak and government engagement weaker still. As discussed earlier, international standards have gaps and national legislation does not always oblige companies to meet their environmental responsibilities.

Environmental Impact Assessments (EIAs) address these gaps to some extent. EIAs are often a legal requirement but many companies feel they are necessary even when this is not the case. This does not mean that their process is necessarily well designed, however, or that they address the range of impacts they should. EIAs should also consider human rights. This is a more profound shift than at first sight because it requires EIAs, most of which are fact-based, to incorporate experience-based analysis. A company may recognise that its emissions or the dust thrown up by its trucks will negatively affect air quality, and may take steps to reduce those impacts according to national, international or its own higher standards: however, setting and meeting targets does not necessarily mean that human rights have been respected because respect for rights cannot always be captured by a purely technical or quantifiable standard.

The dust that they emit... goes to us, we are the ones inhaling their dust.

Muslim community traditional leader, Lanao del Norte, Mindanao

This point finds practical expression in frequent disputes over data. In a typical scenario, a company will claim, supported by scientific data, that levels of pollutant in the air or in a water source fall within internationally defined limits. Local communities or environmental activists will dispute this and will often provide evidence of their own that contradicts data published by the company. The argument that results benefits no-one. Leaving aside the question of whether one side has better data, the argument is circular because company and community approach the issue from different perspectives. One assumes that responsibilities are determined by standards, the other that they are determined by impact. A ten per cent or even one per cent increase in air pollution may be acceptable under health and safety guidelines but is still negative.

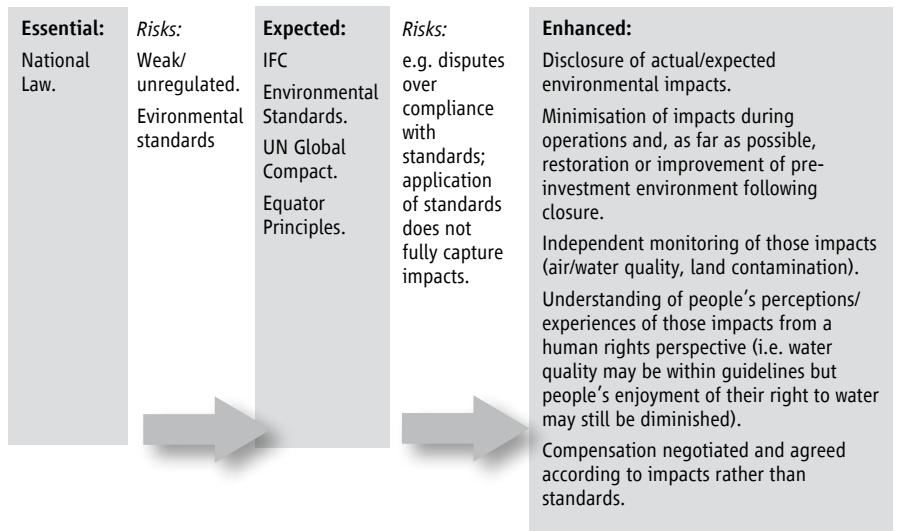
The same differences of approach may be found in environmental reporting. Companies may report on emissions levels, for example, but many do not emphasise their impact on the natural and human environment.⁶⁴ This is precisely where human rights impacts

⁶³ Frynas, 2010.

are felt. It is not that standards are irrelevant; on the contrary they are vital. But they are not sufficient from a human rights perspective.

Responsibilities

Compensation strategies need to flow from this recognition of the more subtle nature of environmental impacts on human rights. Given that a company can limit but cannot eliminate its environmental impact, it needs to agree a fair level of compensation with those who are affected. Though corporate respect for human rights is technically a baseline responsibility (that is, negative impacts cannot be offset by positive action elsewhere⁶⁵), in practice offset may be necessary. If it wishes to fulfil its responsibilities, a company's first preference will be to replace like-for-like (replace a contaminated water source by one that is clean and equally accessible). Where this is not possible (or not the claimants' preferred option), the company might, as an alternative, improve health services or offer employment by the project. This is not about 'bribing' local communities to accept harmful impacts but a method of addressing the gap between international environmental standards and human rights impacts. The point is that positive action is undertaken after fair negotiation, and with the agreement of those affected, who should fully understand the impacts in question.



64 Frynas, 2010.

65 Ruggie, 2010.

Land and water

Land and water are both environmental issues but also carry wider human rights implications. Their importance, particularly in high-risk countries, is illustrated by the number of disputes and conflicts which they generate, around:

- *Survival*. They are essential to most people's existence; degrade or expropriate either and their existence is threatened.
- *Scarcity*. When land or water are scarce, it increases their value and also competition for access to them.
- *Sanctity*. Land in particular is often much more than an economic asset: it represents history, place, culture, religion and identity.

These factors should shape how companies approach land and water issues because they provide a framework for understanding and therefore mitigating impacts.

Rights

- Right to safe and clean drinking water and sanitation.
- Right to life.
- Right to health.
- Right to own property.
- Right of self-determination.
- Right to work.
- Right to an adequate standard of living.

Companies need land and water for their operations. People need land and water to live and make a living. Unless either or both resources are unused by anyone, the company's activities are likely to have a negative impact on the lives and livelihoods of the original users, at least initially. Technically, a company's responsibilities are relatively straightforward: determine what those impacts are (i.e. how its requirements will affect existing land and water usage), minimise the disruption, and compensate for it.

Both land and water have many uses and support many functions. They are also used differently (for example, by men and women). These variations need to be incorporated into any baseline. Water is needed for drinking, cooking, sanitation, washing, fishing and irrigation. Like land, which is needed for housing, agriculture and hunting, it supports individuals but also services, such as schools or clinics.

These functions, essential for survival, need to be available, of good quality, and accessible. This may be hard, even impossible, to achieve in an environment in which resources are scarce. A company's water consumption, or pollution of water, may require local communities to draw water from a source that others use, potentially creating competition and conflict. Its impact may not be immediate or local but may result in

depletion or contamination many miles away. Land acquired by a company may impede access to, or absorb, a community's fields or hunting grounds, obliging it to look elsewhere, again creating the potential for conflict. All such impacts also need to be considered and addressed.

Finally, the emotional impact is significant. The tangible value of land, and indeed water, may be far less than its intangible value. The social function of both can matter enormously. Installing piped water may seem an improvement but may not be perceived as such if it prevents the community from gathering socially at the river's edge. The religious or historical significance of land cannot be monetised or replaced. In addition to severely complicating a company's technical human rights responsibilities, the social, cultural, religious and historical importance of land and water emphasises an additional dimension related to the point made earlier about environmental impacts. It may be possible in theory to respect rights without respecting people, but in practice it is not. The fact that a company may offer substantial benefits in exchange for a community's land or water does not mean that individuals will *feel* their rights have been respected. Rights are thus not only a technical matter but depend on the sum of an individual's personal experience.

"Can you accept to live here? Do you think we like this life? No, but we cannot give up the land. These marks on my head tell you I am the guardian; I am ready to die for this land." **SPLA soldier, South Sudan**

The only certain way to fulfil both elements is by agreement, which implies consent, formally articulated in the principle of Free Prior Informed Consent (FPIC). FPIC has legal status in international law in relation to Indigenous Peoples but is inconsistently incorporated into national legislation, particularly in high-risk countries.⁶⁶

Few companies argue with the *principle* of "free, prior and informed" (although many struggle with the practice), but most fall short of endorsing "consent" unless they are legally obliged to do so under national law.⁶⁷ The question now is whether FPIC acquires additional weight under the 'Responsibility to Respect' framework. Where FPIC is incorporated in domestic legislation, it is clearly an obligation, but where it is not, a company is bound to look to international human rights instruments for guidance. In that respect FPIC does imply responsibility, at least in respect to Indigenous Peoples.

⁶⁶ United Nations Declaration on the Rights of Indigenous Peoples (2007); International Labour Organisation, Convention No. 169 on Indigenous and Tribal Peoples. It should be noted, however, that the Declaration is not binding on States and that the ILO convention has been ratified by only 22 countries and does not grant veto power to indigenous communities.

⁶⁷ See International Council on Mining and Metals, *Indigenous Peoples and Mining: Good Practice Guide*, ICMM, 2010.

FPIC

Free. People are able to freely make decisions without coercion, intimidation or manipulation.

Prior. The time allocated to the decision-making process is sufficient to allow people to become involved and participate.

Informed. People are fully informed about the project, its potential impacts and benefits, and about positive and negative attitudes to it.

Consent. Effective processes permit affected Indigenous Peoples to approve or withhold their consent, consistent with their decision-making processes, and that their decisions are respected and upheld.

Adapted from International Council on Mining and Metals: Good Practice Guide; Indigenous Peoples and Mining, ICMM, 2010.

A company's responsibility is less clear-cut in relation to non-indigenous communities. A company cannot respect people's rights if coercive or manipulative tactics are employed to force decisions on them. This is true of major issues such as resettlement and impact mitigation measures. Likewise, if a company does not provide relevant information in a timely and accessible manner, then it will not understand the scope of its human rights impacts and will be unable to prevent or mitigate them. It will also deny affected people the opportunity to make informed decisions about their future.

This leaves consent. A company rarely has the right to force people off their land and property. A company needs consent (and consent obtained through the application of the three preceding principles), or it needs the government to invoke compulsory purchase legislation to secure land on its behalf. The latter procedure may be legal but creates many difficulties. The State's right of Eminent Domain would need to be communicated early to affected populations. This might undermine the engagement process. People need to know that they are free to make a decision but also that their decision can be freely ignored. In this situation, the decision does not look quite so free.

In developed countries, compulsory purchase is time-consuming and expensive for State and company and distressing for the individuals affected. In high-risk countries, the procedures may be faster and cheaper but the consequences are potentially more damaging. Apart from a long-term legacy of bitterness and mistrust which will render any of a company's previous consultation efforts largely meaningless, the risk is high that abuses may occur during the process.

At the same time, the notion of consent is problematic. It can be difficult to establish who has the standing to speak for the community, and the extent to which individuals who claim authority genuinely represent the views of those they claim to represent. This

is even more the case where the 'community' lacks clear decision-making structures or those structures are themselves exclusionary or autocratic. This is true whether 'consent' is granted or withheld.

Ultimately, in relation to non-indigenous peoples, consent cannot be considered a requirement under the responsibility to respect human rights for the simple reason that there is no provision for it within international human rights frameworks. It may even become an unhelpful distraction. A company is more likely to succeed in winning individual and community support if it meets responsibilities that have been clearly identified, rather than focusing on obtaining and proving consent.

Responsibilities

For most people, the natural environment is closely associated with their quality of life and identity. The more isolated and traditional a community is, and the more restricted it is in its geographical and social mobility, the more this is true. In these circumstances, a company's arrival is inevitably hugely disruptive, whether or not its activities are ultimately positive.

Land and water: three priorities

1. Minimise disruption.
2. Maximise benefits.
3. Manage government.

Minimising change is a first priority. A company should work around existing communities whenever it can, even if this entails extra costs. The operational complications may prove more manageable than social ones. This means avoiding resettlement where possible, with one caveat. The need for resettlement depends not only on what resources the company requires but on the impacts of its operations. If a project makes a nearby community economically or socially unviable, resettlement would be necessary even if the company did not acquire the community's land. This might be the case, for example, if a community's access to markets were blocked or if resettlement of other villages isolated the community physically.

Limiting emotional trauma is an important consideration. Maintaining access to familiar sites (when it is safe to do so) can help soften the impact of a project, as can allowing people time to adjust to the idea of change. Companies can organise visits to other projects where resettlement has taken place. It is certainly good practice to allow communities to participate in planning mitigation and compensation measures.

Maximising benefits is a second priority. If compensation is understood as a purely economic transaction, it will almost certainly not be sustainable. People must be paid for land and property that they own, but cash alone is a short-sighted solution to a long-term

process. Resettlement involves uprooting people, a drastic impact entailing substantial changes to people's lives. Money is rootless and companies should be looking to support people in putting down new roots. This means considering the whole spectrum of issues which shape an individual's quality of life: housing, services, livelihoods, environment and community.

Land and property ownership can be a difficult issue, particularly in high-risk countries. Establishing ownership is essential but should not be the only criterion for framing compensation packages. This is a significant implication of pursuing a rights-based approach. People need to be compensated for impacts on their rights, not only impacts on their possessions. In certain cases, this presents an opportunity for genuinely improving people's quality of life. Those holding no land or property title can be officially registered as owners on new land. This can be particularly important for people who have a customary but not legal entitlement to land or who may be barred from owning property (for example, women under discriminatory inheritance laws).

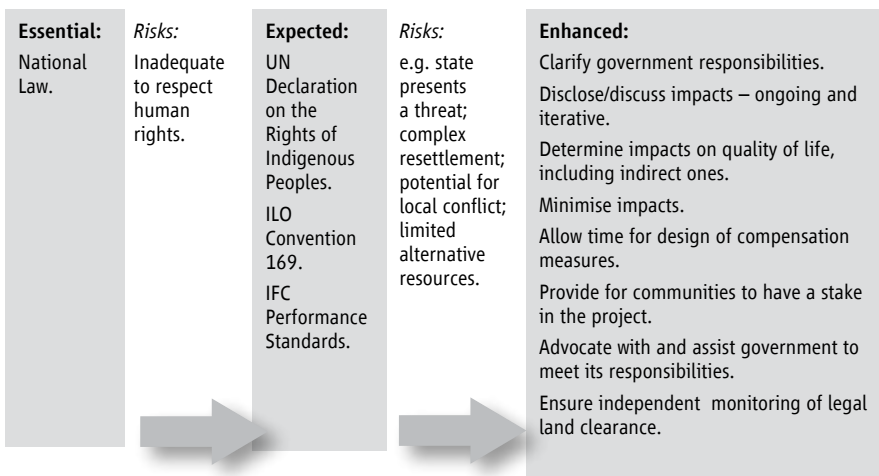
The most extensive arrangements cannot entirely compensate communities for loss of cultural, social or religious ties. However, one kind of bond can be at least partially replaced by another, even if it is not of the same nature. Maintaining people's links to the land by offering them a stake in the project, and pledging to return the land following closure, might be the clearest way to show respect and fulfil responsibilities. Jobs are an aspect of this but granting communities a share in the profits, perhaps through a Trust Fund, can provide a tangible attachment to mitigate the loss of an intangible one.

Managing government involvement is the third priority: avoiding government intervention in some areas and promoting it in others. This is perhaps the most obvious distinction between high-risk countries and other contexts. Relying on the government to secure consent or purchase land can be risky, because the procedure may be done badly and may prevent the company from establishing its own relationships with affected people. In the worst instances, a company may be accused of benefiting from abuses by the State and, even in less extreme circumstances, inadequate or forced consultation may cause community hostility and resentment. This risk is clearly present too when land has been secured and perhaps cleared before contracts are signed.

A company needs to exercise as much control as it possibly can over acquisition of resources. At least then the question of how it prevents human rights impacts is a matter of its own actions and not vulnerable to the choices of others. The threat of aggressive government intervention, or its legacy, ought to call the project into doubt. On its own, strong and broad local opposition should be sufficient grounds for a company to think very hard before proceeding; combined with a real risk of abuse by government forces, withdrawal may prove the only appropriate decision.

On the other hand, companies need to promote the role of government in mitigating impacts. A State's inability or unwillingness to provide support (in terms of basic services

or alternative land) puts the entire burden on the company. As previously discussed (see *Government*), it is in everyone's interest that the State plays its proper role. Where it cannot or will not a company has a responsibility to help government to do so. Either that or it will increasingly be expected to take on the role itself.



In our opposition for the destruction of our ancestral land, we used our bodies to barricade the big equipments of the company like their drilling machine. Their bulldozers attempted to overrun us.

IP Official, Zamboanga del Norte, Mindanao

Dealing with the past

All countries are influenced by their histories. While most have succeeded in managing tensions in their societies and with neighbours, some continue to struggle with the demands of building a viable nation State. For these countries, conflict, neglect, inequality and poverty are features of both the past and the present.

Tangible consequences live on in inequality, ethnic division, gender imbalance, uneven education, discrimination in the job market, and inequitable access to basic services. Foreign involvement (by NGOs, or bilateral or corporate donors) offers fresh opportunities but at the same time recalls past failures or memories of exploitation that may date back centuries. Inflated expectations mingle with mistrust.

Challenges

- History of state abuse and neglect.
- Entrenched inequality and discrimination.
- Mistrust and suspicion.
- Legacy of past abuses, either by the same company or a different one.
- Corrupt or dysfunctional legal system.

A country's past

Companies operating in high-risk countries are confronted by this mix of expectations. Past experience shapes current attitudes, particularly in rural areas; a company may be new but the location in which it invests may have a bitter-sweet experience of past investment. Companies cannot assume that, because they have yet to begin operating, they write on a clean slate.

In the case of extractive or agricultural projects, where disruption will be greatest and where resettlement might be required, this is particularly important. If distrust is the starting point, it will evidently be difficult to establish good relationships. This is not simply a matter of a company's own behaviour. A history of government neglect or abuse will certainly colour attitudes. (The opposite may be true too, of course: local communities may be enthusiastic about the arrival of a company, and this too is a matter of managing expectations.)

If attitudes are shaped by the past, they are shaped even more by the present. The situation of people prior to a company's arrival should guide how companies approach their responsibility to respect human rights. In particular, how does a company respect rights that were not respected before its arrival? In areas under a company's direct control (for example employee rights), companies should be able to affirm core standards. Outside, however, this is not straightforward. The 'Respect' framework focuses on avoiding adverse impacts but it assumes implicitly that, by and large, the State fulfils its human rights duties and obligations. In many instances, this will not be the case, and companies face the problem that 'doing no harm' simply maintains an unjust status quo.

Communities that historically have been harassed by State security forces (or non-State armed groups) expect a company to provide *some* protection, particularly as its arrival may encourage the State to be even more attentive to signs of protest or opposition. People who have little or no access to basic services expect a company to make *some* improvement in their situation. Individuals with limited opportunities for employment expect *some* jobs to materialise.

Although there are many perspectives on this question, one conclusion is uncontroversial: companies must understand the human rights context in which they are operating. Standard due diligence processes do not adequately address the political, social and economic situation of high-risk societies, or the risks faced by those whose lives are affected by an investment. Political risk assessments may analyse risks to the company, but they rarely consider risks associated with efforts to respect rights, or the risks that investment poses to others. Environmental and Social Impact Assessments (ESIAs) are more comprehensive but still flawed. Companies need to prepare themselves for the challenges they will face, not merely react to them as they arise. This underlines the need for baseline assessments conducted as early as possible in the investment cycle.

A company's past

Many companies carry with them a reputation, because of past controversies. How does a company demonstrate respect for human rights when many allege that it has not done so in the past? To start with, a company can change its policies and practices, but this does not address the question of remedy, the third pillar of the 'Protect, Respect, Remedy' framework.

Victims of perceived injustice have a right to seek redress for the alleged abuses committed against them. When responding to such allegations, companies have traditionally favoured a legal approach, at least in serious cases. So long as companies do not obstruct or undermine judicial (or non-judicial) processes, they are behaving in accordance with their responsibilities. At one level, this approach has been quite successful: few companies (relative to the number of allegations) have been found guilty of rights abuses in courts of law,⁶⁸ or been held accountable when complaints have been made through non-judicial mechanisms.⁶⁹

It could be argued that this success rate reflects the weaknesses of the cases themselves. More likely, however, it reflects the weaknesses of the system. In any context, the odds are stacked against complainants. Companies have access to resources and the best legal advice and are in a position to pursue cases through appeal, whereas litigants are often relatively poor and do not have access to the same quality of advice. This asymmetry is compounded by any weaknesses that exist in the legal system. In many high-risk countries, initiating legal action against companies is not only unlikely to succeed but dangerous.

Many of the most serious human rights complaints against companies allege complicity rather than direct and sole responsibility. The State itself is often the main perpetrator and itself has no interest in a successful prosecution. It is not surprising that cases

⁶⁸ Dumont, 2011.

⁶⁹ 40 per cent of cases reviewed by National Contact Points under the OECD Guidelines on Multinational Enterprises are judged to be without merit or to fall outside the Guidelines' purview: OECD, *Review of NCP Performance: Key Findings*, document DAF/INV/WP(2008)1/REV1. In Ruggie, 2010.

pursued through the domestic courts are frequently blocked by a legal system that is effectively subordinate to government or undermined by intimidation of complainants and witnesses.

In theory, the international system can provide an alternative avenue for litigation, but the obstacles remain daunting. Even for those with substantial international support, the problem of jurisdiction and the difficulty of proving complicity mean that companies are seldom required to defend themselves in court.

For the companies, nevertheless, victories tend to be pyrrhic. The reputational stain can be significant and long-lasting; the financial cost of fighting cases or preventing them from being heard can be exorbitant; and local communities can be embittered by unresolved grievances, unfairly suppressed. Companies do not benefit from a situation in which complaints cannot be pursued fairly in domestic courts and stand to be dismissed on technical grounds internationally. Even though liability is not established, nor is innocence.

The complainant's rights are also left hanging. If an impartial hearing cannot be held domestically and is judged beyond the purview of home country courts or international judicial and non-judicial mechanisms, the complainant's right to a fair trial is not respected. Where the original allegation stemmed from a company's actions (or inaction), it is implicated in this failure by virtue of the fact that it has a responsibility to respect all rights that its operations may have impacted negatively. Actual liability on the company's part is not the issue, because the right in question relates to process, not outcome. In principle, this means the company as defendant is obliged to take whatever steps it can to ensure a fair trial (of itself).

Responsibilities

The conclusion companies should draw from this is that a legalistic approach to resolving disputes in high-risk countries should be a last resort, reserved for the most egregious cases. Often, litigation will serve neither the interests of justice nor the interests of the company. In the absence of an effective judicial system, companies which are serious about respecting human rights and addressing the grievances of local communities need to promote more informal non-judicial mechanisms of dispute resolution. Effective grievance mechanisms are important in this respect but relate to the present and future, not the past.

When confronting allegations about their past, companies need to focus less on legal guilt and innocence. This point emerges strongly from the Special Representative's interpretation of the corporate responsibility to respect human rights. The salient issue is whether a company has impacted negatively on the rights of others, not merely whether it has acted illegally. In countries with strong and properly enforced justice systems, these two objectives are less distinct. In high-risk countries, where the gap may be wider, respecting domestic law may not guarantee that a company respects human rights.

This is of particular importance when dealing with the past because cases may have preceded the development of international best practice guidelines or may have been launched when the political environment was more conflictual or repressive. Is the responsibility to respect retrospective? Is a company expected to address negative impacts that occurred five or even twenty years earlier?

The answer is probably that it is not. If companies had a responsibility to evaluate the effects of their past activity on every individual right, it would potentially open the way to a flood of complaints that would prove impossible to substantiate or address. At the same time, a company probably does have a responsibility to address outstanding grievances that may still be poisoning community relations and tarnishing its reputation. The reality is that companies that fail to tackle grievances rooted in the past will find themselves caught in a cycle of allegation and rebuttal that makes it impossible for them to repair relations with communities or present themselves as responsible investors.

Various approaches can enable companies to work through grievances in ways that do not establish or apportion culpability but identify constructive and consensual solutions. They can range from formal bodies (such as the World Bank/IFC Compliance Advisor Ombudsman) and professional mediation organisations, to more informal alternatives such as establishing independent panels or appointing a facilitator to manage negotiations between company and complainants. A simple dialogue between company and complainants can be valuable. Which approach is appropriate will depend on context and on the parties.

One difficulty is that grievances may be framed in rather broad terms. For example, communities may claim that environmental damage has accumulated over many years or that the workforce is unrepresentative because of past discrimination. These are impacts from the past which are still felt in the present. In such cases, companies need to do more than simply improve their standards and change their policies. They need to identify measures together with the community to mitigate or compensate for the past harm that was done. This can be done in a way that is designed to lay the past to rest rather than establish liability.

A similar principle can usefully be applied to situations where a new company is investing in an existing project, for example as the result of an acquisition or a take-over. A company may not consider itself responsible for the behaviour of its predecessor but it should be aware of the legacy it is inheriting, including outstanding grievances or liabilities. This is a matter of due diligence; but in addition it is in the incoming company's interest to forge good relations with local communities and therefore to address and resolve continuing grievances. A company that does not consider such risks may well find that its operations are compromised by neglected problems for which it was not originally responsible.

Enhanced due diligence

- Prior to operations, conduct a baseline assessment to determine existing condition of impacted communities.
- Negotiate a division of responsibilities with local and national government.
- Consider historical inequality and discrimination in employment and social investment strategies.
- Focus on impacts not only on law when dealing with past grievances.
- Identify non-judicial forms of remedy and resolution.
- Recognise and as necessary address the legacy of other companies.

Part two: The response

Faced by the challenges explored in Part one, companies have sometimes chosen to stay away or disinvest.⁷⁰ When they do invest, they have three options. They can adapt downwards, by exploiting the advantages that weak regulation and poor governance can offer; they can adapt upwards (and thereby potentially differentiate themselves from their peers) by introducing policies and approaches that deal with the challenges; or they can try a bit of both. The first is risky, the second difficult, the third both risky and difficult.

Lowering or abandoning standards may have short-term attractions but courts long-term harm and is not sustainable. Raising standards and the quality of systems and processes of internal management and external engagement are often time-consuming, expensive and resource intensive, and do not come with any guarantees of success. A more common response therefore has been to try a combination and muddle through. This is essentially a reactive approach, which responds to problems and criticisms as they emerge. It aims to offer the minimum required rather than the maximum possible. It does not work.

3 steps to 'Respect'

1. Identify internal company systems.
2. Establish external processes.
3. Address human rights impacts.

From a company perspective, reacting to events has proved to be just as time-consuming and resource intensive over the long-term, and has compartmentalised standards and policies, which are added on rather than properly integrated and consolidated. From the perspective of communities and the wider society, a reactive approach conveys the impression that companies are dragging their feet, are not genuinely concerned by their impacts on people, and can only be influenced by protest and criticism. For governments, it sends mixed signals about a company's intent and the seriousness of its commitment to respecting human rights throughout its operations.

The challenges may be complex but, in broad terms, they are predictable; companies do not need to act blindly and hope for the best. They can put in place the fundamental elements of good practice that will enable them to anticipate and address problems before they become critical. Over time, doing so will save money, strengthen reputation, and support a more stable business environment. Policies should include three main pillars:

- Configure internal **company** systems, structures and attitudes.
- Design effective **processes** for understanding risk, building relationships and providing remedy.
- Provide mechanisms and resources for preventing and mitigating negative **impacts**.

The following sections address each of these in more detail.

⁷⁰ For example, some oil companies chose not to invest in Sudan, while others have divested in view of the ongoing conflict.

Chapter four: Company⁷¹

A cross-section of businesses and business associations has broadly accepted the 'Protect, Respect, Remedy' framework, making it possible to integrate human rights considerations into company operations in the years ahead. The question as to *whether* companies have a responsibility to respect human rights has been answered. The challenge now is how to implement the framework, especially in high-risk countries where human rights risks are more acute, more complex, and less familiar. The task can seem overwhelming when set alongside the many difficulties companies have with the concept of human rights:

- Companies run their affairs on the basis of priorities. Most of the measures they use are quantitative and the availability of resources determines expenditure. They are not used to applying principles that take priority almost irrespective of cost or the availability of resources.
- The language of human rights, and the way they are discussed, can seem alienating and distanced from the realities of business.
- Competing 'social responsibility' frameworks vie for attention.
- Human rights cut across function; it can be difficult to implement policies or standards which impact on a variety of activities.
- Companies often lobby in support of their interests but many are not willing to engage with wider political issues.

A company cannot respect human rights, least of all in high-risk countries, if it does not address its own systems and structures. Five aspects need to be considered: policies, structures, staff, integration, and reporting.

Policies

Human rights should not be seen as a threatening framework. Stripped back to fundamentals, the corporate commitment to respect human rights is about ensuring that company activities and relationships do not undermine the enjoyment of rights by individuals and communities.

In developed countries, the law, supported by regulatory agencies, largely ensures this is the case, although abuses still occur. Most companies operating or headquartered in developed countries will have established and integrated policies that ensure they comply with human rights, though these will not necessarily be framed explicitly in human rights language. Such policies may require better verification, benchmarking, or may need to be refined, but the foundation is usually in place. Companies that operate in more than one country will also know that they need to adapt their policies to the specific legal frameworks that prevail in the different countries in which they trade.

⁷¹ This section draws extensively on a background paper by Edward Bickham, commissioned for this report: *Human Rights; the internal management challenges*, IHRB, 2011.

No company needs to develop a stand-alone human rights policy; human rights can be integrated into policies that already exist. That said, the heightened risks which exist in high-risk countries and the additional complexities involved in preventing and mitigating those risks, make it advisable to outline a company's human rights commitments in explicit terms. A statement of this sort will have limited value, however, unless the company then integrates and internalises the standards in all its operations.

This last point is critical. Comprehensive corporate-wide standards are invaluable for company managers working in high-risk countries, because they must solve extremely challenging problems that national law is unlikely to provide answers to. A company cannot assume, as it might in developed countries, that it will comply with human rights if it respects national laws. Company-wide standards (for example around resettlement) will help to compensate for deficiencies in national legislation.

The more that corporate headquarters fail to provide guidance, or instead grant autonomy on human rights matters to their country operations, the more likely it is that local abuses will take place and patterns of inconsistency will occur across a company's global portfolio. Given that difficulties at one site can tarnish the reputation of a company as a whole, companies have a strong incentive to ensure that individual managers implement a set of shared standards, regardless of whether these are relevant in all operations.

Generic standards are necessary but not necessarily sufficient. In high-risk countries, they will need to be assessed against risk, via consultation, and probably adapted. Mapping a company's human rights risks and establishing policies tailored to address them is the first step.

Human rights policies and standards: seven steps

Headquarters

1. Map existing company-wide policies against international human rights standards.
2. Benchmark policies against other companies in the sector or against companies which are perceived to be leaders.
3. Determine whether to produce a single framework for managing human rights or integrate human rights into existing management policies and systems.

Project

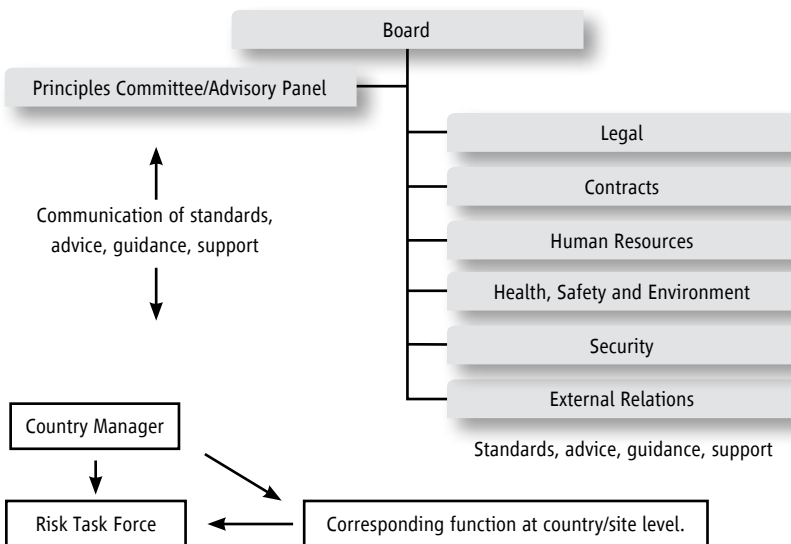
4. Define potential human rights risks for each business stream and country operation. Include risks posed by company relationships.
5. Assess identified risks against company policies and national legislation.
6. Consult with employees, investors, governments, communities and relevant NGOs to ensure full coverage.
7. Refine policies and standards accordingly.

Structures

Like law, policies only work if the structures exist to enshrine and enforce them. If they are to be more than declaratory they need to be supported by management systems to ensure integration with how the company is run and with its decision-making processes.

The policy, supported by standards and tools, indicate what a company's objectives and positions are. A Board member, given responsibility for the human rights agenda, would then work with a group of professional staff to define who will be responsible for its implementation. Staff should be allocated responsibility in a similar way within each business unit of the company at country or site level.

Given the cross-cutting nature of human rights and their potential influence on company decisions and strategies, a company is likely to benefit from establishing a space where representatives of the company's different operations can discuss human rights-related issues. This might be a full Committee (for example, a Principles Committee⁷²) or an advisory or stakeholder panel.⁷³ Whatever its form, such a body needs to have a direct line to the Board and preferably should be chaired by a Board member. Equally important, the structure should be mirrored at site level where it would harmonise risk assessments and mitigation strategies.



72 See for example, De Beers, *The Principles Committee, established in 2007, addresses all sustainable development issues contained in the Report to Society*. At: www.debeersgroup.com/en/Inside-De-Beers/Governance.

73 See, for example, Newmont Mining, *Building Effective Community Relations: Final Report of the Advisory Panel to Newmont's Community Relations Review*, 2009.

Staffing

Both policies and structures require the right individuals to implement and people them. An obvious implication of taking human rights seriously, especially in high-risk countries, is ensuring that a company has appropriately qualified or experienced professionals. This does not necessarily mean that companies should recruit human rights 'experts'; they should ensure that staff understand the human rights dimensions of their work and can deploy their knowledge effectively. The shift in emphasis from risks in the workplace to risks outside it, which is explicit in the 'responsibility to respect' framework, underlines that staff need to have the right skills to consult, engage and negotiate with, as well as understand, local communities and others with whom the company has external relationships. If it is doing business in a high-risk country, a company will need to manage social governance and related challenges with the same rigour and professionalism that it would its 'core' functions. This implies training.

It may prove difficult to attract managers of the required seniority or experience to work in high-risk environments. This raises important questions about incentives (see below). It also means that companies need to balance expatriate and local managers. Managers from the host country may understand the political and social context well, and are likely to have good local contacts. On the other hand, they may be less inclined to question the social order, or, depending on their political alignment, see the need to distance the company appropriately from government. It may be sensible to appoint some expatriates who have worked elsewhere to ensure that the company's culture and values are reflected in the way the company conducts itself in a new country. A similar calculation may also be made further down the management chain, most obviously in the External Relations and Security functions. The objective should be 'nationalisation' over time, while ensuring there is a sound mix of skills and experience.

Integration

Companies do not march in lock-step directed by the Board's 'controlling mind'. Embedding human rights in country operations is therefore a more complex process than simply legislating from the centre.

Though promulgation of standards is essential, they may appear abstract to staff on the ground, perhaps struggling to keep an operation from foundering in a deteriorating operating environment. Staff may also be cynical about new policies communicated from 'on high', especially if they do not match their experience of company culture or the tone of other management communications. Such a reaction is more likely if human rights commitments are presented as additional to, and separate from, other core responsibilities; or the message is seen to come from staff who are comfortably distant from work on site. For this reason peer-to-peer communication is usually more effective than instruction by a specially-appointed human rights expert.

Managers should be equipped to ask the right questions; understand the principles that should guide them; and have mechanisms to support them. They also need to understand

the implications for other parts of a global organisation of making insensitive or bad decisions.

The policies and standards themselves need to be clearly expressed and to be supported by accessible briefing and supporting materials that are properly communicated. This will provide important reinforcement; but the most obviously effective way of integrating any issue is through remuneration and recognition. Since much management focuses on financial indicators, many employees may feel that a company is not serious about an issue until it is part of their incentives and performance contract. The greatest obstacle to this in respect of human rights is the problem of qualitative as opposed to quantitative indicators.

In some areas quantitative indicators are relatively easy to identify and use; human resources performance, for instance. More often, however, it will be necessary to define Key Performance Indicators (KPIs) which reflect the qualitative nature of human rights work. This is more easily done if assessment is linked to regular risk analysis and to a baseline.

Linking employee objectives and performance to risk analysis, and to impact prevention and mitigation, provides a means to encourage and measure progress. It promotes responsibility and ownership and rewards success and, over time, will help the company to embed a culture of human rights. Indicators can be developed on the basis of best practice standards; for example, meetings with local communities, the type and frequency of issues discussed, participation rates and diversity of group meetings, concerns raised and resolved. These provide a mix of quantitative and qualitative indicators. Developing social performance indicators may be more difficult than in other areas but is far from being the obstacle that is sometimes presumed.

Incorporating human rights considerations into job descriptions and promotion criteria is another important avenue. If a company advertises the fact that candidates for a post will need to show awareness of and commitment to human rights in their sphere of competence, it will spread the message far more rapidly than any number of information bulletins. Insisting that applicants for senior management positions, such as Site Director, also need to have demonstrated a commitment to human rights in their current or previous positions will promote the emergence within the company of leaders who consider human rights to be a core element of their jobs. Incentives are key to successful integration.

Sanctions are the corollary of incentives. If managers consistently fail to uphold a company's human rights policy, it should be grounds for disciplinary action. Employees as well as contractors and suppliers should be encouraged to report infringements through their line managers or a whistle-blowing process. Good practice suggests that a company should make available to staff (and to contractors, where appropriate) a distance facility, via telephone, post or computer, which enables them to report suspected lapses in their own language or the working language used by the company.

Such mechanisms are elements of a company's Grievance Mechanism (see *Process* below) and must be supported by assurances that individuals who raise issues or make complaints will not be sanctioned for doing so. Confidentiality is particularly important in high-risk countries, because complainants are likely to be at much greater risk. Analysis of complaints and responses to them provide very useful data for tracking the progress of human rights policies, and employee perceptions of them.

Reporting

The 'Respect' framework provides companies with an opportunity to re-orient reporting in two important ways. First, most or all of a company's social or sustainability reporting can be combined. In theory, this should resolve problems of multiple reporting to different constituencies. Respect for human rights offers a company a way to measure its non-business performance, and this may become the primary function of a company's social reporting. (Companies are not of course prevented from advertising their activities more widely.)

Second, it focuses attention on a critical audience: those on whom the company's activities have an impact. Aside from the legal requirements of reporting to shareholders and investors, companies have tended to design their communications strategies with an international audience in mind. This has the unfortunate effect that organisations and individuals with little or no connection to the company are better informed about its activities than those who live on the company's doorstep. Companies go to great lengths to fight international fires, sometimes forgetting that their source is local.

Reporting is a bottom-up process. While policies flow down a system, reporting flows back up. A company needs to examine the degree to which its reporting systems comply with policies and standards, but also capture the attitudes and treatment of external parties who relate to the institution. Measures for this can be developed via an external audit or self-assessment. From a human rights perspective, they are invaluable because they permit a company to track its impacts and distinguish them from the impacts of others.

If the company is arriving, and the project is a green field project, setting a baseline at the start will increase the transparency of reporting. A company will benefit greatly from initiating a well-structured reporting process before its activities have made significant impacts – and therefore before it can be held to be responsible for problems. Well founded reporting can also show progress more easily. Respecting rights is an iterative and incremental process, especially in high-risk countries. It is better to be honest about this and to describe the actions that have been taken to address gaps, rather than treat reporting as a public relations exercise, because a simplified positive story can rarely be sustained.

Key considerations

Ensure policies are aligned with international human rights standards.

Consolidate individual policies into an overarching human rights statement.

Refine corporate-wide policies for specific country operations.

Create structures at headquarter and site levels which promote a 'whole of company' approach to anticipating and addressing human rights issues.

Recruit and train properly qualified staff.

Incentivise through bonus and promotion schemes which reward success in social and human rights performance.

Combine social reporting under a human rights umbrella framework.

Focus external reporting and accountability on those impacted by the project.

Chapter five: Process

Business is about cooperation: with staff, customers, partners, suppliers, and with governments and communities. Cooperation makes business possible but – like any variable that cannot be controlled – it creates an element of risk. Cooperation is therefore about risk management.

The nature of a cooperative relationship will depend on what each party wants from the other. Like managing risk, building relationships is a process.

Finally, cooperation presumes satisfaction, that each party provides what the other wants. When that is not the case, mechanisms are required to address the disagreement. Resolving disputes and providing remedy is a process too.

The Three 'Rs'

1. Understand **Risk**.
2. Build **Relationships**.
3. Provide **Remedy**.

Companies take for granted that risk management is about managing legal, financial and reputational risk to the company; that relationships are based on mutual economic value; and that the law is the final arbiter in disputes. In high-risk countries, however, these assumptions do not always hold and can become barriers to, rather than parameters of good practice. Risks are more acute and more diverse. Business relationships may be conditioned by compelling personal and political interests. And law is subject to manipulation.

Companies need a more sophisticated approach, especially under the 'Respect' framework. Risk must be understood also in terms of a company's ability to respect human rights – because companies have a duty to consider human rights but also because doing this protects them from certain risks. Many companies have been caught up in expensive and disruptive situations that damage their reputation, precisely because they have interpreted risk too narrowly.

Understanding risk in broader terms will also promote better relationships, particularly with local communities. Real or perceived abuse or neglect of neighbouring communities generate many of the problems and much of the discontent that companies encounter. This is not coincidental. Companies have insufficiently appreciated that their operations create risks for and harm others. A lingering assumption that communities should be grateful for the benefits that investment brings can blind companies to how individuals experience its impact. Companies may view their relationships with a community in transactional terms, – in terms of job opportunities and other benefits – but the community's perception may be quite different. People are not (just) economic entities.

Companies prefer tangible outcomes (negotiation followed by a signed agreement that delivers specific outcomes) and are less at ease with intangible values like trust, dignity or respect. A company's engagement with local communities needs to give importance to such values: in this sense the process of creating a relationship is a means but also an end.

Providing remedy is no less important. Grievance mechanisms are the most widely used instrument. They track potential risk and can fulfil an early warning function. They also help to strengthen relationships, by demonstrating a company's interest in the concerns of the local population and providing tools to address them. Remedies offer the best route for resolving a dispute before it escalates; but they too present dilemmas in high-risk countries.

Establishing sound processes in these three areas is not an indulgence, because process is what connects a company to its social context. When it is done well, process offers a way to prevent and mitigate harmful impacts; done badly, it simultaneously increases risk and blinds a company to its presence. It requires time, effort, patience and resources – all commodities in relatively short supply – but repays the investment many times over.

Understanding risk

Risk assessments are standard practice for most companies; the 'Respect' framework simply expands their scope. They need to encompass human rights risks *to* others and *by* others, specifically those with whom a company has relationships. They do not need to be distinguished from impact assessments. Negative impacts can usefully be understood as risks, and *vice versa*. A company should avoid creating new procedures: it is better to consolidate what exists, and to create a continuous analytical process running throughout an operation's activity.

Human rights risks are subject to the same principle. A company needs to consider whether it should separate human rights from other risk factors in its risk assessment processes. On one hand, a stand-alone human rights assessment is visible and evidence of a company's commitment. On the other, it may suggest that human rights are not integral to a company's operations but a secondary task farmed out to consultants. One underlying purpose of the 'Respect' framework is to bring human rights into the centre, rather than add layers to the periphery.

If human rights are not understood as part of everyone's responsibility, they will not be anyone's. Allocating responsibility for human rights assessments to an individual within the company, however senior, will marginalise them. Since human rights risks cut across departments and functions, each department must have responsibility for analysing human rights risks within its area of competence. This may require support and training, because staff may not be familiar with human rights or the duties they impose in relation to external actors. As discussed in the previous section, companies will benefit if they create a forum for discussion of human rights risks and policies; but devolution of analysis combined with centralisation of findings is the most sustainable approach.

Risk needs to be understood by those who are responsible for preventing or mitigating particular impacts. External consultants have a useful role to play but only where specialist expertise is needed or capacity is limited (initial assessments for major acquisitions, for example, or risk mapping by smaller companies). Consultants have value when they support staff, but should not do their jobs.

Human rights are not a specialist topic. Assessing human rights risk does not therefore have to be a specialised process, conducted and reported in specialised language. Indeed, the opposite is more appropriate. What matters is to identify and address problems. Complicated language can push human rights to the margins. So long as company standards are informed by human rights, it is better to articulate them in terms that are familiar to those who are responsible for their implementation. Standards do not have to be diluted but described simply.

This echoes a point made previously about communities. It is widely accepted that dialogue and communication with communities needs to be conducted in a culturally appropriate and accessible way. This applies to assessments of human rights risk. Little is gained from using formal human rights language if it is not understood by those who are being consulted. From a company perspective, too, strategies designed to identify problems and mitigate impact will not be useful if discussion of them turns into an argument about whether any given right has been abused, infringed, neglected or insufficiently respected.

The question of language finds its most practical expression in the debate about risk assessment methodologies (see box). Some of these focus on human rights, others on high-risk countries.

Risk assessment resources

Rights and Democracy, *Community HRIA Guide for Foreign Investment Projects*.
At: www.dd-rd.ca/site/_PDF/publications/Getting-it-right_HRIA.pdf.

International Alert, *Conflict Sensitive Business Practice: Guidance for Extractive Industries* At: www.conflictsensitivity.org/publications/conflict-sensitive-business-practice-guidance-extractive-industries.

IFC and IBLF, *Guide to Human Rights Impact Assessment and Management*.
At: www.ifc.org/ifcext/sustainability.nsf/Content/Publications_Handbook_HRIA.

Danish Institute for Human Rights, *Human Rights Compliance Assessment*.
At: www.humanrightsbusiness.org/?f=compliance_assessment.

Maplecroft, *Human Rights Tools*, At: www.maplecroft.com/themes/hr.

OECD, *Risk Awareness Tool for Multinational Enterprises in Weak Governance Zones*.
At: www.oecd.org/dataoecd/26/21/36885821.pdf.

Methodology should not be a primary concern. Which one to use depends on the needs of the individual company. Some companies have included human rights risks in their risk analysis and social and environmental impact assessments for a long time, even if they have not done so formally. Those with well developed internal methodologies will do better to enrich the system they have rather than adopt a new one. Ultimately, methodologies are as good as those who use them and the advantages of a familiar, consistent and sustainable company methodology will usually outweigh the merits of starting anew.

This presumes, of course, that the company's approach is properly configured to pick up impacts and associated risks. This is far from certain, especially in high-risk countries where many issues will be unfamiliar or not included in a company's traditional mandate. In such environments, company risk analyses often suffer from limitations of design or practice that undermine their value.

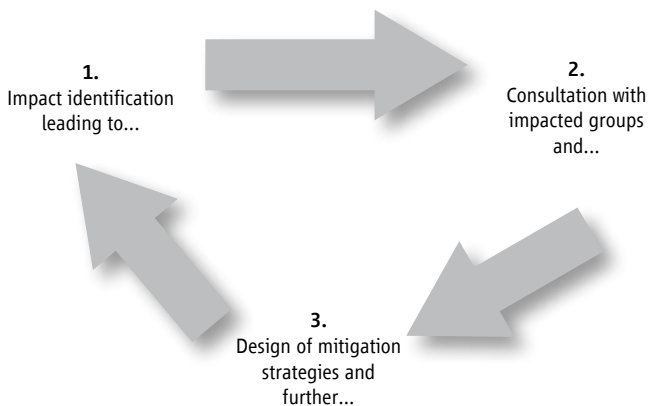
This is true of the different *types* of assessment carried out (political risk analysis, security threat assessments, Environmental and Social Impact Assessments) and the *relationships* between those who conduct them (Security department, External Relations department, etc.). It is not a problem that different departments undertake their own analysis but their perspectives must be pulled together. In addition, at different levels of a company, staff may perceive risk differently. What may appear to be a major human rights risk at headquarters may seem appropriate to an in-country manager who is under pressure to get a project underway. Risks are not only poorly collated but may be differently understood.⁷⁴

Assessment processes may also be narrowly framed – in terms of purpose and scope, or for reasons of confidentiality or timing. As noted earlier, assessments are relationship-building tools. Beyond the question of their rights, people *like* to be consulted over issues that affect them and like to feel their opinions matter. Understanding a risk assessment purely as an extractive, fact-finding exercise damages relationships. It is also a question of transparency. Some parts of a risk assessment will need to remain confidential, but much does not and should not. Wherever possible, companies need to validate their findings and conclusions with those whom their activities affect.

Impact should determine the scope of an assessment rather than, for example, geographical proximity. Since impacts, and those impacted, evolve over time, this means that assessment is inevitably an iterative process, which should continue through the lifespan of a project (see diagram⁷⁵).

⁷⁴ Bickham, 2011.

⁷⁵ Adapted from *Conflict-Sensitive Business Practice (CSBP): Guidance for the Extractive Industry*, International Alert, 2005.



Restricting participation, on geographical grounds or more arbitrary criteria such as perceived opposition, can create resentment. Risk assessments need to be inclusive and expansive as well as impact-orientated. They also need to be continuous. While it is sensible to assess at critical points in a project's development, regular tracking of developments and concerns is vital.

It has been argued that a comprehensive approach to risk assessment will generate information that will increase a company's liability.⁷⁶ This assumes that not knowing reduces risk, which is questionable under the 'known or should have known' interpretation of complicity. Ignorance is not necessarily a valid defence – certainly if the only way of 'not knowing' is to avoid questions that might produce uncomfortable information. Deliberately limiting the scope of an assessment cannot be a sound strategy for defending the company's interest or against charges of complicity. Risk and impact assessment processes are essential tools for anticipating, preventing and mitigating harmful human rights impacts. They are a requirement under the 'Respect' framework, but particularly in high-risk countries, too often they lack rigour.

⁷⁶ For a full discussion and rejection of this argument, see John F Sherman III and Amy Lehr, *Human Rights Due Diligence: Is it too Risky?* Working Paper No 55, Corporate Social Responsibility Initiative, Harvard University, 2010.

Human rights risk and impact assessments: key considerations

Continuous. Assessment should continue through the life of a project (even if fixed point assessments remain important as milestones).

Integrated. Human rights considerations should be a core feature of assessment processes, not separate analyses.

Devolved. Individual departments (security, human resources, contracts, external relations, legal, etc.) should have responsibility for assessing human rights risks in their domain.

Harmonised. Their separate analyses should be brought together and integrated (for example through a Risk Task Force).

Baseline. Companies need to establish a baseline description of conditions, if they wish to properly identify their impacts. This will also help to set and communicate responsibilities (of the company, government, etc.).

Process-orientated. Include intangible outcomes. Values like trust and respect are important and risk assessments should reflect this in their design and implementation.

Accessible. Those implementing an assessment and those consulted by them should be at ease with its framework and language. If formal human rights language is unhelpful, do not use it. What matters is identifying the problems not how they are described.

Inclusive. Speak to all relevant constituencies. Where this is genuinely not possible (women in certain situations, some critics of government, etc.) identify third parties who can access them or representatives who can speak for them.

Comprehensive. Examine all issues and relationships; include external parties.

Focus on impacts. Understanding impacts is the main purpose of assessments. Make sure the terms of reference are appropriate (e.g., avoid artificial geographical boundaries, etc.).

Validate. Be transparent whenever possible, respect confidentiality where necessary. Reflect back the findings of assessment to those who were consulted and have an interest.

Building relationships

Strong relationships are not a requirement under the 'Respect' framework. It is not necessary to get along with an institution, group or individual in order to respect rights. Positive relationships do nevertheless make many things easier, and negative ones can have damaging consequences.

Companies need no advice on managing their business relationships. No company will last long without proven strategies for working with its partners, contractors and suppliers, not to mention its clients and customers. To a lesser extent, this is also true of political relationships. Companies may not always feel comfortable dealing with governments and government agencies, and senior managers may not be attuned to the way political decisions are made, but they recognise their importance. In high-risk countries, relationships with government representatives but also with other business partners are especially likely to have political implications (see previous sections), but the fundamentals do not change.

The greater problem lies in a company's social rather than economic or political relationships. Companies are driven by economic imperatives and this is at the heart of their often contentious relationship with local communities. Many companies have proved to be socially inadequate – clumsy and insensitive. Some find it hard to conceive of their relationships except in terms of mutual economic advantage, and making the leap from contracts to rights can be equally difficult.

Engagement

Resources

International Alert, *Conflict-Sensitive Business Practice (CSBP): Guidance for Extractive Industries*.

At: www.conflictsensitivity.org/publications/conflict-sensitive-business-practice-guidance-extractive-industries.

CDA Collaborative Learning Projects, *Getting it Right: Making Corporate-Community Relations Work*, CDA. At: www.cdainc.com/cdawww/publication.php.

Global Compact, *Responsible Business in Conflict-affected and High-Risk Areas*. At: www.unglobalcompact.org/docs/issues_doc/Peace_and_Business/Guidance_RB.pdf.

Companies need to understand the nature of their relationship with communities. It is not just another negotiated contract; they are not a non-profit form of business partner. The difference is due partly, of course, to the character and culture of the community in question, but primarily to the fact that large projects have a profound impact on their lives, and these impacts are not only economic but cultural. They bear on relationships, personal security, livelihoods and status.

The balance of those impacts will often be positive, but that is not enough to establish good relations. Companies that have succeeded in building strong relations with neighbouring communities have recognised this and adapted accordingly.

There are links here to the 'Respect' agenda, not simply because good relations are built around mutual respect, but because of its emphasis on impacts. 'Stakeholder' is a convenient term but is misplaced when used to refer to local communities. It conveys the impression that people are defined by their relationship to the company and reinforces the perception that what is good for the company must also be good for the people. First and foremost, local populations are impacted by the company. This is how they need to be approached – with the respect due to those whose lives are being or are about to be fundamentally changed.

How an individual or group perceives a company's impacts (and any measures it takes to mitigate them) will determine whether the company is judged to be respectful of human rights. If people *feel* abused or neglected by the company, regardless of whether the allegations are fair, the company will be condemned. In this sense, strong relationships with local communities, based on respect, are essential because they will shape how the company is judged.

Relationships most commonly break down because the company is perceived not to have engaged (see *Communities*). Companies fail to engage in high-risk countries for several reasons.

Risk. Managers fear the company will be sucked into local disputes and become embroiled in wider grievances.

Cost. Engagement requires time and resources. It may delay the project.

Messiness. Managers find people unpredictable; there are lots of them and they all want different things.

Unnecessary. Managers consider that social policy and social issues are a government responsibility and not the project's business.

Each point has some truth, but they are largely irrelevant to policy because, even if engaging is risky, messy and expensive, *not* engaging is riskier and more expensive still. A company cannot separate its interests from those whose lives its activities affect. This is at the core of the 'responsibility to respect'.

From a company perspective, this implies engaging from the outset, bringing a respectful attitude, suitably qualified people, and commitment. Companies need to discuss with

communities the changes they bring, and not just to secure the ‘consent’ they seek. This seems a small point but it has very significant implications – for relationships, and negotiation of agreements. One is about mutual respect, the other mutual gain. Economic and political relationships can be constructed around the second, social relationships require the first.

Companies also need staff with the right skills, cultural awareness and languages. Although consultants can be of value, it is always unwise to contract out relationships. Though a company may seek the help of (particularly local) organisations when it cannot access specific constituencies, it needs to ensure that its relationships are direct. (Consultants can of course be effective if they are embedded for a period within the company, for example to help develop an effective internal team.)

The company’s commitment also needs to be open-ended. This links to the distinction between relationship and consent. Consent is not ‘fixed’ in time, unlike an agreement or contract with another business or with government.⁷⁷ A contract can be written on stone, consent is written on water. Technically, communities that sign an agreement cannot revoke their consent if the company has met its promises; but they will withdraw good will. A company is likely to be punished if it assumes that its social relationships are defined by a contract, let alone end at the moment of signature.

A company needs to act in ways that are inclusive, fair, appropriate and open. Excluding people, deliberately or unintentionally, is likely to incite grievances against the company and possibly provoke intra or inter-community tension. If companies focus on impacts they can identify those who should be included and differentiate between them fairly by scale and nature. Such an approach can secure the consent the company seeks and create the relationship of trust, respect and dignity that communities desire.

Social investment

Social investment is the second key mechanism for building relationships. Social investment is essentially a form of strategic philanthropy.⁷⁸ Companies support projects that bring communities benefit. In turn, they benefit from increased support in those communities and a more positive public image, and have the satisfaction of doing something good.

Social investment has increasingly acquired wider significance, however. Internationally, it is perceived as the repayment of a ‘debt’ to society (an obligation) or a contribution

⁷⁷ Agreements with governments in high-risk countries may not prove all that fixed either.

⁷⁸ See also Ruggie’s analysis: “Clearly, companies may undertake additional commitments voluntarily or as a matter of philanthropy. Moreover, some have developed new business opportunities by offering goods and services more closely aligned with basic needs, as in bottom-of-the-pyramid strategies and other types of inclusive business models. These are worthy endeavours that may contribute to the enjoyment of human rights. But what is desirable for companies to do should not be confused with what is required of them. Nor do such desirable activities offset a company’s failure to do what is required, namely to respect human rights throughout its operations and relationships.” Ruggie, 2009, para. 62.

to broader development objectives. Locally, it is viewed as a source of much-needed support or a right (in the sense that local people believe they are entitled to benefit from a company's presence). For companies themselves, it has become an instrument of risk mitigation as well as a demonstration of their commitment to social progress.

As its significance has increased, so has the attention paid to it. The real purpose and value of social investment have been criticised. Some consider that it diverts attention from the harmful impacts of investment, while others argue that it is frequently ineffective, unsustainable and a source of competition and conflict.⁷⁹

Resources

Jedrzej George Frynas, *Beyond Corporate Social Responsibility: Oil Multinationals and Social Challenges*, Cambridge University Press. At: <http://ebooks.cambridge.org/ebook.jsf?bid=CBO9780511581540>.

International Alert, *Conflict-Sensitive Business Practice (CSBP): Guidance for Extractive Industries*. At: www.conflictsensitivity.org/publications/conflict-sensitive-business-practice-guidance-extractive-industries.

CDA Collaborative Learning Projects, *Getting it Right: Making Corporate-Community Relations Work*, CDA. At: www.greenleaf-publishing.com/productdetail.kmod?productid=2830.

Global Compact, *Responsible Business in Conflict-affected and High-Risk Areas*. At: www.unglobalcompact.org/docs/issues_doc/Peace_and_Business/Guidance_RB.pdf.

The main problem is that companies have yet to work out what social investment is really for, beyond the general sense that it should do some good and *en route* benefit the company. Some companies have identified global priorities (for example, education) which are reflected in their local social investment strategies. Others leave allocation to the discretion of local managers; or insist on a proper process of consultation to identify appropriate projects. While the third approach is clearly most likely to be effective and sustainable, it is not an easy process to get right.

Yet doing it well is a requirement. Even though companies do not have a formal duty to invest in social programmes, their projects have impacts for which companies are responsible. This creates potentially awkward scenarios. For example, if a company chooses to build or redevelop a school or clinic, it has a duty to make sure that the service it funds is effective and sustainable. A poor service would prejudice access to the rights to education or health (since users would be deprived of a service they once had).

⁷⁹ For a more detailed discussion, see Frynas (op.cit), and Luc Zandvliet and Mary. B. Anderson, *Getting it Right: Making Corporate-Community Relations Work*, CDA Collaborative Learning Projects, Greenleaf Publishing, 2009.

In other words, any social investment project triggers responsibilities which the company need not have incurred.

This is an argument for avoiding social investment, or doing it carefully; or rethinking what social investment is for. Development is an arduous process in high-risk countries, even for professional agencies, and companies which finance development projects need to have a clear strategy and purpose. If companies invest sensibly to mitigate impacts on local communities, their social policies acquire strategy and purpose; they can support surrounding communities; and their framework will ensure fairness while managing expectation.

Building relationships: key considerations

Recognise the social character of a company's relationship with surrounding communities. Respecting human rights is as much about 'how' as 'what'.

Commit to an open-ended process. Relationships need to last as long as the project, not just until 'consent' is obtained.

Recruit staff with appropriate skills, attitudes and ethnic, religious, linguistic balance.

Design a process that is *inclusive* (of all impacted groups), *fair* in terms of benefits (judged by impact), culturally *appropriate*, and *open* (regular and transparent communication).

Focus on winning trust.

Align social investment strategies with impact mitigation responsibilities.

Providing remedy

Rigorous risk assessment and strong local relationships will help to attenuate, but will not eliminate grievances. Legitimate grievances need resolving and even unsubstantiated ones can benefit from an airing. It is increasingly recognised that a company is responsible for providing remedies to people inside and outside the company who have been harmed as a result of its activities.

Formal grievance mechanisms have been given considerable attention. The Special Representative has identified a set of principles to guide their development: legitimacy, accessibility, predictability, equitability, rights-compatibility and transparency. He adds that these should be operationalised by means of dialogue and engagement; a company should not act as adjudicator.⁸⁰ Several other models have also been put forward (see box).

⁸⁰ Ruggie, 2010.

Resources

CDA Collaborative Learning Projects, *Getting it Right: Making Corporate-Community Relations Work*, CDA. At: www.greenleaf-publishing.com/productdetail.kmod?productid=2830.

International Finance Corporation, *Good Practice Note: Project-Level Grievance Mechanisms for Affected Communities*, IFC. At: [www.ifc.org/ifcext/sustainability.nsf/AttachmentsByTitle/p_GrievanceMechanisms/\\$FILE/IFC+Grievance+Mechanisms.pdf](http://www.ifc.org/ifcext/sustainability.nsf/AttachmentsByTitle/p_GrievanceMechanisms/$FILE/IFC+Grievance+Mechanisms.pdf).

Rights Compatible Grievance Mechanisms: A Guidance Tool for Companies and their Stakeholders, Harvard University. At: www.hks.harvard.edu/m-rcbg/CSRI/publications/Workingpaper_41_Rights-Compatible%20Grievance%20Mechanisms_May2008FNL.pdf.

From a company perspective, if dispute resolution mechanisms are trusted they can provide an informal, inexpensive means to achieve redress and resolve grievances. Advantages include the possibility of resolving an issue locally, at an early stage; resolving inadvertent errors; establishing local goodwill; and pre-empting the need for costly and time-consuming legal cases.⁸¹ Secondly, they provide companies with an additional tool for anticipating risk and tracking performance on human rights issues.

They bring complications as well. The mechanisms themselves are not a problem; but in high-risk countries many people do not have access to justice and a company grievance mechanism may be the only means of remedy available. In so far as a complaint is against the company, this is straightforward. It is less so when the complaint is not against the company but a third party with whom the company has an association. In such circumstances, companies may find themselves drawn into disputes from which they have no clear exit.

Grievance mechanisms do not (and should not) have the force of a judicial process; they presume that parties are willing to reach a resolution. Complaints can legitimately be made against parties with whom a company is associated; for example, allegations of sexual harassment, intimidation, or corruption should be investigated. But cooperation by the third party, or the authorities, may be absent.

Assuming the third party (a contractor or supplier, for instance) is one over whom the company has some influence, a company's responsibilities would extend to the threat of termination of the contract. This would be a last resort and would presumably depend upon a number of factors, including the severity of the allegation, the balance of evidence or the weight of cumulative complaints.

⁸¹ Bickham, 2011.

The investigation might raise difficult issues of confidentiality, or put the complainant at risk of retribution. And the difficulties increase further when the grievance is directed at a government representative or agency. The company responsibility remains to investigate but how far does this extend? A mechanism designed to catch and resolve issues informally may quickly become the source of a dispute between the company (innocent of the alleged offence) and the authorities.

Underlying the problem is the judicial system. Corruption in the legal process, including investigating authorities, creates a minefield for companies. Allegations of criminal behaviour must be referred to the judicial process; grievance mechanisms clearly should not displace legal mechanisms.⁸² Yet referral to the courts may bring no remedy; worse, it may provoke abuse, for example if the complainant is bullied or the alleged offender is tortured or mistreated, or, alternatively, bribes his way out. In meeting its responsibilities, a company may become an unwitting party to an abuse that could be more serious than the original offence.

The dilemma is familiar: how can companies meet their responsibilities if these are partly determined by the actions of others? If neither the company's grievance mechanism nor the judicial process provide justice, where is remedy to be found?

A company has a responsibility to do what it can. If it can resolve a grievance informally, this should be done. If it concerns a third party, a company should persuade the third party to provide a remedy. If that fails, it should consider terminating its contract. If the allegation is of a criminal nature or concerns a government agency, it should defer to the relevant authorities but should monitor the process (or request other organisations to monitor the process) and seek assurances that the process will be pursued fairly. If there is a credible risk (a risk that needs to be determined in consultation with independent parties) that referral will lead to further abuse, a company should consider circumventing official channels in favour of an alternative form of remedy.

⁸² Caroline Rees, *Rights Compatible Grievance Mechanisms: A Guidance Tool for Companies and their Stakeholders*, Corporate Social Responsibility Initiative, Harvard University, 2008.

Providing remedy: key considerations

Establish a grievance mechanism according to best practice principles.

Encourage staff and local communities to raise concerns through the grievance mechanism.

Resolve genuine complaints against the company through negotiation, apology and compensation (as appropriate).

Pressure partners and suppliers to investigate and address complaints directed towards them and keep informed of progress and resolution.

Take appropriate action against partners and suppliers (including possible termination of contract) according to severity of allegation, balance of evidence and weight of cumulative allegations.

Assess the integrity and effectiveness of judicial mechanisms.

Monitor progress and outcome of complaints addressed through judicial mechanisms.

Avoid, *in extremis*, deferring to judicial mechanisms if there are substantial and credible risks of abuses being committed by officials.

Chapter six: Impacts

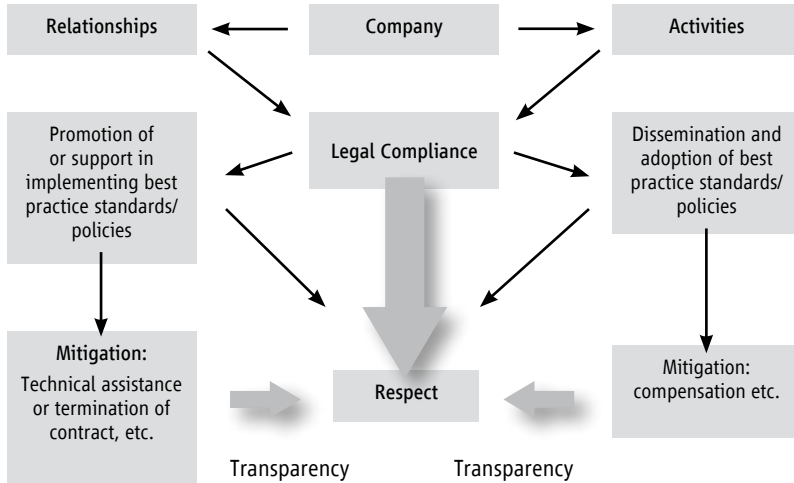
Every company's activities have an impact on human rights. Companies have responsibilities to those whose rights are harmed by those impacts, and responsibilities with regard to impacts caused by external actors with whom they have an association (contractors, suppliers, business partners, governments, communities). Impacts can therefore be divided into impacts *on* others and impacts *by* others. In the terminology of the Special Representative, the first is a matter of company *activities*, the second of company *relationships*.

A company's activities will cause some harmful impacts that it cannot avoid. Appropriation of land is likely to involve resettlement and some destruction of property, for example. A company can provide compensation in such cases, or build replacement infrastructure, or support alternative livelihoods. It can also spend as little time and effort on mitigation as possible. The choices a company makes will determine whether it respects human rights. Under the 'Respect' approach, its responsibilities will be assessed against outcomes.

With respect to relationships, a company's responsibilities are not absolute. It cannot oblige others to respect human rights, though it should make efforts to persuade them to do so. It can avoid entering into agreements with those it suspects of dubious practices; ensure its own standards are reflected in contracts; investigate and monitor behaviour; avoid provoking infringements (by setting realistic delivery schedules, for example); assist others to raise their standards; and threaten sanctions if business partners consistently abuse rights. It can expect government agencies to ensure legal compliance by its suppliers.

A company's responsibilities are therefore outcome- and process-oriented. They are determined by the steps it takes, not only the results it achieves. This inevitably introduces uncertainty, which needs to be addressed transparently. If a company can *show* it has adopted the right measures, it can reasonably claim to be working to fulfil its responsibilities.

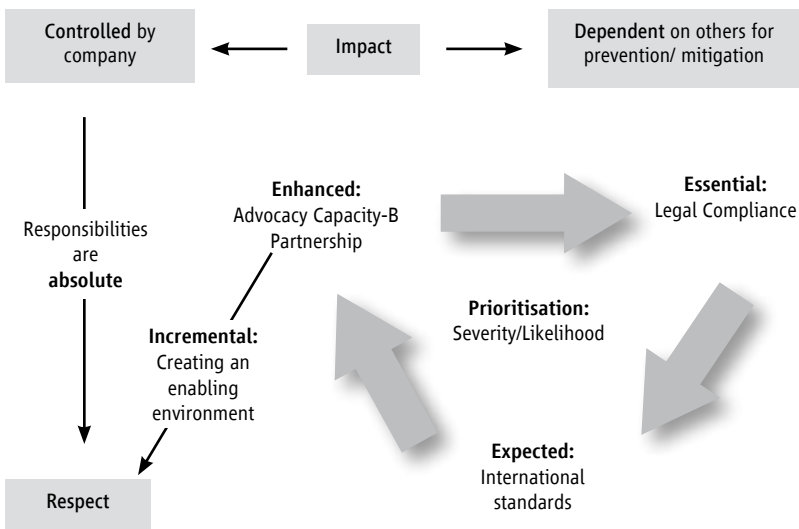
In relation to both categories of impacts, responsibilities are relatively straightforward in principle, but not necessarily in practice. Assessment of a company's record of implementing rights depends firstly on legal compliance (which, if achieved, may be sufficient), then on the application of international best practice guidelines, and finally on mitigation measures should negative impacts prove unavoidable.



In theory, the same logic applies everywhere. In practice, weaknesses in the rule of law create exceptional conditions in high-risk countries. If a company cannot depend on the law to impose standards, or cannot trust those with whom it associates to be subject to law, including those responsible for protecting and administering the law, this will affect the integrity of all its relationships.

Lack of control is characteristic of high-risk countries. Companies cannot impose their standards and may be obstructed from respecting standards by domestic law or pressure from government. They are not in control of all their impacts, which are shaped by the actions of others – associates, communities, officials, other external actors. They do not even control their mitigation efforts, many of which will not be effective in the absence of official or community cooperation. Finally, companies cannot control their relationships.

The extent of the problem varies considerably, even within high-risk countries, and none of this absolves companies of their responsibilities; it complicates them. A company should still be judged on its behaviour, but the nature of the external environment both compounds its responsibilities and reduces the degree to which its performance can be assessed in absolute or simple terms. In parallel, how a company manages the risks associated with its weak control (both effort and judgement) will determine whether or not it meets its responsibilities adequately. Addressing harmful impacts will often require – over and above compliance with domestic legislation (essential) and adherence to best practice (expected) – substantial efforts to mitigate the risks posed by those who do neither (enhanced). This means that a company should undertake activities which promote conditions under which it *can* (begin to) meet its responsibilities.



Addressing impacts: key considerations

Comply. Establish whether the application of domestic and international law and best practice guidelines will be adequate to address actual or potential impacts.

Promote an enabling environment. If the context is problematic, work to change it. The company has responsibilities whether or not other actors are irresponsible. A company needs to do what it can to promote an enabling environment.

Be iterative and incremental. Over the life of a project, a company can control many (but not all) of its impacts.

Sequence. Based on severity, probability and capacity, companies will need to prioritise some impacts compared with others.

Collaborate. Collaborate with other companies, with host and other governments, and with NGOs. This is partly about meeting responsibilities, but also because a company cannot engineer changes in the larger environment without cooperation with other actors.

Be transparent. A company should discuss dilemmas openly and show what it is doing to meet its responsibilities. A transparent approach is not always declaratory, but silence and secretiveness breed suspicion.

Address perceptions. Attitudes are based on what people *feel* is being done. Companies must consider what they will do and how they will do it. Bad process can destroy a company's credibility and its claim to respect human rights.

Conclusion

For the majority of companies, respecting human rights is a question of will. Companies have access to the resources, the instruments, the tools and the external support to enable them to meet their responsibility to respect human rights – if they decide to use them. In high-risk countries, it is not so simple. Companies may adhere to the law and follow best practice and still find themselves struggling to meet their commitments.

Companies are dependent on the environment in which they operate. The corporate responsibility to respect human rights may exist independently of the State's duty to protect, respect and fulfil, but a company's ability to meet that responsibility will be heavily influenced by State behaviour. If government cannot or will not meet its human rights responsibilities, then a company cannot do so – or at least cannot do so across the full range of its impacts. This is firstly because the State is among any company's core relationships, and under the 'Protect, Respect, Remedy' framework this confers some responsibility on companies for the impacts of certain government actions. Secondly, State failure to regulate and control the activities of third parties means that even the most diligent companies will inevitably find themselves working with or alongside businesses and other institutions that are breaching human rights responsibilities. Finally, government neglect (or worse) of its citizens' civil and political and social, economic and cultural rights will exacerbate any harmful company impacts and simultaneously prevent the company concerned from acting effectively to mitigate them.

For all these reasons, high-risk countries are defined by the nature of the State. A predatory or ineffective government will pose risks *to* a company but, equally importantly, will increase the risks posed *by* a company. Some will assume that this will allow companies to evade their own responsibilities by blaming government. Others will conclude that companies should withdraw from such societies.

Neither of these views accurately describes reality. High-risk countries demand from companies a higher level of rigour, creativity and sensitivity than elsewhere. At the same time, high-risk countries need responsible investment. The economic, social and political benefits companies can bring to such societies should not obscure, or be obscured by, the economic, social and political harms that companies can inflict.

The conclusion of this report is that companies operating in a high-risk environment have a particular responsibility to influence that environment, within the bounds of their own impacts. This is the additional responsibility which the decision to invest in such countries places upon companies. Drawing upon the UN Special Representative's analysis, this supplementary responsibility includes the duty to *know*, *do* and *show*. A company needs to fully understand the direct and indirect risks that arise from poor governance, and needs to act on that understanding by managing and supporting appropriate State interventions as necessary. Finally, it needs to be transparent (in so far as this is possible) by explaining the dilemmas it faces and discussing the measures it is taking to address them. Together, these three forms of response will reduce risks and enable a company to meet its responsibility to respect human rights in high risk countries.



Annexe: Summary of enhanced due diligence

Section one: The Law

Challenges	Enhanced due diligence
<p>Deficient national law Imperfect international law Weaknesses of soft law</p>	<p>Exceed national legislation where it falls short of best practice (e.g. environmental/labour standards).</p> <p>Where feasible, advocate for changes in domestic legislation which contradicts international standards.</p> <p>Identify ways to maintain the spirit of best practice when blocked by domestic legislation (e.g. alternative worker representation bodies).</p> <p>Incorporate risks of complicity in grave human rights abuses into contracts with host governments (e.g. commitment not to use violence in resettlement processes).</p> <p>Full and transparent implementation of soft law guidelines.</p> <p>Harness the potential of multi-stakeholder initiatives to lobby host governments.</p>

Section two: The People

Actor	Challenges	Enhanced due diligence
Government	<p>Weak State capacity. Contested legitimacy of government. Limited State authority. Absence of government will.</p>	<p>Assess government capacity, authority, legitimacy and will as part of due diligence.</p> <p>Consider risks government deficiencies might present.</p> <p>Provide technical support to increase government capacity, particularly at local level.</p> <p>Advocate for strong State role in socio-economic development.</p> <p>Identify partnerships/ alliances with international organisations to support and encourage the government.</p> <p>Where possible, be transparent; where not, discuss measures confidentially.</p> <p style="text-align: right;"><i>continued over</i></p>

Section two: The People *continued*

Actor	Challenges	Enhanced due diligence
Communities	<p>Differing perspectives on 'Rights'.</p> <p>Limited understanding amongst communities of international human rights frameworks.</p> <p>Inter- Intra- community tensions.</p> <p>Expectations on company, including fulfilling State responsibilities.</p>	<p>Understand differing perceptions of 'Rights'.</p> <p>Clarify expectations, including limitations of company responsibilities</p> <p>Develop a genuine and ongoing engagement process with affected communities (see also 'Building Relationships' in Part two).</p> <p>Focus on maximising 'core' benefits (i.e. jobs and broader economic development).</p>
Armed Groups	<p>Absence of State control/ lawlessness.</p> <p>Potential for abuses by non-State and State forces; risk of allegations of complicity.</p> <p>Companies as targets or opportunities – impact never neutral.</p> <p>Exposure to threat of sabotage, kidnapping and extortion.</p> <p>Corresponding threats to neighbouring communities.</p> <p>Difficulty of proper community consultation and engagement.</p>	<p>Understand these impacts, including agendas of armed groups.</p> <p>Suspend/postpone investment if impacts might credibly lead to grave human rights abuses.</p> <p>Avoid paying off/otherwise benefiting armed groups, as far as possible.</p> <p>Enhance company security measures to include protection of local communities as necessary and as far as possible.</p> <p>Support capacity of State forces in line with best practice guidance (and with an understanding of the potential risks).</p> <p>Develop joint approach with other companies.</p> <p>Address grievances related to company impacts and in so far as they intersect with local community concerns.</p> <p>Partner/support organisations working to address grievances.</p> <p>Advocate confidentially, with host and/or home governments and/or international organisations.</p> <p>Discuss risks and mitigation measures with trusted international bodies.</p>
Gender	<p>Difficulty of exploring socio-economic and political inequalities.</p> <p>Obstacles to engaging with women in certain cultural contexts.</p> <p>Sensitivity of measures to strengthen the capacity and role of women.</p>	<p>Include gender analysis in risk assessment processes.</p> <p>Ensure women (and other disadvantaged groups) are properly engaged.</p> <p>Assess how company impacts will affect groups differently.</p> <p>Develop tailored strategies for mitigating those negative impacts.</p>

Section three: Issues

Impacts	Challenges/Rights	Essential	Expected	Enhanced
Shadow Economies	Revenue mismanagement. State-sanctioned criminality. Systemic corruption. Patronage, ethnic/religious/gender discrimination. 'Conflict' minerals.	National Law. International and third country law. OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.	OECD Guidelines on Multinational Enterprises. Extractive Industries Transparency Initiative. UN Global Compact. Equator Principles.	Advocate for fair allocation of resources to operating region. Support institutional strengthening of local government. Partner with local government on service provision/infrastructure. Communicate and disseminate tax/royalty payments locally. Support to media and civil society to hold local government accountable. Support anti-bribery initiatives, particularly at local level. Conduct joint (multi-stakeholder due diligence) on products sourced from high-risk countries. Develop a common strategy for addressing the problems or, in extremis, change source.
Labour	Right not to be subjected to slavery, servitude or forced labour. Rights of protection for the child. Right to work. Right to enjoy just and favourable conditions of work. Right to form trade unions and join the trade union, and the right to strike.	National Law ILO Declaration on Fundamental Principles and Rights at Work.	Social Accountability 8000. UN Global Compact. OECD Guidelines on Multinational Enterprises. Global Sullivan Principles. IFC Performance Standards.	Alternative mechanisms for staff representation. Affirmative action for disadvantaged groups (women, ethnic/religious minorities). Allocation of local jobs on the basis of extent of impacts. Targets for % of local hires. Educational support (local schools, scholarships). Long-term training to raise skills. Maximise use of local suppliers, including capacity-building support for businesses. Advocate/support improvements in the business environment.

continued over

Section three: Issues *continued*

Impacts	Challenges/Rights	Essential	Expected	Enhanced
Security	<p>Right to life, liberty and security of the person.</p> <p>Freedom from cruel, inhuman and degrading treatment.</p> <p>The right to peaceful assembly and freedom of association.</p> <p>Right to just and favourable working conditions.</p> <p>Right to privacy.</p>	<p>National Law.</p> <p>Geneva Conventions and Additional Protocols I and II.</p>	<p>VPSHR.</p> <p>UN Code of Conduct for Law Enforcement.</p> <p>Officials and Basic Principles on the Use of Force and Firearms by Law Enforcement Officials.</p>	<p>Contracts with host government address risks.</p> <p>Strong local representation in guard force, including women.</p> <p>Training in people and crisis management skills.</p> <p>Better linkages between Security and Community Relations.</p> <p>Avoid use of public security where possible.</p> <p>Conditional assistance to public security.</p> <p>Training for public security.</p>
Environment	<p>Right to health.</p> <p>Right to food.</p> <p>Right to an adequate standard of living.</p> <p>Right to security of the person.</p> <p>Right to life.</p>	<p>National law.</p>	<p>IFC Environmental Standards.</p> <p>UN Global Compact.</p> <p>Equator Principles.</p>	<p>Disclosure of actual/expected environmental impacts.</p> <p>Minimisation of impacts during operations and, as far as possible, restoration/improvement of pre-investment environment following closure.</p> <p>Independent monitoring of those impacts (air/water quality, land contamination).</p> <p>Understanding of people's perceptions/experiences of those impacts from a human rights perspective (i.e. water quality may be within guidelines but people's enjoyment of their right to water may still be diminished).</p> <p>Compensation.</p>

continued opposite

Section three: Issues *continued*

Impacts	Challenges/Rights	Essential	Expected	Enhanced
Land and Water	<p>Right to safe and clean drinking water and sanitation.</p> <p>Right to life.</p> <p>Right to health.</p> <p>Right to own property.</p> <p>Right of self-determination.</p> <p>Right to work.</p> <p>Right to an adequate standard of living.</p>	National law.	<p>UN Declaration on the Rights of Indigenous Peoples.</p> <p>ILO Convention 169.</p> <p>IFC Performance Standards.</p>	<p>Clarify government responsibilities.</p> <p>Full disclosure/discussion of impacts – ongoing and iterative.</p> <p>Determination of impacts on quality of life, including indirect impacts.</p> <p>Minimisation of impacts.</p> <p>Time for design of compensation measures.</p> <p>Provide for communities to have a stake in the project.</p> <p>Advocating with and supporting government in meeting its responsibilities.</p> <p>Ensure independent monitoring of legal land clearance.</p>
The Past	<p>History of State abuse and neglect.</p> <p>Entrenched inequality and discrimination.</p> <p>Mistrust and suspicion.</p> <p>Legacy of past abuses, either by the same company or a different one.</p> <p>Corrupt or dysfunctional legal system.</p>			<p>Prior to operations, conduct a baseline assessment to determine existing condition of impacted communities.</p> <p>Negotiate division of responsibilities with local and national government.</p> <p>Consider historical inequality/discrimination in employment and social investment strategies.</p> <p>Focus on impacts not only law in dealing with past grievances.</p> <p>Identify non-judicial mechanisms to provide solutions.</p> <p>Recognise and, to the extent necessary, address legacy left by other companies.</p>

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Companies operating in weak governance zones or dysfunctional states face multiple human rights risks, and their actions may pose risks to others. Building on the UN endorsed 'Protect, Respect, Remedy' framework on business and human rights, *From Red to Green Flags: The corporate responsibility to respect human rights in high-risk countries* explores the specific human rights dilemmas and challenges facing companies operating in such contexts and provides detailed guidance for business leaders in meeting their human rights responsibilities. It is designed to assist corporate managers as well as NGOs, governments and academics with an interest in business and human rights and related fields.

“For those companies who see war zones and repressive regimes as niche markets, law enforcement and civil actions are probably the best option. But for the majority of businesses who find themselves working in or sourcing from places where violence and coercion are facts of life, this report will be a welcome source of guidance. No document can offer a simple and guaranteed way to eliminate all the risks of business-related human rights abuse, but this report from the Institute for Human Rights and Business will go a long way to helping companies act responsibly in the most difficult of circumstances.”

*Mark Taylor, Researcher, Fafo Institute, Norway
and principal researcher of the Red Flags Initiative www.redflags.info*

“Over the years companies have begun to develop an understanding of what they must not do. Compliance with the law, and doing no harm, are the essential building blocks for companies operating in high risk zones. But once they are there, what can they do? In this report, the Institute for Human Rights and Business offers sound advice on this very real problem businesses face. It doesn't offer easy answers, because there are no easy answers. It offers ways to approach the issue with caution, and provides the framework for companies to get it right.”

David Rice, Senior Associate, University of Cambridge Programme for Sustainability Leadership, and formerly Director, Policy Unit, and Chief of Staff, Government and Public Affairs, at BP plc.

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