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

---

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.\(^{11}\)

---

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. 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.

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.
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 personal 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 law**

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.

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’ expands further to include less egregious abuses of human rights.

---


15 Variousy 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.

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 companies

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.

---

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 unrefomed, 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.  

Soft law guidelines cover a wide spectrum of approaches and issues. Some, like the UN Global Compact, set out broad principles, while others, like the Extractive Industries Transparency Initiative, the Voluntary Principles on Security and Human Rights (VPSHR), and the Global Network Initiative (GNI), 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.
From Red to Green Flags: The corporate responsibility to respect human rights in high-risk countries

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). 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](http://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.