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. 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. 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.


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.\textsuperscript{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 \textit{Government} and \textit{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.

\textbf{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

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

\textit{Many people are afraid to talk about it, because this is a big problem.}
\textbf{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.

\textbf{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.\textsuperscript{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


a manner that conflicts with the company’s policies. 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. 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.
**Essential:**
National Law.
International and third country law.
OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.

**Risks:**
- Law unenforced or not enforceable.

**Expected:**
OECD Guidelines on Multinational Enterprises.
Extractive Industries Transparency Initiative.
UN Global Compact.
Equator Principles.

**Risks:**
e.g. Taxes and Royalties captured or wasted.
Endemic corruption.
Supplies sourced from contested regions.

**Enhanced:**
Advocate for fair allocation of resources to operating region.
Support institutional strengthening of local government.
Partner with local government on service provision and infrastructure.
Communicate and disseminate tax or royalty payments locally.
Support 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

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.

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.\textsuperscript{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 positions\textsuperscript{58} 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) elite. Manageable for a while, such arrangements are likely to create serious long-term problems.

\textit{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.}

\textbf{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 \textit{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.

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

\end{footnotesize}
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. 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

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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.

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 willfully 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. 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 managing 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.
Environmental

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. 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. This is precisely where human rights impacts

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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 elsewhere⁶⁴), 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.

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64 Frynas, 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.

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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.

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.

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<th>Land and water: three priorities</th>
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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, or been held accountable when complaints have been made through non-judicial mechanisms.68

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

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68 Dumont, 2011.

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.