Chapter two: People

Government

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

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

Challenges

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

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

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

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

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

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

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

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

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

For companies, such extreme contexts are doubly difficult. State authorities will not fulfil their obligations because it is not in their interest to do so. Keeping people poor may be a strategic choice, designed to maintain the ruling elite in power; encouraging the development of a region will only promote an alternative and therefore unwelcome power base. At the same time, the income from large projects helps to perpetuate the system, enabling the régime to resist international or local pressure to reform, and stripping the international community of much of its leverage.
All the above situations are characteristic of high-risk societies. Due diligence processes need absolutely to consider them. Failure to do so blinds a company to a multitude of risks, including human rights ones. Since much investment revolves around sound risk management, it is also poor business practice.

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

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

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

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

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

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

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

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

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

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

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

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


31 Ruggie, 2008.
Engagement with government has two principal dimensions: capacity-building and advocacy. A third can be added: partnership with others to strengthen the first two. In most high-risk countries, government agencies lack information, expertise and experience in critical areas. This is even more true of local government offices. This lack of capacity undermines a company’s own capacity to meet its responsibilities. Management of immigration, for example, requires forward-planning, appropriate policing, investment in services, and the establishment of regulatory bodies and procedures to monitor and enforce standards for suppliers and contractors. To address deficiencies in these areas, companies may be required to invest staff or financial resources, or involve themselves in lobbying. They may need to solicit the involvement of other parties, to provide technical capacity, deal with sensitive issues, or increase political access. Once again, the central point to make is that, when States fail to fulfil their functions, companies are exposed to a range of risks and to a set of demands they cannot usually meet and should not necessarily be expected to meet. Conversely, when a government fulfils its duties, it becomes much easier for a company to define its own duties and fulfil them. Companies therefore have both a responsibility and an incentive to strengthen State capacity and effectiveness.

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

32 Frynas, 2009, makes a similar point in respect of social investment.
33 Ruggie, 2009.
These are challenges for which there is only one response: to exit (or never enter). External calls for summary withdrawal are only realistic, however, when a company is credibly accused of complicity in egregious human rights abuses or when its presence unavoidably or deliberately worsens the situation of those within its sphere of impact. In the overwhelming majority of cases, even in high-risk countries, the situation is far more complex.

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

**Enhanced due diligence**

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

**Communities**

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

**Challenges**

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

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34 This section draws on *Community Perspectives on the Business Responsibility to Respect Human Rights in High-Risk Countries*, a report produced for this project by CDA Collaborative Learning Projects in partnership with the Institute for Business and Human Rights. The paper is based on field-based interviews with local community members and representatives in Afghanistan, Colombia, the Philippines and Sudan.
Companies and communities often interpret the meaning and reach of human rights differently and bring different assumptions to discussions of corporate accountability and a company’s responsibilities. Many company-community disputes arise from these differences of understanding. Disagreements may also occur about whether certain rights are being protected, respected and fulfilled; and about who is responsible.

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

**Zakat, Afghanistan**

“There is an expectation by many communities that the company will understand and follow local cultural or religious beliefs in regards to rights and benefits-sharing. In Afghanistan, expectation of corporate respect of “rights” is founded in religious and cultural beliefs, including an obligatory charitable contribution by those better off to those less fortunate. People reaching a certain threshold of capital are expected to pay Zakat, the fourth pillar of Islam, and most companies making a profit are considered to fall within such a threshold. Hospitality and generosity on the part of all entities are also integral parts of Afghan culture.”

CDA Collaborative Learning Projects and Institute for Human Rights and Business, “**Community Perspectives on the Business Responsibility to Respect Human Rights in High-Risk Countries**”

At: www.institutehrb.org.

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

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

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

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

Engagement matters for four reasons:

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

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

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

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

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

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

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

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

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

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

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

Challenges

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

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

Businesses are uncomfortable with the idea that they should understand the motivations of armed groups, let alone address their grievances. Most companies tend to consider that they are politically neutral, and regard a conflict as none of their concern and unrelated to their own presence. This view might be viable if armed groups shared the same perspective. In general, however, armed groups regard businesses as assets of the State, with which they sign partnership agreements, to which they pay taxes and royalties, and which provides them with security, including military protection where it is necessary.
Companies cannot avoid this risk: armed groups will see companies as either a threat or an opportunity and in both cases as a target. They may be a threat because their presence increases the strategic value of the region in which they operate. A company’s arrival is a promise of future wealth generation, and more immediately jobs. It is likely to generate new transport infrastructure, which may improve military access to the area. The taxes it pays resource the State’s counter-insurgency operations. Sabotage of company infrastructure becomes an obvious strategic option for armed groups seeking to disrupt economic activity and divert or prevent the movement of military personnel and hardware. Companies face enormous challenges and the cost of maintaining security, safeguarding staff and protecting assets in the face of repeated attacks is extremely high.

Business and international humanitarian law

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

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


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

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

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

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

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

A classic response is to boost security and sub-contract responsibility for it to a private security firm, military units, or armed police. This approach too carries risks. Police and military units often commit human rights abuses themselves, perhaps especially frequently when they are combating a guerrilla force that blends in with the environment or the surrounding communities and enjoys local support. When security forces commit abuses while acting on behalf of a company, the company may be liable whether or not it ordered or intended the intervention in question (see security).

Even if no legal problems arise and no abuse occurs, a highly securitised response to the risks the company faces is likely to harm its reputation and its local relationships.

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

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

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

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

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

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

**Responsibilities**

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

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

The first two considerations provide the elements of an analysis. The third contextualises the company’s strategy. Companies need to recognise that they have an impact and are an element in the conflict. Addressing negative impacts lies at the heart of the ‘Respect’ framework, and provides the key to mitigating risk. In most cases, raising the barricade and declaring political neutrality, or stating that the company will not have contacts with (illegal) armed groups, will merely create further difficulties for those on the ground who are usually obliged to deal with both insurgents and government forces when these seek favours, information, resources or compliance: detailed guidance is needed.
Armed groups dissolve because they have no more reason to fight or no more capability. A company’s role in relation to armed groups is dictated by the extent to which its own impacts increase these groups’ motivation and capacity to inflict harm on the company or on surrounding communities. These can be limited or substantial. In certain cases, particularly in the extractive sector, the production process and its side effects may be so closely bound up with a conflict that the companies involved are perceived to be parties to it.

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

**Chief of Mentang sub tribe, South Sudan**

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

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

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

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

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

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

Enhanced due diligence

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

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

Challenges

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

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

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

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

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

38 See, for example, Christine Chinkin, Shelley Wright and Hilary Charlesworth, *Feminist Approaches to International Law: Reflections from Another Century*, in *International Law – Modern Feminist Approaches*, 2005.
Finally, gender and women’s empowerment need to be addressed as distinct issues. Gender is primarily an tool of analysis that illuminates differences and inequality of treatment between men and women in society. By contrast, women’s empowerment builds on the insights of gender analysis. For companies, the first is an integral element of due diligence and therefore a responsibility; the second is not (except in certain circumstances).

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

**Integrating gender: key areas**

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

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

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

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

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

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

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

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

Enhanced due diligence

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

International cooperation

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

In theory, all these agendas are mutually reinforcing. Companies are encouraged to invest responsibly; responsible investment creates jobs and stimulates growth; this contributes to development, to improved living standards, better services and more stable government, which are the keys to social stability and improved governance,
and these create an environment that encourages more companies to invest, further stimulating growth – and so on in an expanding circle of virtue.

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

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

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

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

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

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

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

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\(^{41}\) Ruggie, 2010.
Policy incoherence is not an accident. Most governments have always been more concerned with investment than with responsible investment. While governments have made encouraging noises about the business and development and business and human rights agendas, this has not changed. The problem is not simply that different agencies within governments work in isolation but that the departments responsible for development and human rights policy have little influence over those that shape business practice.

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

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

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

Export Development Canada

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

42 Ruggie, 2010.
43 See, for example, Dr Susan Hawley, Turning a Blind Eye; Corruption and the UK Exports Credit Guarantee Department, The Corner House, 2003.
45 At: www.edc.ca/english/social_151113.htm.
Governments need to give clearer direction about what they expect of companies. At the same time, development and human rights departments could affirm more than they do the value of working closely with companies on matters of governance. Business departments are isolated too. Governments will not persuasively claim to be defenders of human rights abroad while they lack procedures that ensure investments they support are made in a responsible manner; nor will policies to promote the developmental potential of business make progress while government structures are not aligned with them.

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

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

**Department for International Development: Private Sector Development Strategy**

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

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

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

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

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<th>The case for cooperation</th>
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<tr>
<td><strong>Protection.</strong> Because of their sensitivity, companies find it difficult (or inadvisable) to raise certain issues with host governments. This can often be done more easily through their home governments, multi-lateral agencies or in multi-stakeholder forums.</td>
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<tr>
<td><strong>Advice.</strong> When companies face the very complex dilemmas that arise in high-risk societies, governments or other actors may be able to suggest alternative solutions, and work with companies to implement them.</td>
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<td><strong>Knowledge.</strong> Companies cannot, and should not be expected, to know everything. Even very comprehensive due diligence will leave gaps. Companies need other institutions, with different forms of experience, to supplement their own analysis and capacity.</td>
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<td><strong>Support.</strong> Companies often need assistance when they address negative impacts.</td>
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<td><strong>Level playing field.</strong> Bad practice in a company undermines the work and reputation of other companies. This is not simply a matter of competitive advantage or guilt by association. Companies that ignore human rights increase risk for others. Cooperation, between companies and with other institutions, can help to raise standards.</td>
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<tr>
<td><strong>Transparency.</strong> Companies need to show they are doing what they can to protect rights and behave responsibly. This is their main defence against a range of risks. Transparency takes many forms and is not necessarily about public declaration. Cooperation with other institutions, including governments and civil society organisations, can assist companies to build public and private trust.</td>
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Similar points can be made regarding the third main pillar of multi-stakeholder initiatives: civil society. Civil society institutions are seen to behave incoherently partly because they are so diverse – their primary strength. The range of their mandates, capacity and expertise constrain the development of multi-stakeholder initiatives. Many civil society organisations simply do not want to cooperate with companies; and those that are prepared to do so have many motives.

The absence of an agreed framework defining company responsibilities has made cooperation much harder. Most NGOs first engage with business to address problems that arise: few start with the assumption that businesses can be allies in social reform.
Particularly in high risk countries, where social, political and economic challenges are deeply entrenched, this is often too narrow a starting point. It is essential to establish benchmarks and standards but this alone will not create societies in which all people are free to enjoy their rights. The social reform that NGOs seek requires a strategy that does not confine itself to restraining company behaviour.

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

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