A distinction with a difference:
Harm avoidance and conflict mitigation in business operations in fragile contexts

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Summary

This paper takes issue with two common perceptions of the way companies drive or sustain conflict. The first of these perceptions is the 'bad actor theory', which suggests that companies only drive conflict through acts of negligence or carelessness. The second is a misrecognition of harm avoidance approaches to business operations as approaches to conflict mitigation. The paper uses the experience of the Tullow Kenya Business Venture's (TKBV) oil project in Turkana county, Kenya, to scrutinise some of the ways in which private-sector projects become entangled in conflict issues in fragile and conflict-affected states (FCS). Several of the conflicts and lines of tension that have emerged or intensified in the vicinity of the TKBV are unpacked in detail, based on conflict analyses and conflict-sensitivity analyses of the region and the oil project, to identify factors that drive or contribute to conflict. An examination of certain impacts of the TKBV, both its activities and its mere presence, suggests that in FCS companies, impacts on conflict do not always derive from harms that they cause through negligence, acts of commission, or breaches of standards of good conduct. Appropriate measures of conflict mitigation, therefore, lie in conflict-sensitive approaches to operations.

Introduction

A persistent perception of the private sector in FCS is that companies do not generate, drive, or sustain conflict unless they are somehow negligent. This view is the 'bad actor theory' of business and conflict: if a company contributes to conflict, it must be because the company's actions are in some way careless, irresponsible, or unethical. A corollary of this view is that responsible companies – companies that are diligent about human rights and environmental impacts, for instance – do not contribute to conflict, because it is carelessness about human rights, environmental impacts, and so on, that exacerbates conflict.

Some companies and financial institutions share this perception. Often, when asked about their conflict management approach, companies refer to their 'social performance' as a way of signalling that they are diligent and ethical, and that any conflict in their operating environments has nothing to do with them. 'Social performance' is company parlance indicating that their practices and policies adhere to the International Finance Corporation (IFC) Performance Standards, the UN Guiding Principles on Business and Human Rights, and possibly a range of other internationally recognised standards and principles of good practice. From an investor perspective, a 2019 paper by the IFC explaining the IFC's approach to investment in FCS strongly implies that companies drive conflict when they fail to "behave rationally in ways that reflect [the private sector's] interest in peace and stability" and suggests that such companies are outliers.[1]

From this perspective, companies contribute to conflict through actions that have the direct effect of diminishing local people's livelihoods, contaminating the natural environment, abusing human rights, compelling people to relocate to inferior places, or directly causing some other concrete social harm, or when they neglect obvious or required actions that guard against such harms.

Although some companies may indeed fuel conflict through unethical conduct or harm that they inflict (carelessly or otherwise) upon discrete stakeholders or groups of stakeholders, a 2020 report by the UN Working Group on Business and Human Rights (UNWG) suggests that, in FCS in particular, companies may also fuel conflict even when they do not cause harm. The report, about business operations in conflict-affected regions, observes that "activities linking business to conflict are often not perceived as salient human rights issues" and that "acting in an apparently rights-compatible way might fuel conflict dynamics". It offers as an illustrative example hiring practices that are "fully compliant in terms of human rights", but which nevertheless "might fuel a perception of advantage of a specific group over another, and lead to an escalation of grievances and violence".[2]

Such impacts, the report suggests, are far more likely in FCS than in other contexts, precisely because of the nature of fragility and conflict. In FCS, the state may not be capable of protecting human rights or otherwise "functioning as intended";[3] a company's business partners (including potentially the state itself) may be "active participants to the conflict, former combatants or abusers" of human rights; and abuses that do occur are likely to be more severe than they might be in other contexts.[4] Furthermore, in FCS, there may also be a far greater likelihood that relationships among companies' stakeholders are marked by histories of conflict and violence, and that those actors may perceive each other through the lens of those histories, with suspicion and hostility.

The persistence and ubiquity of the 'bad actor theory' suggests that it is worthwhile to examine how impacts upon conflict genuinely occur in the context of extractive industry operations in FCS. The aim of this paper is to do so in the case of the TKBV project in Turkana county, Kenya.[5] The paper will explore several illustrative conflicts and lines of tension that exist within and among local communities and other external stakeholders of the company. An exploration of some of the adverse impacts on conflict that are associated with the TKBV will illustrate how, in FCS, conflict impacts can arise without any conspicuous negligence, gross deviations from major standards of responsible business conduct, or behaviour on the part of the company that is not rational or reflective of the private sector's interest in peace and stability. The exposition of these impacts and their genesis demonstrate that in conflict-affected settings the presence and activities of even well-intentioned, 'rational' companies and their projects may contribute to conflict when their operations are insufficiently adapted to the conflicts and tensions that exist within the operational context.

This paper looks in particular at three lines of conflict that emerged or worsened as TKBV's Turkana oil project unfolded. Examination of these lines of conflict, and the way in which the company's presence and activities interacted with them, suggests the following points about companies' impacts upon conflict:

- Corporate impacts that drive, sustain, or intensify conflict do not necessarily arise as a direct consequence of acts of commission or omission by companies.
- Impacts in some cases arise from conduct that is consistent with standards of responsible business operations, and may, in some cases, arise from efforts to adhere to those standards.

This paper does not provide an exhaustive account of the TKBV's impacts (good and bad) or of current conflict dynamics in Turkana county, and it is not a comprehensive or evaluative assessment of the TKBV's operations.

Background

This paper is based on work performed and evidence gathered in Kenya as part of a two-and-a-half-year project called Enabling Good Governance in Kenya's Oil Sector. That project was a joint initiative of International Alert, CDA Collaborative Learning (CDA), the Center for International Private Enterprise (CIPE), and KARMO. The project was funded by the Bureau of Democracy, Rights, and Governance at the United States Agency for International Development. The goal of the project was to create an enabling environment for multi-stakeholder dialogue on conflict-sensitive governance of the oil sector in Turkana county. Evidence for the paper was gathered in interviews with a range of internal and external stakeholders of the TKBV, and in the course of work with those stakeholders in Turkana county and in Nairobi. The paper also relies on the collective experience of Alert and CDA of more than 40 years working with companies, particularly those in the extractive industries in FCS.[6]

The context

Government

Although not officially regarded as a fragile and conflict-affected state by the World Bank,[7] Kenya has experienced episodic, predictable violence since at least the early 1990s, relating first to protests against Kenya's single-party state and then, with the legalisation of opposition political parties in 1991, to elections. Since 1991, the only election cycles that have been largely free of violence occurred in 2002 and 2013 (although there were pockets of violence in parts of the country in the 2013 cycle). The violence that followed the 2007 elections, in particular, was catastrophic, with clashes in Nairobi and several areas of the countryside killing more than 1,000 people and displacing at least 350,000. The 2007–08 crisis led ultimately to the adoption of a new constitution in 2010. The new constitution created 47 counties with significant powers vested in directly elected county governments. This form of government replaced a province- and district-based administrative structure (with the new counties corresponding roughly with the former districts) in which all local and regional administrative offices outside Parliament were filled by appointment by the Office of the President. The new county administrations were launched in 2013.

The population in Turkana county expresses a degree of confidence in the Turkana County Government (TCG), but county-level institutions came into existence less than one year after the discovery of oil in Turkana county and the scope of their authority in relation to the central government remains unsettled with respect to certain issues. Kenya's oil law, for instance, which determines the percentage of royalties allocated to central government, the county government, and local communities, was only signed in 2019. Furthermore, TKBV's project is Kenya's first and, to date, most advanced oil production project (in terms of time remaining until production). Before the TKBV launched its activities in Kenya, there was no government agency in Kenya that had any relevant, prior experience in managing, regulating, or overseeing oil projects. County government officials expressed to our project team uncertainty about what they could be doing through policy and governance processes that would make good outcomes more likely.

Central government has insisted on setting overall strategy for the oil sector itself, involving the TCG only after key decisions have been made. The Government of Kenya's approach has not always been to TKBV's liking: for example, the government indicated a desire to manage land acquisition on its own, as a compulsory acquisition, without involving the TCG. TKBV invested significant time in dissuading the government from this line of action, which would have made IFC financing for the project significantly less likely, and encouraging it to engage the TCG in strategy development about issues such as land acquisition and public consultations.

Turkana county

Turkana county was historically and remains today one of the poorest areas of Kenya. Land throughout the county is arid, rainfall is meager, and drought is common. A majority of the population depends on transhumance and livestock – camels and goats – to survive, and on humanitarian aid during periods of drought. Historically, Turkana county has also been one of the areas of Kenya that has been most neglected by the state. Successive post-colonial governments deliberately focused state expenditure on more densely populated (and thus politically important) agricultural areas to the south. Currently, outside the major towns, there is one paved road – the A1, a two-lane tarmac road that runs between Lodwar, the county seat, and Kitale, in Trans Nzoia county. At the time of writing, major roadwork was underway on the A1; however, as recent as 2019, sections of the A1 within Turkana county were so potholed that in several locations between Lodwar and Kainuk traffic left the roadway itself and passed through the 'bush'. Armed banditry targeting passenger vehicles along the A1 has been common in recent years, and local police consistently indicate that they lack the resources to patrol regularly or to investigate incidents.

As a consequence of all of the above, many Kenyans consider Turkana county to be remote and undeveloped. Locals in Turkana share the view that they are in some sense outside Kenya's development: at the airstrip in Kapese, security staff (who are themselves local people) screening travelers bound for Nairobi ask whether they are "going to Kenya" ("Unaenda huko Kenya?").

The company and the Turkana oil project

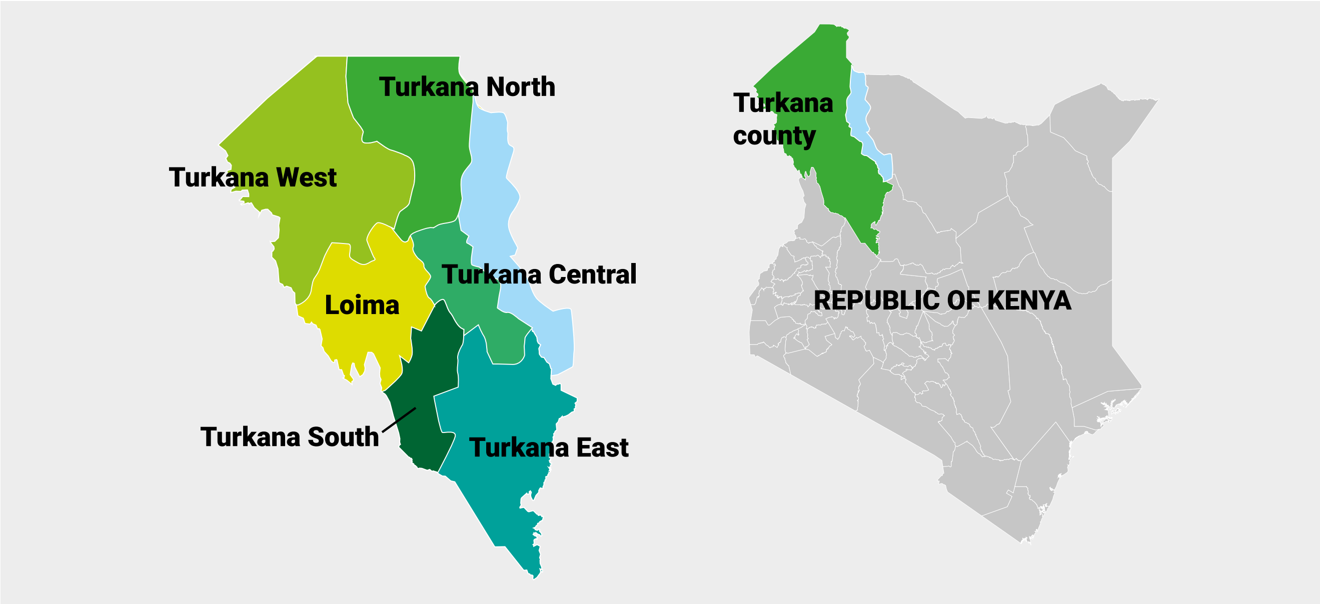
Tullow Oil is a UK-based oil and gas company known for its exploration projects in sub-Saharan Africa and for its offshore production operations in Ghana. The company has historically enjoyed a good reputation among oil companies and industry experts as a small company that 'punches above its weight' in terms of social responsibility.

Tullow Oil is the operating partner in the TKBV, a joint venture that also includes Total SE, a French energy company, and Africa Oil Company (AOC), a Canadian oil and gas company. As Tullow Oil is the operator, it is responsible for the policies and approaches which inform the practices of the TKBV. In 2015, AOC received financing from the International Finance Corporation (IFC) for projects in Ethiopia and Kenya (including the TKBV). The financing from the IFC obligates the TKBV to adhere to the IFC Performance Standards on Environmental and Social Sustainability, which the operation has taken quite seriously.

The TKBV has been exploring in Turkana county since 2010 and the first discoveries were announced in early 2012. Since 2010, the TKBV has constructed an expansive base camp at Kapese and several well pads for exploration drilling in the Ngamia and Amosing oilfields, all of which required the acquisition of a modest acreage of land in Turkana East and Turkana South sub-counties. The company has also opened and staffed offices in Lodwar (the seat of the county government) and in Lokori, a small settlement in Turkana East sub-county.

The TKBV's project plan calls for injection water for pressurising the oil wells to be drawn from the Turkwel Gorge Reservoir, which is just over 100 kilometers from Kapese in West Pokot county. Water will be transported

Map 1: Turkana county and its sub-counties



to the oilfields via an underground pipeline. At the time of writing, several of the initial surveys of the proposed pipeline route have been completed, but land acquisition has not begun.

The human rights policies of the TKBV are set by Tullow Oil and are consistent with the UN Guiding Principles on Business and Human Rights and the Voluntary Principles on Security and Human Rights.[8] The company has welcomed collaboration with the Geneva Center for the Democratic Control of Armed Forces (DCAF) and SafeStainable to train the Critical Infrastructure Protection Unit of the Kenya Police in human rights. It also collaborated with International Alert in the delivery of a training course on the Voluntary Principles for its staff and contractors working with security and other related functions. It proactively solicited input from International Alert and CDA when it wished to revise its non-judicial grievance procedure and in initial conversations about its community benefits framework. It has engaged openly with a range of other local and international NGOs such as Oxfam and it has consistently welcomed engagement with Kenyan civil society actors such as the Kenya Civil Society Platform on Oil and Gas, Friends of Lake Turkana, and others.

In the context of its operations, the company also initiated several projects intended to benefit local communities, including drilling a number of boreholes to provide water to local people and their animals and setting up a vehicle scheme in which the company sold vehicles to local people and leased them back from them, and it established a closed, anonymous, wireless text chat platform for residents of Turkana East and South sub-counties.

TKBV also established several policies and practices intended to benefit communities that were affected by its operations. As is standard practice in the oil and gas industry, the TKBV gives preference to contractors based in Turkana county in its procurement and to people originating in Turkana county in the recruitment of labour. The same requirement is imposed upon TKBV contractors through contractual obligations. That said, as is common in extractive industries projects, much of the goods, services and labour that the company has needed could not be sourced within Turkana county because it was not available or appropriately specialised or qualified, or because it did not meet standards that the company required as per other policies. More technical contractors and specialised staff were drawn from other parts of Kenya and in some cases from other countries.

The TKBV's project has been highly visible in the media and widely discussed throughout Kenya, generating extraordinarily high expectations about national and local wealth and development, jobs, contracts, and the like. The press, in particular, routinely references "Kenya's oil riches" and "oil billions" in these and similarly sensationalising formulations.

Impact on conflicts in operational area

Despite good intentions and significant investment to the benefit of local people by the TKBV, the presence and activities of the oil project have intensified existing tensions among local communities and other actors, and have generated new tensions within local communities. In the following section, we discuss three specific ways in which the company's activities and presence created, sustained, or inflamed local conflict dynamics. This is not intended as an exhaustive account of the TKBV's impacts or of conflict dynamics in Turkana county, but as an illustration of how well-intentioned and largely responsible businesses can worsen conflict dynamics. The examples are:

- resource conflict between the Turkana and Pokot ethnic groups;[9]
- social fragmentation within local communities in the oil zones in Turkana county; and
- tensions between local communities and central government.

The discussion is intended to illustrate the ways in which company projects may interact with contexts of conflict and fragility to generate, drive or sustain conflict, notwithstanding the company's intentions or deliberate efforts to mitigate direct social impacts.

Land acquisition

In Turkana county, outside municipal areas very little land is held by individual title. Most of the land in the county, and in other areas of Kenya that are inhabited predominantly by pastoralists, is legally 'communal': the community as a whole is the owner, but the land itself is held in trust, with the county government as the sole trustee.

This legal framework coexists with complex, customary land rights and use patterns. Turkana people recognise that clans, sub-clans and families[10] have specific relationships with specific lands within the county. These relationships are derived from ancestral residence and historical patterns of land use, and specific locations are sometimes marked with grave sites or ancestral shrines, which are considered cultural patrimony. Members of a clan expect to use their own clan's lands freely. They also use the lands of other clans and families to water and pasture animals and to establish temporary, seasonal residences, with the permission of the 'host' clan or sub-clan. Often, these arrangements entail an expectation of reciprocity in the future, and people do not systematically exclude members of other clans from their own clan's lands. People in Turkana county who practise transhumance spend significant parts of each year away from their own clans and clan lands, using lands that are associated with other sub-groups of Turkana people. An implication of these land use practices is that, for any given parcel of land, there may be a large group of people with complex, differentiated, and socially recognised rights of use and access.

TKBV's impacts

To move the oil project forward, TKBV needed to establish exclusive rights to the lands on which it might build well pads, a base camp, and eventually infield pipelines and a central processing facility. The IFC obligates companies to compensate landholders who sell or lease to the company, voluntarily or otherwise, at a fair market value. Without meeting this standard, commercial projects are less likely to be approved by the IFC, and this in turn may influence commercial lenders to avoid the project. IFC endorsement is extremely important for the commercial viability of projects like the TKBV's and, as noted above, AOC's membership in the TKBV in any case obligated the company to follow the IFC Performance Standards in the phases before the Final Investment Decision (FID).

In the oil zones of Turkana county, however, there is no basis for establishing a fair market value for compensation, and it is not obvious how an entity might acquire exclusive rights to land. There is effectively no existing commercial market for undeveloped land in Turkana county in two senses. Firstly, there is little, if any, buying and selling of lands in Turkana county because lands that have communal status cannot be bought or sold without first being privatised. There is thus no recognised, accepted, formal or informal process for an entity that is not a member of the community to establish exclusive rights to land. For community members themselves, the process is arduous, requiring documentation that few local people have and a complex, bureaucratic process of land registration. Not surprisingly, therefore, there are also no historical reference points (e.g. prior, commercial transactions of land) against which to benchmark the fair market value of land. Secondly, there is very little land (other than lands that have been gazetted as municipal areas and possibly lands along the Turkwel River) that has any evident, intrinsic commercial value. The difficulty in transacting land

and establishing exclusive rights contributes to the indefinite nature of land values, but even in areas near the A1 road where gravel quarrying or firewood cutting are practised for commercial ends, it is unnecessary to establish an ownership claim to exploit those resources because the land is communal.

As of the time of the TKBV's initial land acquisition process, applicable Kenyan laws about compensation made matters still more complicated.[11] Kenya's Land Value Index Act stipulates that land that is undeveloped (e.g. having neither built structures nor crops on it) is 'zero-registered', meaning that it is registered as having a compensation value of zero.[12] The Act stipulates that for a person to receive compensation for land, the land must be registered as their private property. None of the lands that TKBV sought to acquire were registered, however. As noted above, unregistered land is held in trust by the county government, but compensating the county government for zero-registered, communal land was clearly not in line with the spirit of the IFC's requirements with respect to compensation. It would also have been unlikely to satisfy local people who had use rights and family associations with, and thus plausible, if non-legal, claims to the lands in question. This also fails to consider the question of grave sites and shrines that may exist on lands acquired by the company.

Prior to acquiring land, the TKBV found itself under some pressure to act because the government indicated a willingness to acquire land for the oil project on a compulsory basis, following Kenyan law pertaining to eminent domain, as well as its willingness to use force to remove people from the lands in question. The TKBV was keen to avoid this outcome, particularly since it risked violence by public security forces and would have meant that many involuntarily relocated families would receive no compensation at all. Compulsory acquisition would have caused substantial harm to local people and it also would have made acquiring the IFC 'green light' for project finance even more challenging.

In the TKBV's assessment, the best of the available options was to negotiate with and compensate the families with the closest links to the lands that TKBV wished to lease. Many of the local families and clans had recognised heads or senior members, and the TKBV chose to deal with these individuals as family representatives and non-legal 'owners'. To ensure fairness across families, the TKBV devised a uniform principle for compensation and compensated those family heads at a uniform rate per hectare of land.

Within Turkana families and clans, there is no formal, customary, or normative mechanism by which family and clan heads are accountable to members of their own families. In many cases, individuals who acted as lessors of land did not discuss leasing or terms with other family members who might have some form of legitimate claim – even if only use rights – to the lands that were linked to their families. In some cases, family heads excluded family members with legitimate claims from both negotiations and compensation payments. The TKBV itself did not undertake to ensure that all relevant stakeholders were consulted, opting instead to deal with family heads as though they were individual owners.

This practice had negative effects on social cohesion among families in Turkana East and Turkana South where the TKBV has acquired land. Participants in a workshop convened in February 2019 indicated that as a consequence of TKBV's approach tensions had emerged within some families between family and clan heads and family and clan members. A consequence was the loss of credibility and legitimacy among some family and clan elders and the emergence of tensions between those elders and their own more junior family members. Rumours and allegations emerged among local people that TKBV staff were undertaking clandestine, night-time visits to the elders in rural *manyattas* (homesteads) and engaging in secret negotiations, an allegation that within the local culture is indicative of deep distrust and breaches of social norms. In describing the dynamics of this process, local people articulated a fear that traditional governance structures were being co-opted by the company and that they were thus failing as mechanisms of accountability, transparency, and community protection.

In 2019, representatives of Turkana communities petitioned the Ministry of Lands to register the community itself as the owner of communal lands in Turkana county, but this petition has yet to be settled. Civil society and non-governmental organisations following land issues in Turkana indicate that there are no signs that Kenya's compensation law will change in the foreseeable future. The oil project is set to move into its construction phase, although the coronavirus disease (COVID-19) outbreak and financial troubles internal to Tullow Oil have delayed it significantly to date.[13] During the construction phase, the TKBV will build a number of additional well pads and a central processing facility, and will undertake time-bound works (such as installing underground infield pipelines) on other lands, and will therefore need to acquire significantly more land than it already has under lease.

Benefits distribution and competition

Turkana-Pokot conflict

Turkana people and their neighbours – some in adjacent Kenyan counties, some across national borders in Uganda, Sudan and Ethiopia – have a history of raiding each other's livestock to replenish herds, and also of forging agreements and alliances to share resources and receive populations displaced by drought and warfare. Historically, conflict has been the norm in some intercommunal relationships – for instance, between the Turkana and the Pokot – and alliances the norm in others such as between the Turkana and the Karamojong across the border in Uganda.

Conflict between Turkana and Pokot people has historically focused on control over or access to natural resources that are essential to transhumance: water, pasture and animals. The broader relevance of this competitive historical dynamic is perhaps clearest to see in the context of the construction of the Turkwel Gorge Dam, located in the extreme northwest of what is today West Pokot county, just outside Turkana county. The construction of the dam, which took place between 1986 and 1991, promised jobs and predictable irrigation of the land along the Turkwel River below the dam. Pokot communities determined that they wanted to control these resources and, according to Turkana people, organised a concerted campaign of violence to displace Turkana people living near the gorge. Although the two communities were ultimately reconciled in the wake of that conflict, the Turkwel Gorge Dam and the reservoir are today entirely within West Pokot county and their surroundings are inhabited primarily by ethnic Pokot people. Turkana people claim that within living memory the gorge was inhabited primarily by Turkana people and today many locations in the vicinity of the gorge bear Turkana language place names. The conflict over the dam demonstrates that historical tensions over natural resources are relevant to contemporary commercial resources as well, and also that large-scale, capital projects in this region motivate conflicts that are more concerted and organised than livestock raiding, as commonly practised historically.

The Turkwel Gorge conflict, and ethnic tensions in northwestern Kenya more generally, should also be understood as a local expression of a pattern of political violence that is relatively common in Kenya, where intercommunal violence has had a close relationship with politics and competition for control over economic resources, especially land. In Kenya, it is common, particularly during political campaign seasons, for influential politicians to mobilise youths of their own ethnic groups to threaten or attack neighbouring ethnic groups, as happened in 2012 in (then) Samburu District; in 2008 in Mount Elgon, Burnt Forest, and Eldoret; in 1997 in Likoni; in 1994 in Enosupukia; in 1992 in Molo and Olenguruone; in Kapedo intermittently since the 1970s; and in other instances as well.

Since the Turkwel Gorge conflict, three separate, successive government commissions, each with a mandate to resolve the issue definitively, have demarcated the boundary between what is now West Pokot county and Turkana county in an effort to mitigate persistent tensions between the two communities. None of those demarcations has ever been enforced by any county- or state-level entity, however, and the boundary remains unsettled today. The government has proven unable to guarantee either security or land rights along the borderline between the two counties, and Kainuk – where the A1 crosses the boundary between West Pokot and Turkana counties, just a few kilometers from the Turkwel Gorge – is a notorious 'black spot' for armed ambushes and banditry against vehicles.[14] A number of other factors contribute to tensions between the Turkana and Pokot communities over the boundaries of their respective territories – inflammatory and manipulative rhetoric by politicians during election seasons, the commercialisation of stock theft, the mutual vilification of each group by the other and most recently the promise of oil wealth in the southeastern region of Turkana county.

Wars and political instability in the neighbouring countries in the 1980s, 1990s and 2000s, in particular the looting of Moroto Barracks in Uganda in 1979, allowed people in Turkana and adjacent counties to acquire small arms, and many families in Turkana county currently possess a firearm and several rounds of ammunition. During the leadership of Daniel arap Moi (1978–2002), the government proved itself incapable of containing conflict between ethnic groups in northern Kenya or disarming local populations, with frequent complaints that disarmament processes were heavy handed and left disarmed communities vulnerable to attacks from others. As an ostensible solution to this problem, the government allowed armed local actors to become 'Kenya Police Reserves' (now renamed 'National Police Reservists') and to receive weapons and ammunition from the government, or to register existing firearms. Until recently, the KPR was structured as a parallel police force, which was difficult for the Kenya National Police to control.[15] The widespread availability of small arms has contributed significantly to the lethality of intercommunal conflicts in the region and the government recently decided to withdraw firearms from National Police Reservists on the grounds of frequent misuse.

TKBV impact on 2017 violence

During the build-up to the 2017 national election cycle in Kenya, attacks intensified by armed groups of Pokot against Turkana homesteads along the boundary between Turkana and West Pokot counties. While the violence occurred between groups who have historically been at odds with one another, according to Turkana people, the violence in 2017 was dissimilar from previous episodes of intercommunal violence in two respects. Firstly, whereas in 'traditional' raiding patterns there is relatively little violence, and it is directed predominantly at adult men, raiders in this instance killed an unusually high number of women and children, apparently purposefully. Secondly, 'traditional' raiding is for the most part construed as need-based or compensatory, with raiders replenishing herds depleted through drought or raiding by other parties. Raiding persists until the raiders have met their needs and then ceases. In 2017, however, raiding parties seized unusually high numbers of animals.

People in Turkana and some TKBV staff speculated in interviews that the raiding was intended to deprive people in Turkana county of animals, rather than to ensure that people in West Pokot county had enough animals themselves. People who practise pastoral lifestyles depend on their animals for their subsistence, so without a herd of a certain minimum size, a family would have to seek alternate means of survival. In Turkana county, pastoralist families with insufficient animals commonly seek refuge among relatives in other locations or move into one of the county's camps for internally displaced people. For these reasons, many people in Turkana county view the raids that took place in the lead up to the 2017 election as part of a deliberate and systematic effort to displace populations, pushing them away from the boundary with West Pokot and further into Turkana county seeking security and adequate nourishment.

Assessments of the motives of Pokot raiding parties remain speculative. The Governor of West Pokot recently remarked that, if water for the oil project is to be drawn from the Turkwel Gorge Reservoir, oil revenues should be shared with West Pokot county, suggesting that some people in West Pokot wish to be included more directly in the benefits derived from the oil project. Beyond this, the attribution to Pokot communities of an intent to acquire territory in the oil zones is plausible. In the build-up to the 2017 election, the rhetoric of political candidates in West Pokot county was perceived as incendiary by many in Turkana county. In 2017, TKBV had not yet announced its plans to draw injection water from the Turkwel Gorge Reservoir; people living in West Pokot county were not aware that TKBV counted them, or planned to count them, among its stakeholders. Turkana and Pokot people both perceived that the oil project would deliver significant material benefits to residents of Turkana South and Turkana East sub-counties in the form of jobs, contracts, and community development projects, while excluding nearby Pokot communities. Within a context configured by the dynamics described above, it is not difficult to see the presence of the oil project as a factor contributing to conflict and violence.[16]

Sub-counties: Tensions about jobs

Since the inception of the TKBV, residents of Turkana South and Turkana East sub-counties have been speculating about jobs, contracts and other benefits, and about how those benefits would be distributed across local social groups. The TKBV, for its part, has determined that it will give preference in its hiring and contracting to local people and enterprises. When we spoke with the TKBV's Local Content Manager in 2018, she indicated that TKBV had not yet decided how the company would manage local recruitment for the construction phase of the project (when the company's demand for unskilled labour would be at its highest), but that the company would most likely establish two tiers of priority for local hiring and recruitment: the first priority would be given to people originating in Turkana county over Kenyans originating in other counties; the secondary priority would be given to Kenyan nationals over nationals of other countries. The company's thinking at that time was that a system that allocated priority to people from specific sub-counties would be unduly complex and burdensome to administer.

Like many companies waiting for a FID, the TKBV viewed as premature any consideration of how operational activities (such as local recruitment for construction-phase activities) would proceed after the FID. By the end of 2019, TKBV had not engaged local people about different potential models of unskilled labour recruitment, preferential allocations among local groups, or a timeline for hiring. The TKBV is not an outlier in this regard: many companies are reluctant to communicate to stakeholders about matters that have yet to be decided or that may be immaterial in the event that the project fails to attract investment for its construction phase. In any case, few people within Turkana East and Turkana Central sub-counties were aware of the TKBV's thinking about local labour recruitment, even as speculation about jobs was widespread among locals.

The question of local recruitment and other material benefits flowing from the company should be contextualised with reference to two other issues discussed above: first, the lack of economic opportunities existing in Turkana county more broadly and, second, the extremely high expectations, both in Turkana county and throughout the country, about the benefits for Kenyans generally from the oil project. Our engagement with people in Turkana East and Turkana South sub-counties, where oil extraction will take place once the project is producing, suggests that they expect that they will be given preference in local recruitment over people from elsewhere in Turkana county. Their (not unreasonable) view is that they are most impacted by the TKBV's activities, so they should benefit more than other stakeholders from those activities.

Our discussion herein of jobs and local recruitment has up to this point set out dynamics that are commonplace in extractive industries projects.

In the case of the TKBV, however, two additional contextual factors also warrant consideration. Firstly, Turkana South and Turkana East sub-counties correspond to parliamentary constituencies, county and central government administrative divisions and, roughly, to sub-clan divisions within Turkana society. Secondly, voters and elected officials have certain expectations of each other with respect to the role of elected officials in the material advancement of their constituents. Politicians' constituents commonly want politicians to provide them with economic benefits and opportunities, and politicians know this.

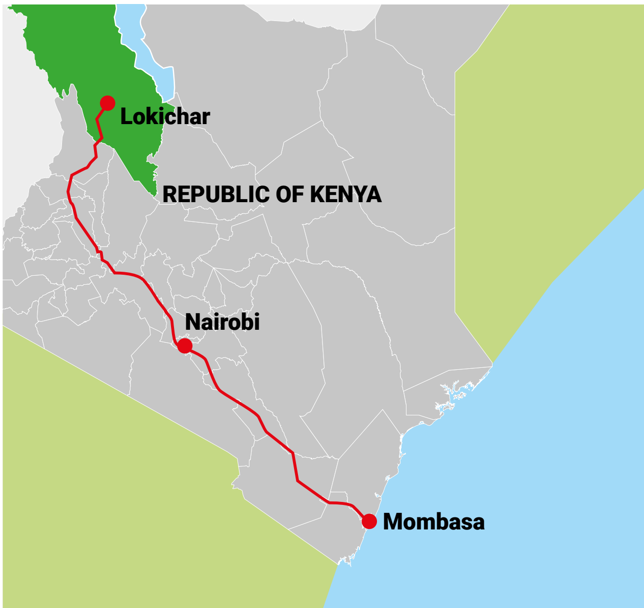
Members of Parliament from the two constituencies in question have openly discussed putting the company under pressure to force it to move planned oil wells from one constituency to another, in the (mistaken) belief that more wells in their constituencies means more jobs for their constituents. Their rhetoric has represented the division of employment opportunities between the sub-counties as a zero-sum game, in which one constituency can only gain at the expense of the other, and in which the other constituency is therefore a competitor. We observed no indications that violence was likely, but clear evidence that this is an emerging line of tension.

Community conflict with the state

Early Oil Pilot Scheme

During 2018 and 2019, the TKBV sold on the global market oil that had been extracted in the course of exploratory drilling. For contractual and technical commercial reasons, revenue generated through oil produced in exploration did not yield royalties for the government; the TKBV was entitled to use this revenue to finance its own activities in Kenya. This Early Oil Pilot Scheme (EOPS), as it is called, entailed oil tanker trucks journeying from Kapese, in Kenya's extreme northwest, essentially the length of Kenya, along a route that includes the cities and towns of Kitale, Eldoret, Nakuru, Nairobi, Voi, and Mombasa (see Map 2). EOPS has thus been visible to Kenyans in Turkana county and around the country, many of whom were well aware that oil produced in Kenya was being sold on the global market. As we shall discuss further below, it was a challenge for the TKBV and for the government to explain to stakeholders throughout Kenya how it was possible that no revenue was entering government coffers, even as anyone who was paying attention could see plainly that Kenya was exporting oil.

Map 2: Route of early oil pilot scheme



Kenya's oil law has been the subject of much discussion in Turkana county, where communities and local officials alike have understood that substantial tranches of the TKBV's royalties would be devolved to the TCG and to local communities in some form. As noted above, the Petroleum Act 2019, which clarifies the devolution of royalties, was only signed in 2019, although the terms of the debate among high-level political actors were well understood locally in Turkana county as it unfolded.

Part of the concern among local people about royalties arises from a lack of confidence that the government is capable of managing public funds effectively in the public interest. Rumours about individual elites appropriating public resources for personal use are ubiquitous in Kenya. The Kenyan press routinely alleges or implies corruption among politically influential people. These perceptions are substantiated in high-profile corruption cases that have come before Kenya's courts episodically over the past 30 years, and by the pervasiveness of bribe-seeking in low-level government offices, which many Kenyans experience first-hand. The apparent helplessness of formal institutions and governance processes to curb the problem further undermines public confidence. In 2020, Kenya received a score of 31 out of 100 from Transparency International, and ranked 124th out of 180 countries surveyed.[17]

When EOPS launched, communities perceived that, although Kenya was clearly exporting oil, people in Turkana had yet to benefit in any way from "our local content", by which they meant devolved royalties. They also saw an opportunity to draw national attention to what they perceived as the government's unwillingness to provide security in and around the oil zone. Their response to the launch of EOPS was to block the A1 road for six weeks, eventuating a sustained shutdown of the TKBV's operations in June and July of 2018. Recognising that a significant risk of violence was inherent in the protests and the response to the protests by public security forces, the TKBV evacuated non-essential staff.

In this instance, the company was not itself a target of community animosity but was instead the best leverage point that members of local communities could access in order to voice their concerns about the public management of royalties and assert the need for government action to improve security locally. Believing that they should be receiving oil production royalties from the government, and knowing for certain that they were not, communities protested by shutting down the transportation of oil from TKBV facilities. It is worth noting that the shutdown was very costly for the TKBV because staff and contractors continued to receive pay while the project itself could not be moved forward.

The actions or inactions of the TKBV played only a minor role in the shutdown and its consequences. The shutdown is nevertheless instructive about conflicts related to the private sector, demonstrating how quickly and easily conflicts about the resources that the company generates – particularly the way they are distributed, the mechanisms through which they are distributed, and perceptions of fairness or unfairness and transparency and opacity in their distribution – can emerge among local actors.

Implications

The foregoing analysis illustrates several things about the conflicts and tensions that emerged in relation to the TKBV oil project.

1. Local actors drove conflict in their efforts to position themselves in such a way as to receive benefits flowing from the company project. In the case of the Turkana-Pokot conflict, these efforts involved violence; in the case of sub-county politicians seeking greater benefits for their constituents, they contributed to a dynamic of social fragmentation.

2. The perception that the government was depriving local people of benefits to which they were entitled, and the expectation that the government would do so in the future, drove tensions and conflict between local communities and the government.
3. Efforts by the company to avoid adverse impacts of forcible resettlement contributed to social fragmentation within Turkana families.

The TKBV may have contributed to these conflict dynamics, but it is difficult to understand the TKBV's contributions as arising from any straightforwardly unethical conduct, obvious breaches of normative standards of responsibility, or a failure on the company's part to "behave rationally in ways that reflect its interest in peace and stability".[18] To mitigate the conflict impacts described in this paper, the TKBV would have had to understand the dynamics of the tensions and conflicts among different local actor groups and how its own presence and activities played into those tensions and conflict, and to have sought to mitigate conflict risks on the basis of those understandings.

The TKBV might, for instance, have attempted to convene stakeholders in Turkana and Pokot communities to negotiate benefit sharing agreements, possibly as part of a larger dialogue on conflict and violence in the region along the boundary between the two counties (presumably with the participation of other actors working locally in support of intercommunal peace agreements). It might have convened local families in Turkana county to discuss lease agreements and land acquisition in ways that allowed for a broader basis of consent for leases within individual families and for sharing the revenues derived from lease payments. A robust, broad-based communication effort, possibly in coordination with representatives of the government, might have fostered a widespread understanding of EOPS among local people and forestalled the demonstrations about "our local content" and the implications for local security. (We note that the TKBV did in fact lobby the government and work with local security actors in an effort to reduce violence in the oil zone.) Any of these courses of action would have gone considerably beyond preventing or mitigating social, environmental and human rights impacts caused directly by the company's actions, as required by the UN Guiding Principles and the IFC Performance Standards.

The conflict issues associated with the TKBV's Turkana project illustrate in several concrete ways the salience of fragility and weak governance as characteristics of the operational context that dramatically exacerbate the risk of conflict and violence associated with business operations. Responses of local actors to TKBV's presence, to actual and anticipated benefits flowing from the project and to each other, were informed fundamentally by factors in the context that are aspects of fragility, such as expectations of government corruption or inaction, perceptions (even if false) that harms are being committed, and histories of tension and violence between certain groups. Under conditions such as these, the introduction – or even simply the promise[19] – of new and substantial resources and material benefits such as those associated with a major private-sector investment has the potential to ramp up tensions and spark violence, even in the absence of any grievous breach of standards of responsible conduct by the company.

The evidence from Turkana county also foregrounds a distinction between harms committed by the company, on the one hand, and the company's impacts upon conflict, on the other. The experience of the TKBV suggests that some of the company's impacts upon conflict flowed from benefits that the company offered to certain stakeholders, and not from any harms at all. Other impacts on conflict arose from the expectation among the company's stakeholders that benefits would be distributed in certain ways. Still others arose from the (false) perception of harms committed by an actor other than the company. Taken together, they suggest that, in the case of the TKBV, the critically important impacts on conflict were effects that the company's presence and activities had on relationships between and among stakeholders and between groups of stakeholders – Turkana and Pokot, Turkana sub-clans, different members of Turkana families, and the Kenyan State and citizens in the oil zone – and not any discrete harms that the company inflicted on any individual or group.

These observations about conflict impacts speak to effectiveness in conflict mitigation. If conflict impacts – and in the case of the Turkana-Pokot conflict, significant violence – can arise in relation to a company project without the company committing concrete harms, then approaches to business operations that focus on avoiding harms – by, for example, not polluting the environment, avoiding abuses of human rights, and opposing moves to forcibly relocate communities – may not be effective in preventing or addressing impacts on conflict. Harm reduction and avoidance, in other words, are necessary but insufficient as forms of conflict management.[20]

Conclusion

The story of the TKBV in Turkana county illustrates how private-sector projects can drive conflict in ways that adversely affect their stakeholders and the stability of the operational context. Examples presented in this paper demonstrate that while conflict impacts may arise from a company's activities, they may also arise from its mere presence, and that while harms committed by the company may contribute to conflict, stakeholders' perceptions of events – whether accurate or otherwise, and irrespective or any actual harms – may drive conflict as well. In FCS, the effects of a company's presence and activities on conflicts in the operational context are far broader and more substantial than the direct impacts of the company's own business activities on discrete stakeholders or groups of stakeholders. Standards and processes that aim to mitigate direct harms caused by the company are important, but in FCS they are in themselves insufficient to mitigate conflict. Companies should assume that when operating in conflict-affected settings, mitigating conflict may call for approaches to operations that go beyond harm avoidance and social performance, and consider ways in which the company's presence and activities interact with local conflict dynamics that may appear to have nothing to do with the company itself.

Evidence from the experience of the TKBV in Turkana county suggests that the effects of the company's presence and activities on relationships between and among stakeholders and between groups of stakeholders were critically important conflict contributors. More generally, conflict is a quality of relationships between actors, and the case of Turkana county illustrates some of the ways in which these relationships can themselves be shaped fundamentally by histories of conflict and by specific aspects of state fragility. In such settings, the 'bad actor theory' of business and conflict does not account for the evidence from the field. Well-intentioned, responsible actors that do not sufficiently account for conflict may inflame it unintentionally. As observed by the UNWG, effective approaches in such contexts are rooted in conflict-sensitive operations and are predicated on an understanding of local conflict dynamics.

Endnotes

1 International Finance Corporation, Generating private investment in fragile and conflict-affected areas, Washington, DC: World Bank Group, 2019, p.14

2 UN Working Group on Business and Human Rights, Business, human rights and conflict-affected regions: Towards heightened action, New York: United Nations, 2020, p.10, para 42

3 Ibid, p.5, para 17

4 Ibid, p.9, para 41

5 The report was published in October 2020, after the events described in this paper; prior to that date, the report did not form a part of the human rights standards that obligated TKBV.

6 For more information see: https://www.international-alert.org/economy; https://www.international-alert.org/publications; https://www.cdacollaborative.org/what-we-do/responsible-business/

7 World Bank, FY21 List of Conflict-affected and Fragile Situations, 2021 http://pubdocs.worldbank.org/en/888211594267968803/FCSList-FY21.pdf. The Fund for Peace ranked Kenya as the 29th most fragile state (of 178); see https://fragilestatesindex.org/country-data/

8 The UN Guiding Principles lay out companies' duties with respect to human rights, in particular the duty to 'respect' (or to avoid abusing) human rights and to provide remedy when human rights are abused. Though the UNGP are not legally binding, their universal adoption by the UN Human Rights Commission means that the UNGP are recognised as the governing standard of corporate obligations in relation to human rights. The Voluntary Principles are widely recognised as a collective standard of good practice, intended to inform responsible security operations. The Voluntary Principles Initiative (VPI) is a multi-sectoral body that promotes the use and implementation of the Voluntary Principles. Tullow Oil and Total SE are members of the VPI; Africa Oil is not.

9 The Pokot are the ethnic group that neighbour the Turkana ethnic group to the southwest. The relationship between the two groups will be explored in more detail later in this paper.

10 Defined as males and unmarried females who trace their ancestry back to a single individual.

11 Kenya's Community Land Act 2016 allows communities to legally register and own their own lands. Representatives of Turkana county presented registration documents to the Ministry of Lands in 2019; but at the time of writing the petition had not been resolved.

12 http://kenyalaw.org/kl/fileadmin/pdfdownloads/AmendmentActs/2019/LandValueAmendmentAct2019.pdf

13 Threat of Tullow collapse looms, Petroleum Economist, 12 March 2020, https://pemedianetwork.com/petroleum-economist/articles/corporate-finance/2020/threat-of-tullow-collapse-looms

14 See, for instance: Kainuk town begins to rise from the ruins of banditry, The Standard, 24 July 2020, https://www.standardmedia.co.ke/business/article/2001379887/kainuk-town-begins-to-rise-from-the-ruins-of-banditry and, further back, Insecurity in northwest Kenya, The New Humanitarian, 14 April 2000 https://www.thenewhumanitarian.org/fr/node/182905

15 Kennedy, Mkutu and Wandera, Gerald, Policing the Periphery: Opportunities and Challenges for Kenya Police Reserves , Small Arms Survey, 2013, https://www.smallarmssurvey.org/sites/default/files/resources/SAS-WP15-Kenya-Policing-the-Periphery.pdf

16 Similar dynamics have also emerged in Kapedo, along the disputed boundary between Baringo and Turkana counties. See, for instance: Border dispute, guns, poverty blamed for Kapedo clashes, The Star, 19 January 2021, https://www.the-star.co.ke/counties/rift-valley/2021-01-19-border-dispute-guns-poverty-blamed-for-kapedo-clashes/

17 The average score for sub-Saharan countries was 31, where 100 is a perfect score; the ranking runs from 1, the least corrupt, to 180, the most corrupt. See Transparency International, Corruption perceptions index, 2020: https://www.transparency.org/en/cpi/2020/index/ken

18 International Finance Corporation, Generating private investment in fragile and conflict-affected areas, Washington, DC: World Bank Group, 2019, p.14

19 We note here that conflict over royalties and their devolution emerged before any royalties were paid, or even owed, per the terms of TKBV's contract.

20 See, for instance: A. Ernstorfer and B. Miller, Corporate impacts and the role of business in the global peace agenda, Cambridge: CDA Collaborative Learning, 2020; and M. Mayer, B. Miller and K. Nwajiaku-Dahou, Business and peace: It takes two to tango, Berlin: FriEnt – Working Group on Peace and Development, 2020

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