

WHY CONFLICT SENSITIVITY MATTERS FOR BUSINESS AND HUMAN RIGHTS

SUMMARY

The principles of conflict-sensitive business practice (CSBP) are well established. Companies operating in conflict areas must be mindful that there is a two-way dynamic between a company and its context, where the context impacts the company and the company impacts context. They must recognise that business activities should be carried out in a manner that prevents conflict and promotes peace. In particular, attention should be paid to issues that are likely to drive conflict, such as resettlement or security arrangements. In this paper, International Alert explores how the principles of conflict sensitivity can enhance and provide additional considerations for companies conducting human rights due diligence (HRDD) in conflict-affected settings (CAS). As HRDD is still a nascent and evolving field of practice, there is opportunity to apply learning from conflict sensitivity. The starting point is to explore the differences between conducting HRDD in CAS and a relatively more stable environment, and how conflict sensitivity can enhance HRDD. Alert outlines four key elements necessary for heightened due diligence in CAS – namely, how investment decisions are made, how impacts are identified and assessed, how to engage with stakeholders, and how to enhance positive impacts on human rights.

INTRODUCTION

CSBP is an approach for operating in CAS that seeks to mitigate business risk, reduce negative impacts on the environment and maximise positive ones. Alert published its original guidance on CSBP in 2005 and since then much has changed. For one, the organisation has gained considerable experience by supporting some 18 companies in its implementation in at least 15 countries, spanning four continents. Significant external policy developments have also taken place, including the UN Human Rights Council's endorsement of the UN Guiding Principles on Business and Human Rights (UNGPs) and subsequent tools on how to operationalise them. Therefore, it is timely for Alert to mark the 10th anniversary of CSBP by reviewing lessons learned and building on the existing guidance.

Although a decade has passed since the publication of the guidance for extractive industries, the core principles of CSBP have not changed.² Companies operating in conflict areas must be mindful that there is a two-way dynamic between a company and its context, where the context impacts the company and the company impacts context. They must recognise that business activities should be carried out in a manner that prevents conflict and promotes peace. In particular, attention should be paid to issues that are likely to drive conflict, such as resettlement or security arrangements. Therefore, the foundations of CSBP have not changed and the original guidance still remains relevant.

Business has a role – sometimes knowingly, sometimes without full knowledge of what is happening – in shaping the conditions that decide whether instability will evolve into a durable peace or collapse into open war.¹

However, there have been numerous lessons learned across 10 years of practice. Firstly, it has allowed us to know the private sector and to understand how decisions are made. We have learned about what motivates companies to implement CSBP and what implementation needs to look like if we want to be successful. It has also shaped the way

¹ International Alert, Conflict-sensitive business practice: Guidance for extractive industries, 2005, p.1, <http://www.international-alert.org/resources/publications/csbp-extractive-industries-en>

² While Alert aims to develop guidance that is relevant in other sectors as well as extractives, for the purposes of this research the focus is on the extractive sector.

Human rights and peacebuilding

From a conceptual point of view, human rights and peacebuilding are linked as a ‘virtuous circle’. Peaceful societies – those that manage conflict without resorting to violence – also have a better realisation of human rights. Moreover, a society where rights are protected and respected is a society with functional access to remedy, stronger citizen welfare and civil society, and an accountable government and private sector. These elements in turn create a platform for managing conflicts without resorting to violence.

As conceptually it is possible to address both when operating in CAS, Alert’s starting point is to explore the degree to which integrating conflict-sensitivity approaches into HRDD can strengthen it and to address some of the outstanding issues of due diligence in CAS.

Figure 1: The ‘virtuous circle’ of human rights and peacebuilding



we engage with the private sector: how to build trust, break down perceptions and stereotypes, and even deal with the reputational risks of engaging with companies. Today, we know that CSBP is much more than a toolkit: it has permeated all our work and is now one of the criteria for our corporate engagement (extractives and non-extractives), for our political economy analysis, for our programming and advocacy. All these valuable lessons will inform and enhance the way companies do HRDD in CAS.

While there has been substantial uptake of the UNGPs, particularly around company efforts to undertake more rigorous HRDD, implementation by companies is still underdeveloped and remains largely an ‘elite practice’. This is particularly the case in CAS, where human rights violations are more likely to take place and where there is little guidance for companies to meet the unique challenges of implementing HRDD in these environments. In our research, we have identified a number of ways in which the field of conflict sensitivity can complement the aims and interests of the developing business and human rights approach. As an established field of practice, conflict sensitivity can draw on a wealth of experience and lessons learned to highlight additional considerations for companies conducting HRDD in CAS.

Given our findings, Alert aims to share learning from the field of conflict sensitivity to highlight the additional considerations that companies need to address when conducting HRDD in CAS, and to identify areas where conflict sensitivity can complement and enhance due diligence processes.

The UNGPs consider HRDD as the process by which companies can identify the range of potential and actual human rights impacts (both positive and negative) associated with their business operations and can act upon the findings to prevent or manage them. While the UNGPs recognise the complexities of CAS, they do so primarily by addressing state responsibility. However, by doing so, UNGP7 also alludes to expectations for business: “because the risk of gross human rights abuses is heightened in conflict-affected areas, states should help ensure that business enterprises operating in those contexts are not involved with such abuses”. Since corporate responsibility is afforded less consideration, there is a need to develop guidance targeted at companies that will help them to conduct conflict-sensitive HRDD in CAS.

To guide this process, Alert identified the following two questions to frame its thinking on HRDD in CAS:

- What are the differences between conducting HRDD in CAS and in a relatively stable environment?
- How can conflict sensitivity enhance HRDD?

To address these questions, Alert convened a Corporate Committee comprising Anglo American plc, Barrick Gold Corporation, Kosmos Energy, Newmont Mining Corporation, Royal Dutch Shell, Total SA, IPIECA, the global oil and gas industry association for environmental and social issues, and the International Council on Mining and Metals (ICMM). Alert is also consulting with other stakeholders in the course of the guidance development, including non-governmental organisations (NGOs), think tanks, consultancy firms and academia.

This report captures Alert's research and consultations to date and outlines the conceptual framework upon which the final guidance will be based. It is intended as a working document to share our emerging thinking and to stimulate broader discussion. Alert will continue to consult and seek feedback throughout the guidance development process.

The final guidance will be published in late 2016. Its primary audience will be practitioners involved in conducting or supporting HRDD processes or integrating conflict-sensitivity approaches in the private sector, as well as the wider business community.

STATE OF PLAY

In addressing the question of what conflict sensitivity can add to HRDD, the starting point is to consider what is already known in terms of understanding the nature of CAS, its implications for HRDD and what further attention or elaboration is required. This section outlines some of the main findings.

What we know

About the nature of CAS

- **Common traits of CAS:**³ While acknowledging that each context is complex in its own way, there are some common characteristics of CAS that impact due diligence. While non-exhaustive, some of the most outstanding traits of CAS involve issues related to:
 - **Levels of resilience** – from the individual through to the community and the state in relation to the ability to absorb and recover from the negative impacts of external stresses and shocks, for instance, those resulting from conflict situations;
 - **Security** – including the presence of armed or criminal groups, social instability and violent protest;
 - **Governance** – including poor regulation, low capacity, accountability and resources of state institutions, poor rule of law, unequal access to justice and corruption, and the impact these have on the business environment. Inadequate governance undermines the system of checks and balances, which works well in better-governed regulatory environments and upon which standard due diligence systems have been developed;⁴ and
 - **Socio-economic conditions** – including poverty, levels of education, inequality and exclusion, and religious or ethnic divide.
- **Companies are not neutral actors:** In CAS, companies will not be perceived as neutral. By virtue of their presence, they will be seen to be aligned more closely with some actors than others. In highly politicised contexts, this is especially pertinent.

High-risk environment versus CAS

Many organisations refer to high-risk environments, particularly when conducting due diligence. In these terms, it refers to a range of potential factors that generate increased risk in specific circumstances. Factors such as technology, the environment, and health and safety can contribute to the categorisation of 'high risk'. For example, drilling in the Arctic could be considered a high-risk environment due to the associated environmental and technical challenges.

CAS are a specific subset of high risk, where the common traits of levels of resilience, security, governance and socio-economic conditions combine and interact to create an environment where operations require careful monitoring and management. Although there are areas of overlap with some other forms of risk, in CAS these risks take on different dimensions when interacting with, and forming part of, conflict dynamics.

³ The common traits encompass the five elements of assessing fragility as outlined in OECD, States of fragility 2015, Paris: OECD, 2015, p. 13, <http://www.oecd.org/dac/states-of-fragility-2015-9789264227699-en.htm>

⁴ Institute for Human Rights and Business, From red to green flags: The corporate responsibility to respect human rights in high risk countries, London: IHRB, 2011, p. 30, http://www.ihrb.org/news/from_red_to_green_flags.html

- **Business relationships are affected by conflict dynamics:** Contractors, partners and the rest of the value chain also experience risks and impacts associated with conflict. For example, there may be an increased risk that security providers hire individuals who have conducted human rights violations in the past. There may also be a risk that contractors, and even more so subcontractors, may be targeted by criminal or armed groups for extortion purposes.
- **The role of the state:** In addition to aspects of inadequate governance, in CAS the role of the state is even more critical for preventing or managing conflict and its escalation into violence. When states or institutions lack the capacity, accountability or legitimacy to mediate relations between citizen groups, between citizens and the state, and between citizens and business, it makes citizens vulnerable to violence.⁵
- **Human rights violations in conflict-affected settings:** In CAS, the likelihood and severity of human rights violations is considerably higher. Furthermore, the most vulnerable members of society are likely to disproportionately experience more negative impacts and to be less resilient to external shocks.
- **The issue of legacy:** In CAS, legacy is often a prominent feature, especially legacies from the state. As will be seen, this is particularly pertinent to how investment decisions are made and how impacts are identified and assessed. In these circumstances, we argue that effective analysis and management is only possible through coordination and collaboration with stakeholders.
- **Accumulation and combination of factors:** The risk of conflict and violence in any society (national or regional) is “*the combination of the exposure to internal and external stresses and societal capability for coping with stress*”.⁶ In both consultations and workshops, participants emphasised that what makes CAS different from other operating environments is how factors combine, interlock and magnify, with potential ‘tipping points’ that could catalyse tensions.
- **From respect to protect:** It is often the case that companies are expected to fill the gap left by the state in many of the countries where they operate. In CAS, these expectations are even greater and can encompass issues such as providing basic services, resolving legal procedures (for instance, land titling) and even expectations of company involvement in peace or transition to democracy negotiations. In human rights terms, responsible companies are now expected to protect human rights as opposed to only respect them.

Implications for HRDD

- **Dynamic nature of CAS:** The volatility of CAS requires company responses that are both rapid and flexible.⁷ While it is recognised that HRDD is an ongoing process, in CAS it may need to be undertaken more robustly and often. HRDD should also have the flexibility to respond to a more dynamic or volatile environment.
- **Typologies of conflict:** CAS is a broad concept that can apply to a wide range of settings, from those of interstate war to those where there is social unrest or cycles of repeated violence and instability.⁸ Although all kinds of conflict can cause harm, the type of conflict a company is facing will also inform how it can conduct its due diligence.
- **Standard approaches to risk management are not enough:** In the first place, they do not provide a full picture of the potential human rights impacts in CAS as they focus on the risks to the business without sufficient attention to the risks to others. Moreover, standard approaches to risk management focus on only one source of risk and “miss other factors [such as conflict] that increase the risk of severe human rights impacts”.⁹
- **Going beyond:** Ten years ago, Alert was one of the first to argue that, while peacebuilding can appear to be beyond companies’ legitimate activities, they do in fact have a role to play beyond the provision of revenue and jobs. “To play this role means taking a comprehensive and holistic approach to the short and long-term challenges facing societies engaged in, emerging from or threatened by conflict, and contributing their competencies toward their alleviation.”¹⁰

5 World Bank, *World development report 2011*, Washington DC: World Bank, 2011, p.xvi

6 Ibid., p.7

7 Danish Institute for International Studies, *Fragile situations background papers*, Copenhagen: DIIS, 2008, p.48

8 As noted by the World Bank: “21st-century violence does not fit the 20th-century mold. Interstate war and civil war are still threats in some regions, but they have declined over the last 25 years ... but because of the successes in reducing interstate war, the remaining forms of conflict and violence do not fit neatly either into ‘war’ or ‘peace’, or into ‘criminal violence’ or ‘political violence’. Many countries and subnational areas now face cycles of repeated violence, weak governance, and instability.” World Bank, 2011, Op. cit., p.2

9 Shift, *Human rights due diligence in high risk circumstances: Practical strategies for business*, New York: Shift, 2015, p.5, http://shiftproject.org/sites/default/files/Shift_HRDDinhighriskcircumstances_Mar2015.pdf. Parenthesis added by International Alert.

10 International Alert, 2005, Op. cit., p.29

- **More robust stakeholder engagement:** Stakeholder engagement is an area that can be very challenging for companies, and in CAS this is the case even more so. Existing guidance on this suggests that stakeholder engagement should be conducted earlier on, with broader and more varied types of stakeholders.¹¹ Closely connected to this is the call for enhanced transparency as the effects of rumours and misinformation can combine with conflict elements (for instance, ethnic divide) to magnify risks for both the company and its stakeholders.
- **Company management systems:** HRDD often builds on existing company management systems and processes. This aids in identifying and assessing impacts and also ensuring that they are acted upon through integration into management plans.¹² Linking back to company risk management systems enables more traction and buy-in within the company. However, in doing so, it is also important to ensure that risks resulting from conflict dynamics are fully understood and captured.

What we don't know

While some general conclusions can be drawn from the existing body of literature on what is required of due diligence in CAS, there are also some considerations that have not received sufficient attention or application and that are central to conducting HRDD in CAS. This section outlines some of these considerations.

Due diligence and the roles of state and business in CAS

Many attribute the success and wide uptake of the UNGPs to its ability to build consensus around the separate roles of state to protect human rights and the business responsibility to respect human rights. The UNGPs do outline that business responsibility exists even – *and especially* – when the state does not fulfil its duties. Furthermore, in scenarios where the national context makes it challenging to meet responsibilities, companies must still ensure they operate to international standards. As explored in the previous section, lack of state capacity, accountability or legitimacy is often a factor in CAS. However, what this means in practice for a company's fulfilment of due diligence is still not fully understood or addressed.

Moreover, the reality is that in these contexts there are expectations that business actors will fill this gap. While Alert is aware of examples of companies working on institutional strengthening or public-private partnerships, it is out of the scope of this research to explore more broadly what this means for business roles. Therefore, the final guidance will focus solely on implications for due diligence in CAS.

More robust stakeholder engagement – in practice

Research has shown that stakeholders who are likely to experience significant impacts but have low influence are the most critical to engage when assessing and acting upon human rights risks and impacts. In CAS, where the most vulnerable members of society are likely to disproportionately experience more negative impacts and be less resilient to external shocks, it is even more pertinent.

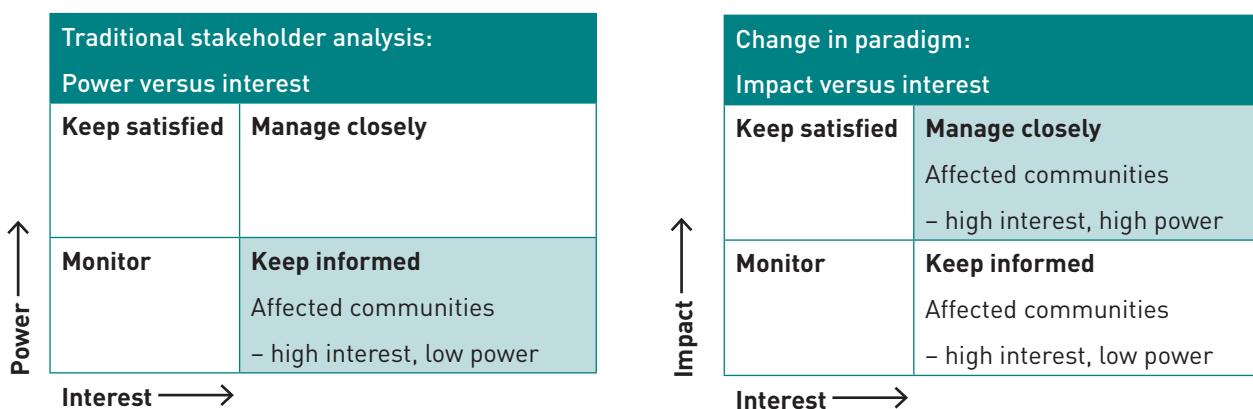
In fact, HRDD and conflict sensitivity share a key principle, which is putting meaningful stakeholder engagement at the forefront of the discussion. Both approaches thus shift the paradigm underlying standard stakeholder mapping and prioritisation as it changes the focus of the analysis to who is being impacted not who has power (see Table 1). Whereas, in the standard approach affected communities

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would end up in the 'keep informed' category (low power, high interest), under the human rights lens affected communities would fall into the 'manage closely' category (high impact, high interest). In the spirit of conflict sensitivity, Alert would also encourage changing the language where possible to imply a more collaborative relationship – that is, changing from the term 'manage closely' to the expression 'work with closely'.

11 Shift, 2015, Op. cit., p.15

12 IPIECA, Human rights due diligence: A practical guide to implementation for oil and gas companies, London: IPIECA, 2012, p.4

Table 1: Stakeholder mapping from a human rights perspective

As this has profound implications in terms of HRDD, and especially so in CAS, consideration is required on how to foster more robust stakeholder engagement in company-led due diligence processes, as “effective stakeholder engagement is one of the most powerful and under-utilized tools we have in addressing human rights risks”.¹³ Moreover, Alert recognises that there are a number of practical challenges for more robust engagement in CAS. The sensitivity and volatility of CAS can make access to actors and information difficult. Companies also need to consider that engagement can potentially put local people at risk. For example, while it is advisable to include stakeholders in the design of due diligence to ensure that its scope and parameters capture how impacts are experienced, due diligence can occur during periods of heightened conflict when it may be even more difficult to engage stakeholders for reasons of practicality as well as conflict sensitivity.

Considering the shift in focus suggested by the conflict-sensitivity and human rights approaches, it is important to ask what more robust stakeholder engagement looks like in practice. Alert believes that some of the best practice from the field of conflict sensitivity can be incorporated or adapted for the due diligence process, and can help to identify some additional considerations for engaging stakeholders in CAS. Because the body of practice on conflict sensitivity has had more time to mature, there is an opportunity to learn from successful initiatives as well as from those more challenging ones.

Full scope of due diligence

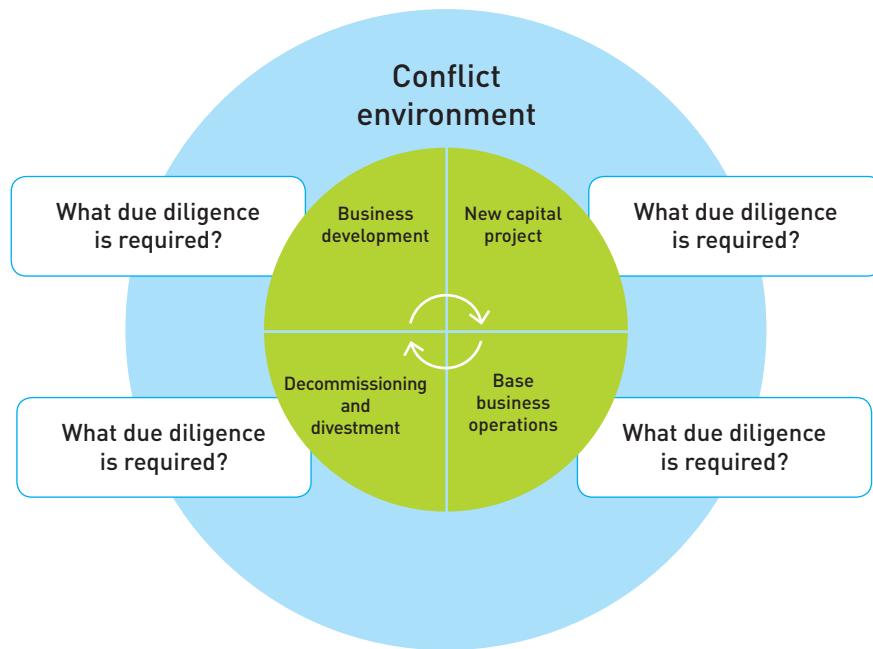
The wide uptake of the UNGPs also means that a significant amount of implementation guidance has been developed to support companies. However, much of the focus has been on the assessment of impacts, rather than the full due diligence cycle of design, assessment, integrating and acting upon findings, tracking responses and communicating how impacts are addressed.¹⁴ While this is a good starting point, it highlights the fact that HRDD is still a nascent and developing field, and that human rights impact assessment is considered a ‘lower hanging fruit’ that can often fit into existing company practices such as assessing environmental and social impacts. Alert thus aims to explore how conflict sensitivity can enhance HRDD in CAS by refocusing on the full due diligence cycle and enhancing the efficacy of the UNGPs’ implementation. Alert is also seeking to understand how the full due diligence cycle plays out across the extractives project lifecycle and across conflict dynamics, especially as human rights issues and how they are experienced will differ depending on both the phase of activity and the type of conflict. For example, in the construction phase of a large project, there are likely to be particularly pertinent human rights impacts, such as in relation to migration and labour practices, which could be powerful conflict drivers for communities. If the construction is in an area with high levels of poverty, poor access to basic services and tensions between ethnic/social groups, immigration and hiring practices are even more salient. The increase in personnel and activities during the construction phase can also attract the attention of criminal or even armed groups, making contractors more vulnerable to criminal activities such as theft, extortion or bribery. Therefore, it is important to identify how HRDD is shaped by project lifecycle and conflict dynamics, and where this will bring different or additional considerations.

CAS and access to remedy

¹³ United Nations High Commissioner for Human Rights, *The corporate responsibility to respect human rights: An interpretive guide*, New York and Geneva: UNHCR, 2012, p.8, http://www.ohchr.org/Documents/Publications/HR.PUB.12.2_En.pdf

¹⁴ The UNGPs outline the due diligence process as including assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses and communicating how impacts are addressed (UNGP 17). Alert also includes the design of due diligence in its approach, as this is essential to the efficacy of the rest of the process; the UNGP does not exclude it, but rather does not specifically call it out.

Figure 2: Due diligence across the project lifecycle



The UNGPs expect that “where a company identifies that it has caused or contributed to negative human rights impacts, it should provide for or cooperate in their remediation through legitimate processes”.¹⁵ In CAS, particularly where security risks are high, these considerations may raise additional risks associated with, but not limited to, complicity in human rights violations. Due diligence can help with identifying this.

There are many other elements to consider. For one, companies will encounter a wide variety of legacy issues concerning legacies from other projects but also legacies associated with conflicts. Examples include governments who have systematically failed to fulfil their duties and the increasing expectation of affected groups to receive remedy. Similarly, other conflict traits such as weak state capacity, corruption, lack of accountability or technical resources also become a barrier for affected stakeholders to access remedy.

Specifically for contexts of internal armed conflicts, the question of access to remedy can become even more serious for companies as it entails legal risks associated with what many of them perceive as accepting responsibility over past abuses occurring in their areas of operation. Many difficult questions may arise. For example, should companies provide additional benefits to victims of human rights violations that took place in their areas of operation (such as victims of land grabbing by armed or criminal groups or victims of actions by public security present in the area)? Does this mean that they are accepting some level of legal responsibility over what happened? Is it better then to do nothing?

In addition, if a negative impact on a right – or even a violation of one – is identified, from a legal perspective it can have broader and more serious implications. This is because it can be linked to international law and can also raise the question of complicity in human rights violations committed by others. Such a scenario can be especially critical in the case of joint ventures with state firms. Recognising the importance of this issue, the guidance will offer some considerations regarding access to remedy in CAS.

WHAT ELSE IS THERE TO CONSIDER?

Going back to the original guiding question on what else there is to look out for when conducting HRDD in CAS, through the research and consultations to date Alert has found at least four elements that help to answer the question: the process of how investment decisions are made, the way impacts are identified and assessed, the way to engage with stakeholders, and the need to enhance positive impacts and contribute to peace. These are explored in the section below.

¹⁵ Shift and IHRB, Oil and gas sector guide on implementing the UN Guiding Principles on Business and Human Rights, Brussels: European Commission, 2013, p.69, http://www.ihrb.org/pdf/eu-sector-guidance/EC-Guides/O&G/EC-Guide_O&G.pdf

How investment decisions are made

As profit-making outfits, companies prioritise financial due diligence. However, from a civil society perspective, Alert has heard that there is not always a sense of sufficient consideration of non-technical risks.¹⁶ In CAS, where the environment is more volatile and there is greater likelihood of human rights issues affecting investments (and where investments are needed the most), incorporating HRDD pre-investment is an opportunity to create a more comprehensive picture of risk. Introducing human rights and conflict-sensitivity considerations at the pre-investment stage may also allow for more leverage and control of how issues are addressed as, once the decision is made, influence – especially with the state and/or the current asset owner – is significantly lower.

Incorporating human rights due diligence pre-investment is an opportunity to create a more comprehensive picture of risk.

This is especially the case where legacy issues may come into play as previous relationships set a precedent and expectations. Raising these issues at the pre-investment stage may be a way to engage in dialogue on what a company expects to be in place in order to proceed.

In practice, the amount of leverage will depend on a range of factors. Firstly, it will depend on the nature of the operation – for example, whether it is a joint venture (JV) and whether the company is the operating partner or not. Moreover, in the current economic climate of low commodity prices, extractives are predicted to operate in an increasing number of JVs.

Another factor is the skills and remit of those ‘at the negotiating table’ in relation to agreeing production sharing contracts (PSCs) and other investment decisions and processes. Not only do company representatives involved in negotiations need to understand the relevance and business case for incorporating human rights and conflict-sensitivity considerations in investment discussions, and have the knowledge and skill sets to do so, they also need to be empowered by senior leaders to do so. Given the potential sensitivity of the issues, and what is at stake for the company, raising such issues at this stage is only possible with senior leader support and endorsement.

Leverage is limited and companies must make strategic decisions about where and when to exercise it. They must also take into consideration their degree of influence, which varies depending on whether an operation

More could be done to enhance the potential of the pre-investment phase in order to address future risks, avoid costs associated with them and work towards co-responsibility of all actors.

is a joint venture, operated or non-operated (among other options) and the percentage of participation. Throughout the course of our consultations, there is recognition that more could be done to enhance the potential of the pre-investment phase in order to address future risks, avoid costs associated with them and work towards co-responsibility of all actors. For instance, there have been some suggestions around

factoring other risks into the acquisition cost. It may be possible, for example, to factor into the budget the time it takes to engage with stakeholders and costs associated with legacies (perhaps including conflicts) inherited from past asset owners.

From a civil society perspective, the option of divestment should be part of the discussion, depending on the magnitude and severity of the conflict facing the company. This also means analysing the impact of pulling out and what this would mean for communities, including if it would lead to a vacuum for less responsible actors to fill.

Further research will be needed to understand pre-investment processes and points of leverage from a human rights perspective, while recognising that commercial sensitivities mean that less information is publicly available.

How impacts are identified and assessed

Human rights impact assessments (HRIAs) aim to identify adverse human rights impacts in order to prevent human rights abuses and to remedy them when prevention fails. HRIAs can – and should – be conducted in all operating environments, whether conflict-affected or not. They can be integrated into other company systems, most commonly environmental and social impact assessments. They can be stand-alone in the form of dedicated HRIAs or take a hybrid form.¹⁷

¹⁶ It may be that political risk is considered at this stage, but this is largely high-level analysis at a country level.

¹⁷ While outside the scope of this paper, Alert acknowledges that further discussion is warranted on the relative merits and appropriateness of stand-alone versus integrated approaches.

However, if a company is operating in an area where there is actual or potential conflict (and it could potentially escalate into violence), the identification and assessment of impacts needs to be underpinned by conflict analysis. Conflict analyses, or as framed in the original CSBP guidance, Conflict Risk and Impact Assessments (CRIA), are aimed at providing companies with a detailed understanding of the conflict situation in the country and site of operation. They are designed to analyse the most significant factors, causes and dynamics driving conflict. Their intent is to help reduce conflict-related risks and costs for a company and to mitigate conflict-aggravating impacts for all affected groups while identifying opportunities to contribute to peace.

A comparative analysis between HRIAs and CRIs identifies some points of convergence as follows:

- **Stakeholder engagement:** Early, consistent, meaningful and empowering stakeholder engagement is at the heart of both processes if done well and with the right intentions. Practical experiences and examples of how this can be enhanced are required to move the discussion and practice forward.
- **Project cycle:** Ideally, both processes are initiated at new country entry, projects or investment phases, as part of assessment of the overall risk management strategy, with reviews triggered by both the project lifecycle and changes to the operating context.
- **Triggers:** Both processes are typically triggered when there are significant concerns over governance (such as corruption, lack of access to remedy, political instability or violence), socio-economic issues (dependence on natural resource exports, inequality, exclusion or high unemployment), security (such as presence of armed opposition groups, or state forces without strong public institutions) or vulnerable groups (including indigenous peoples).

While there are complementary aspects, there are also some caveats:

- Due to the changing nature of CAS, companies find themselves revisiting conflict analysis more often because they are integrated into risk assessment and the nature of the environment demands it. An HRIA does not necessarily lend itself so easily to the demands of the volatility as it is a heavier process with more significant resource implications.
- HRIAs are not able to capture the complexity of conflict dynamics in the same way that a conflict analysis would as their objectives and outcomes differ substantially.
- In CAS, different factors combine, reinforce and exacerbate one another in ways that are difficult to understand and respond to solely through an HRIA.

Therefore, Alert posits that HRIAs and conflict analyses address *different but complementary* subject matters. Combining conflict analyses and HRIAs produces a more balanced approach than either on its own allows, as conflict analysis can highlight additional risks and impacts that may not be captured by a traditional HRIA in a way that is also better able to respond to the dynamic nature of CAS. Conflict analysis can also enhance HRIA by building in more responsiveness and identifying the triggers to revisit due diligence – as is required more often than in more stable operating contexts.

Human rights impact assessments and conflict analyses address different but complementary subject matters. Combining them therefore produces a more balanced approach than either on its own allows.

How to engage with stakeholders

The challenge for more robust stakeholder engagement in CAS is how to do it in a way that is practical, meaningful and mindful of the conflict context. For instance, it needs to take into consideration risks that could be generated for stakeholders by engaging in the process (some of which are clearly linked to conflict dynamics such as the presence of an armed group exerting pressure on stakeholders). There also needs to be consideration of how conflict dynamics can interact with stakeholder engagement. In particular, stakeholder engagement in CAS should pay particular attention to gender considerations and the views of vulnerable groups.

The nature of CAS also means that there will be more stakeholders with real or perceived interests in business operations. Therefore, stakeholder engagement needs to be broader. Some caution is required as legitimate

project stakeholders are at risk of being co-opted by political motivations and agendas, particularly those who are most vulnerable. Moreover, a company must consider how to deal with certain groups such as armed non-state actors (ANSAs). While not usually seen as ‘stakeholders’, such groups often have a real interest in and influence regarding the project and can pose a serious risk to projects and communities.

In addition to being aware of the conflict context and how it can affect stakeholder engagement, conflict sensitivity calls for more community participation. This is also echoed in HRDD, particularly in the assessment of human rights impacts. In fact, Oxfam argues that the tools and processes developed by companies to assess their human rights impacts “often fail to seek out the expectations or assertions of the very people whose rights they are at risk of violating”¹⁸ and instead suggests community-led impact assessments to fill that gap.

This approach also champions educating and sensitising communities on their rights so that they can become advocates and engage in assessing human rights impacts.¹⁹ However, Alert adds a note of caution as, if not done well and in a conflict-sensitive manner, it can actually drive conflict as communities can be put at risk by engaging in company processes.

Alert also argues that there is a step that precedes rights-training and rights-advocacy: communities need to better understand the most important technical aspects of the industry and what they can expect from its presence –

for example, what is involved in building a pipeline, what it looks like and what impact it is expected to have in their everyday lives (such as moving livestock or changing routes to school). Without this knowledge, it is very difficult for communities to meaningfully participate in the assessment of impacts as they will not have sufficient knowledge of how their rights might be impacted by company operations. Since there is a risk

that information conveyed by the company is often very technical – and ‘translating’ this clearly and simply is a skill in itself – there is a clear role for civil society in supporting these processes. Moreover, it is possible that information is not reaching all the right people in an organisation – for instance, if only men attend meetings with companies, there is a risk that information is not passed on or is incorrectly conveyed to women.

The final guidance will provide examples and suggestions of ways in which companies operating in CAS can successfully engage stakeholders. By drawing on real examples encountered in our experiences with companies, we aim to demonstrate that with creativity and commitment companies can engage stakeholders meaningfully as part of due diligence processes, even in the most complex of environments. This requires consideration of the type of conflict facing a company in the first place and what this means across each phase in the due diligence cycle. Conflict sensitivity is central to gaining these insights.

Enhancing ‘the virtuous cycle’ between peace and human rights

The fourth element of the answer to the question regarding additional considerations when conducting HRDD in CAS lies in the need to use due diligence to identify where companies can enhance positive impacts. As outlined in the UNGPs, negative human rights impacts cannot be offset by positive ones; nevertheless, companies should understand the full potential for both positive and negative impacts in the environments where they operate.

Given the connection between realising human rights and peace, as highlighted in the introduction, enhancing positive impacts in CAS can lead to peace and stability. As a peacebuilding organisation, Alert believes that maximising positive impacts on the human rights situation can

Peace factors

Alert has identified five peace factors. They are integral parts of an interconnected web in which the presence or absence of each has an influence on the presence or absence of others.

The five peace factors are:

1. Power – how leadership is provided, how people relate to each other and how they gain their sense of belonging;
2. Income and assets – how people make their living and manage their assets;
3. Fairness, equality and effectiveness of the law and legal process – how justice is applied and received;
4. Safety – how people are able to keep safe from harm; and
5. Wellbeing – how people’s mental and physical wellbeing is maintained and how their aspirations are considered.

¹⁸ I. Tamir and D. Kearney, *Community voice in human rights impact assessments*, Washington DC: Oxfam America, 2015, p.1, <http://www.oxfamamerica.org/explore/research-publications/community-voice-in-human-rights-impact-assessments>

¹⁹ Ibid., pp.15-17

lead to better economic and social conditions, which can eventually result in better enjoyment of human rights and therefore contribute to peace. In CAS, this can also involve addressing root causes and drivers of conflict, supporting peacebuilding processes or transitions to democracy, and helping to alleviate the effects of conflicts on people (for instance, working with victims of armed conflicts or in humanitarian aid).

If peace is when people, groups, societies, countries and regions manage their conflicts without violence, there are certain conditions – or ‘peace factors’ – that contribute to and enable peace. While acknowledging that some areas of peacebuilding are outside the scope of private sector actors, it is possible for companies to actively support peacebuilding.²⁰ Moreover, the HRDD in CAS opens up the possibility of enhancing the virtuous circle between human rights and peace. In the final guidance, we will identify how a conflict-sensitive approach in HRDD processes can help to maximise positive benefits – in particular, contributions to the five peace factors that inform all of Alert’s methodology. This will also support the development of the second supplement to CSBP on business contributions to peace.

CONCLUSIONS

In the course of research and consultations, it has become clear that the field of conflict sensitivity can offer much to the emerging field of practice on business and human rights. While there has been substantial uptake of the UNGPs, particularly around company efforts to undertake more rigorous HRDD, there is little guidance on what this means for companies operating in CAS and what the conflict-sensitivity field can bring to the discussion. With this in mind, Alert convened a Corporate Committee comprising representatives of Anglo American plc, Barrick Gold Corporation, Kosmos Energy, Newmont Mining Corporation, Royal Dutch Shell, Total SA, IPIECA and ICMM to support and provide input to the discussions. Alert has also held consultations with other actors in the course of the research, including NGOs, think tanks, consultancy firms and academia.

To guide this process, Alert identified the following questions to frame its thinking on HRDD in CAS:

- What are the differences between conducting HRDD in CAS and in a relatively stable environment?
- How can conflict sensitivity enhance HRDD?

This background paper identifies at least four additional elements resulting from operating in CAS that warrant particular consideration as follows:

- 1. How investment decisions are made:** In CAS, incorporating conflict sensitivity into the pre-investment stage can help to create a more comprehensive picture of risk and a more realistic investment plan and timetable. It can also allow for more leverage with the state and/or current asset owner – especially where legacy issues may come into play. The amount of leverage depends on a range of factors such as the nature of the operations and the skills and remit of the company negotiating team, including whether they receive support from the highest echelons to raise sensitive issues. Some civil society actors have suggested that, in certain circumstances, considering divestment should be an option.
- 2. How impacts are identified and assessed:** In CAS, conflict analysis needs to underpin HRDD and in particular HRIAs, as this can bring to light additional or different risks that increase the likelihood of severe human rights violations. For example, a conflict analysis may reveal how allocation of employment opportunities in a context of deep ethnic divisions can increase the risk of discrimination and hinder the right to work (and therefore livelihoods) of those who have been left out, while exacerbating one of the root causes of that particular conflict. It might show how the need for increased army checkpoints due to insecurity, combined with poor human rights records of public security and past cases of gender-based violence associated with an armed conflict, may increase the vulnerability of women passing through these areas to collect water or wood (and the impacts this can have on their livelihoods). Anecdotal evidence indicates that there is increased responsiveness when HRIA and CRIA are combined, helping to identify how factors from both dynamics (business and conflict) come together, accumulate and reach tipping points. This also allows for changes in context to be quickly identified and acted upon.

²⁰ UN Global Compact Business for Peace, Advancing the sustainable development goals by supporting peace: How business can contribute, New York: UN Global Compact, 2015, p.10, https://www.unglobalcompact.org/docs/issues_doc/Peace_and_Business/AdvancingSDGsPeace.pdf

3. How to engage with stakeholders: Stakeholder engagement in CAS needs to be even more robust and mindful of the conflict context and what risks participation can pose for affected groups. In addition, there is a greater call for broadening stakeholder engagement to capture the perspectives of all those with an interest in or who are at risk of impact – for instance, by including more communities or considering the interests of other actors such as ANSAs.

4. How to enhance the virtuous circle between peace and human rights: Companies should understand the full potential of both positive and negative impacts in the environments where they operate. Given the link between realising human rights and peace, enhancing positive impacts in CAS can lead to peace and stability. One way to maximise positive impacts in CAS is to support sustainable peace and stability as framed by the five peace factors – namely, in terms of power, income and assets, fairness, equality and effectiveness of law, safety and wellbeing.

Taking into account the points listed above, Alert will seek to address and develop these considerations, integrating them into the steps of the HRDD cycle that are most relevant for companies operating in CAS. At the same time, we will seek to explore how the different types of conflict affect HRDD.

In addition, Alert aims to raise particularly challenging and complex issues related to HRDD in CAS for discussion. Alert does not claim to have all the answers and recognises the diversity of views concerning what is expected of companies in these very complex situations. However, it is important to initiate candid and open discussions. Some initial observations regarding these challenging and complex issues are highlighted below.

1. Where national law is weak or not enforced, how can companies work to the higher international standard?

It is important to anticipate where national law is weak or contradictory to international standards, so that there is time to ensure that company processes, systems and procedures reflect ways in which it is possible to work in such situations. For example, it may be possible to identify alternative solutions, such as developing labour committees where national law does not recognise the right to freedom of association and collective bargaining. This means trying to be as proactive as the circumstances allow. Working in sector-wide, multi-stakeholder initiatives may also start to address some of these gaps in national law.

2. What does legacy from other actors, especially the state, mean for due diligence in conflict-affected environments?

Understanding the issue of legacy is complicated and it is not a natural strength for companies. Conflict sensitivity will help companies to understand legacy as a conflict driver. Where the state is involved, a good conflict analysis can also help to distinguish the root causes – whether it is from lack of will or lack of capacity. This will in turn help to determine the scope for response.

During the pre-investment phase, the company may have more leverage. It may be possible, for example, to engage with the government or the current asset owner and to request that certain issues be addressed for the investment to be made – such as including conflict costs and the time it takes to deal with them in the asset price. Exploring the role of home states and trade treaties is also important to identify additional points of leverage.

3. What should companies do when there are victims of human rights violations that took place in their area of operation?

As stated in the UNGPs, companies should use whatever leverage they may have with government authorities to prevent violations from recurring, while encouraging states to provide access to remedy to victims. The first step for companies is to find out what happened and the extent to which the company may have played a role (causing, contributing to or linked to the violation). It is important to understand the type of violation that took place, and whether it is an isolated event or a more systematic or structural issue. This will also help to determine the options for response.

PLANS FOR THE FINAL GUIDANCE

This background paper serves as the conceptual framework that will underpin the guidance due to be published in late 2016. The guidance will:

- Identify and detail where conflict sensitivity can add the most value and is most critical to HRDD in CAS. It will be structured to follow the due diligence cycle, with considerations (as outlined in this report) aimed at strengthening due diligence. For instance, it will look at how better stakeholder engagement can be conducted throughout the cycle;
- Map the extractives project lifecycle against conflict dynamics to identify what risks are heightened at different project phases, and what implications this will have for conducting HRDD;
- Include a typology of conflicts to understand what risks and impacts can be expected of each and what this means for HRDD;
- Provide examples and case studies for each key due diligence step in order to extract lessons and recommendations from existing experiences in the conflict-sensitivity field that can be used for or adapted to a HRDD process in CAS; and
- Include ‘flashpoints’, as in the original CSBP guidance, to have an in-depth view of key issues, define the business case and shed some light on how to address them, such as engaging with vulnerable groups and addressing legacies from the state and other companies in CAS.

Alert will continue to consult with a range of stakeholders throughout the guidance development process. Any parties who are interested in getting involved should contact Roper Cleland at rcleland@international-alert.org or Yadaira Orsini at yorsini@international-alert.org.

ADDITIONAL REFERENCES

Danish Institute for Human Rights and IPIECA, Integrating human rights into environmental, social and health impact assessments, Copenhagen and London: DIHR and IPIECA, 2013

Organisation for Economic Co-operation and Development, Risk awareness tool for multinational enterprises in weak governance zones, Paris: OECD, 2006

Shift, Bringing a human rights lens to stakeholder engagement, Shift Workshop Report No. 3, New York: Shift, 2013

UN Global Compact/Principles of Responsible Investment, Guidance on responsible business in conflict-affected and high-risk areas: A resource for companies and investors, New York: UN Global Compact, 2010

This paper was written by International Alert's Head of Economic Development for Peace, Yadaira Orsini, and Senior Programme Officer for Corporate Engagement, Roper Cleland.

About International Alert

International Alert helps people find peaceful solutions to conflict. We are one of the world's leading peacebuilding organisations, with nearly 30 years of experience laying the foundations for peace. We work with local people around the world to help them build peace, and we advise governments, organisations and companies on how to support peace. Find out more at www.international-alert.org

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