

Responsible risk-taking in conflict-affected countries: the need for due diligence and the importance of collective approaches

John Bray and Antony Crockett

John Bray is a Director at the Tokyo office of Control Risks, a business risk consultancy. His international experience includes varied projects with private sector companies as well as multilateral agencies and NGOs operating in complex environments.

Antony Crockett is Senior Associate at the London office of Clifford Chance LLP. He is admitted to practice as a lawyer in England & Wales and in Australia. He holds the degrees LLB (Hons) (Melbourne), BSc (Melbourne), and LLM (London School of Economics).

Abstract

This article discusses some of the challenges that may be encountered by companies seeking to adhere to the Voluntary Principles on Security and Human Rights and the United Nations Guiding Principles on Business and Human Rights when operating in conflict-affected countries. The authors argue that corporate respect for human rights may not be sufficient to correct or compensate for state failure and also suggest that the leverage or influence enjoyed by individual companies in relation to the conduct of security forces and host governments may be limited, particularly in times of crisis. There is therefore a need for a collective approach to human rights risks in

conflict-affected countries, and this should focus on public security sector reform and good governance as well as on corporate due diligence.

Keywords: risk assessment, due diligence, private sector, conflict-affected areas, corporate responsibility, human rights, Voluntary Principles, Guiding Principles, case studies.



In this issue of the *International Review of the Red Cross*, Hugo Slim discusses the varied roles of business actors in conflict-affected countries as ‘victims, perpetrators, suppliers, humanitarians, peacebuilders, and preventers’.¹ For us, the most important role of business in conflict-affected settings is to drive economic recovery and growth. There is little prospect of lasting settlement to conflict without equitable economic development, and this will not happen without the private sector. On the other hand, careless or irresponsible private sector activity can contribute to ongoing cycles of violence in conflict-affected countries, or may undermine fragile political settlements. The central question is therefore not *whether* business can make a positive contribution, but *how* to ensure that this happens.² In this paper we discuss two key international standards relating to human rights which provide essential guidance for businesses operating in high-risk areas. We also review some of the challenges that may be encountered in implementing them.

The first standard discussed is the Voluntary Principles on Security and Human Rights (hereinafter ‘Voluntary Principles’). The Voluntary Principles were published in 2000 and provide guidance to companies on how to ensure the security of their assets and personnel in high-risk regions while also ensuring respect for human rights. The Voluntary Principles are the product of a multi-stakeholder initiative, originally sponsored by the United States (US) and United Kingdom (UK) governments and involving a select group of human rights NGOs and multinational companies operating in the extractive sectors.³ The relatively small number of participants lends greater focus to the initiative, but also limits its impact. That said, many non-participating companies and governments regard the Voluntary Principles as an important source of guidance.

The second standard we discuss is the United Nations (UN) Guiding Principles on Business and Human Rights, which were finalised in 2011.⁴ The Guiding Principles mark a major step forward because they are applicable to all

1 Hugo Slim, ‘Business actors in armed conflict: towards a new humanitarian agenda’, in this issue.

2 For an earlier discussion of related arguments, see John Bray, ‘The role of private sector actors in post-conflict recovery’, in *Conflict, Security and Development*, Vol. 9, No. 1, 2009, pp. 1–26.

3 The current participants in the Voluntary Principles process include eight governments (Canada, the Netherlands, Norway, Colombia, Switzerland, the United Kingdom, the United States, and Australia), twenty-two oil, gas, and mining companies, and eleven human rights non-governmental organisations. The text of the Voluntary Principles is available at: www.voluntaryprinciples.org/principles/introduction. All internet references were accessed on 29 May 2013 unless otherwise stated.

4 See Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework, UN Doc. A/HRC/17/31, 21 March 2011, unanimously endorsed by the United Nations Human Rights Council on 16 June 2011. Individual Guiding Principles in this article are referred to as GP 1, GP 2, etc.

companies across the entire range of human rights. Their endorsement by the UN Human Rights Council followed a six-year process of multi-stakeholder consultation led by Professor John Ruggie, who in 2005 was appointed as the Special Representative of the UN Secretary-General on the issue of human rights and transnational corporations and other business enterprises.

Having enthusiastically welcomed the Guiding Principles, states have since been active in seeking to implement them. Meanwhile, other international instruments relating to corporate responsibility – including the Organization for Economic Co-operation and Development (OECD)'s Guidelines for Multinational Enterprises⁵ and the International Finance Corporation's Performance Standards on Social and Environmental Sustainability⁶ – have been revised to reflect the recommendations contained in the Guiding Principles. Many companies are also taking steps to align internal policies and risk management processes with the Guiding Principles.

The success of the Voluntary Principles and, more recently, the Guiding Principles is laudable, but it must be recognised that many challenges remain. In relation to conflict-affected countries and other high-risk areas, the scale of the problem should not be understated. The World Bank's *World Development Report 2011* estimates that more than 1.5 billion people live in fragile and conflict-affected countries or in countries with very high levels of criminal violence.⁷

In this paper we highlight some of the challenges that businesses may face when operating in these environments. In doing so, we aim to identify relevant lessons from past practice for companies seeking to implement the Guiding Principles and/or the Voluntary Principles. Our observations draw upon our experience advising private sector clients operating in these areas and are informed by our participation in international policy debates.

The first part of this paper very briefly discusses the reasons why business enterprises invest in conflict-affected countries notwithstanding the risks involved in doing so. The second part of the paper presents three case studies drawing on international companies' experience in relation to conflict-affected countries. The case studies underline the importance of identifying risks in advance, as well as the challenges of responding to human rights risks in a crisis situation. The third and concluding part emphasises some of the ways in which states and other actors can encourage responsible risk-taking and create an environment that enables the private sector to make a positive contribution to peacebuilding and post-conflict economic development.

5 Organization for Economic Co-operation and Development (OECD), *OECD Guidelines for Multinational Enterprises*, OECD Publishing, 2011.

6 International Finance Corporation (IFC), *IFC Performance Standards on Environmental and Social Sustainability*, 2011, available at: www.ifc.org/performancestandards.

7 World Bank, *World Development Report 2011: Conflict, Security and Development*, Washington D.C., 2011, p. 2 (and accompanying fn. 3).

Opportunities and risks

The ways in which individual companies perceive and assess the opportunities and risks associated with doing business in conflict-affected countries depend on numerous factors, including their size, sector, and risk appetite. Some companies perceive the economies of such countries as offering significant opportunities. In particular, countries recovering from conflict are often seen as zones of untapped potential and pent-up consumer demand for previously unavailable products or services. These countries may also be rich in natural resources. Obvious examples include Sierra Leone and the Democratic Republic of Congo in the early 2000s, and more recently, Myanmar (also known as Burma) and South Sudan.

Private sector investment in conflict-affected countries may contribute to the fulfilment of important social and policy objectives, including peacebuilding⁸ and post-conflict economic development.⁹ Because the private sector can play a positive role in these countries, governments and international organisations may offer incentives which aim to offset some of the risks that companies face. For example, companies prepared to risk capital in conflict-affected countries may be able to secure political risk guarantees (from national or multilateral agencies), finance on favourable terms, or access to preferential trade opportunities.

In many cases, companies see first-mover advantages in setting up operations in new markets ahead of their competitors. One of the most difficult calculations is when to make the first move. Companies that make the wrong call by investing too early may be exposed to extraordinary risks, including political risks, security risks, and risks to their reputation in cases where private sector activity is seen to cause or contribute to violence and conflict. Petroleum and mining companies are particularly exposed when investing in conflict-affected areas. The significant costs incurred at an early stage by investors in these sectors mean that walking away may not be an easy option if the political or security climate deteriorates.

Assessing risks: the evolving normative framework

Historically, companies considering investments in emerging markets were concerned with risks to their operations including, for example, the risk of expropriation, currency risk, and risks to company assets and employees resulting from conflict or violence. Since the late 1990s, leading companies have also begun to take greater account of the risk that their operations in such contexts may have

8 See the case studies in Jessie Banfield, Canan Gündüz, and Nick Killick (eds), *Local Business, Local Peace: the Peacebuilding Potential of the Domestic Private Sector*, International Alert, London, 2006. See also Safal Ghimire and Bishnu Raj Upreti, 'Corporate engagement for conflict transformation: conceptualising the business-peace interface', in *Journal of Conflict Transformation and Security*, Vol. 2, No. 1, 2012, pp. 77–100.

9 On this point, see United Nations Development Programme (UNDP), *Post-Conflict Economic Recovery: Engaging Local Ingenuity. Crisis Prevention and Recovery Report 2008*, UNDP Bureau for Crisis Prevention and Recovery, New York, 2008, especially pp. 53–57 and 117–120.

adverse impacts on the rights and interests of third parties. However, companies' awareness and sensitivity to these risks remains very uneven.

The Voluntary Principles provide an example of how attitudes to risk had begun to evolve in the early 2000s. They recognise that security 'is a fundamental need, shared by individuals, communities, businesses and governments'.¹⁰ The Voluntary Principles expressly acknowledge that companies can play a positive role in conflict-affected countries, in particular by supporting security sector reform and efforts to improve governance. It follows (although the Voluntary Principles do not make the point explicitly) that companies may play a negative role and that irresponsible private sector activities may contribute to human rights abuses, violence, and conflict.

The Voluntary Principles also recognise that the risks for companies in conflict-affected countries include the possibility that security forces assigned to protect their assets, employees, and operations may commit human rights abuses and/or use force inappropriately. In this regard, the Voluntary Principles recommend that companies should conduct thorough risk assessments and that such assessments should:

consider the available human rights records of public security forces, paramilitaries, local and national law enforcement, as well as the reputation of private security. Awareness of past abuses and allegations can help Companies to avoid recurrences as well as to promote accountability. Also, identification of the capability of the above entities to respond to situations of violence in a lawful manner (i.e., consistent with applicable international standards) allows Companies to develop appropriate measures in operating environments.¹¹

The Guiding Principles incorporate many of the same principles as the Voluntary Principles but, as noted above, have a much wider scope in that they are applicable to all companies across the entire range of human rights, rather than focusing solely on security issues in the extractive sector.

Like the Voluntary Principles, the Guiding Principles state that operating in conflict-affected countries may 'increase the risks of enterprises being complicit in gross human rights abuses committed by other actors'.¹² In such contexts, the Guiding Principles recommend that companies should: (i) 'respect the standards of international humanitarian law' in areas where there is ongoing armed conflict;¹³ and (ii) 'treat the risk of causing or contributing to gross human rights abuses as a legal compliance issue'.¹⁴

Of course, risks to human rights in conflict-affected countries do not arise solely in relation to armed conflict, security, and the use of force, and therefore the standards of international humanitarian law are not the only relevant standards. The Guiding Principles recognise that the activities of business enterprises can cause

10 Voluntary Principles, above note 3.

11 *Ibid.*

12 Guiding Principles, above note 4, p. 21.

13 *Ibid.*, p. 14.

14 *Ibid.*, p. 21.

or contribute to adverse impacts ‘on virtually the entire spectrum of internationally recognized human rights’.¹⁵ Moreover, the Guiding Principles describe the responsibility to respect human rights as a standard of conduct that companies should observe ‘wherever they operate’.¹⁶

The Guiding Principles introduce the concept of human rights due diligence as a process which allows business enterprises to ‘identify, prevent, mitigate and account for how they address their impacts on human rights’.¹⁷ In short, human rights due diligence allows business enterprises to ‘know and show’ that they respect human rights.¹⁸ Guiding Principle 7 explains that the human rights due diligence process includes assessment of ‘actual and potential human rights impacts, integrating and acting upon the findings of risk assessment, tracking responses, and communicating how impacts are addressed’.¹⁹ The Guiding Principles further state:

Conducting appropriate human rights due diligence should help business enterprises address the risk of legal claims against them by showing that they took every reasonable step to avoid involvement with an alleged human rights abuse. However, business enterprises conducting such due diligence should not assume that, by itself, this will automatically and fully absolve them from liability for causing or contributing to human rights abuses.²⁰

The commentary to GP 18 introduces risk assessment as ‘the initial step in conducting human rights due diligence’.²¹ Further, the commentary states:

In order to gauge human rights risks, business enterprises should identify and assess any actual or potential adverse human rights impacts with which they may be involved either through their own activities or as a result of their business relationships.²²

The commentary to GP 17 further notes that human rights due diligence can be included within ‘broader enterprise risk-management systems’ provided that it meets the basic requirement of identifying risks to rights holders, not just the company.²³ In relation to impact assessment, a recent report issued by the International Council on Mining and Metals points out that in many cases, it will be appropriate to integrate human rights impact assessments into wider social and environmental impact assessment processes.²⁴ It is left to companies to decide, on a case-by-case basis, whether to conduct stand-alone human rights impact assessments.

15 *Ibid.*, p. 13.

16 *Ibid.*

17 *Ibid.*, p. 15.

18 *Ibid.* The Guiding Principles also refer (at pp. 15–16) to the adoption of a human rights policy commitment by business enterprises as ‘the basis for embedding their responsibility to respect human rights’.

19 *Ibid.*, p. 16.

20 Guiding Principles, above note 4, p. 17.

21 *Ibid.*, p. 17.

22 *Ibid.*

23 Guiding Principles, above note 4, p. 16.

24 International Council on Mining and Metals, *Human Rights in the Mining and Metals Industry: Integrating Human Rights Due Diligence into Corporate Risk Management Processes*, London, March 2012,

The case for conducting stand-alone human rights impact assessments is likely to be stronger in conflict-affected countries. In this regard, a document published by the UN Office of the High Commissioner for Human Rights (OHCHR), entitled *The Corporate Responsibility to Respect Human Rights: an Interpretive Guide*, points out that:

the risks of involvement in gross human rights abuse tend to be most prevalent in contexts where there are no effective government institutions and legal protection or where there are entrenched patterns of severe discrimination. Perhaps the greatest risks arise in conflict-affected areas, though they are not limited to such regions.²⁵

The limitations of a legal compliance approach

It is relevant to consider how the recommendation to treat the risk of causing or contributing to gross human rights abuses as a 'legal compliance' issue might inform companies' understanding of the nature of the risks which may be encountered when operating in conflict-affected countries. In relation to this recommendation, the OHCHR's *Interpretive Guide* states:

Where enterprises are at risk of being involved in gross human rights abuses, prudence suggests that they should treat this risk in the same manner as the risk of involvement in a serious crime, whether or not it is clear that they would be held legally liable. This is so both because of the severity of the human rights abuses at stake, and also because of the growing legal risks to companies as a result of involvement in such abuses.²⁶

There is some tension between the use of the word 'involvement' in this context, which might be interpreted very broadly, and the more narrowly defined circumstances in which a business enterprise may be held criminally complicit or otherwise legally liable for human rights abuses perpetrated by others.

It has been argued that exposure to civil liability under domestic law may justify a 'legal compliance' approach.²⁷ However, although examples of civil lawsuits

available at: www.icmm.com/page/75929/human-rights-in-the-mining-and-metals-industry-integrating-human-rights-due-diligence-into-corporate-risk-management-processes.

25 United Nations Office of the High Commissioner for Human Rights (OHCHR), *The Corporate Responsibility to Respect Human Rights: an Interpretive Guide*, 2012, p. 80, available at: www.ohchr.org/Documents/Issues/Business/RtRInterpretiveGuide.pdf.

26 *Ibid.*, p. 79. The *Interpretive Guide* also explains (at p. 6) that '[t]here is no uniform definition of gross human rights violations in international law, but the following practices would generally be included: genocide, slavery and slavery-like practices, summary or arbitrary executions, torture, enforced disappearances, arbitrary and prolonged detention, and systematic discrimination. Other kinds of human rights violations, including of economic, social and cultural rights, can also count as gross violations if they are grave and systematic in scope and nature, for example violations taking place at a large scale or targeted at particular population groups.'

27 See, for example, Jonathan C. Drimmer, 'Human rights and the extractive industries: litigation and compliance trends', in *Journal of World Energy Law and Business*, Vol. 3, No. 2, 2010, pp. 121–139. Arguments in favour of a 'legal compliance' approach often point to the risk of civil suits in the US or UK

in the US or, somewhat less frequently, in European courts may resonate with the few multinationals that have been sued in those countries, it should also be recognised that many of the business enterprises operating in conflict-affected countries include small and medium-sized enterprises, local companies, and sole traders who will not be familiar with these precedents and who are less likely to become targets for litigation.

It also bears emphasising that there have been very few cases in which it has been determined that a business enterprise is liable for complicity in human rights violations. This means that there is very little case law from which conclusions about the type of conduct which may expose a company to liability can be drawn. In contexts where legal liability for complicity is in theory a possibility,²⁸ a very high threshold applies. For example, in cases involving questions of whether an individual has aided or abetted violations of international humanitarian law, guilt depends on showing that the individual knowingly provided practical assistance, encouragement, or moral support which substantially contributed to the perpetration of a crime.²⁹

Because legal principles relating to complicity are highly technical, it is not clear that the recommendation to treat the risk of complicity in gross human rights abuses as a legal compliance issue is helpful to companies that do not have a sophisticated understanding of the risks involved.³⁰ Likewise, many corporate lawyers will not be expert in issues of complicity or corporate liability for human rights abuses and may fail to identify relevant risk factors. For example, in high-risk areas, complying with local law or other legal obligations (such as a contractual obligation to supply equipment or other resources to security forces) may immediately imply a risk of involvement in gross human rights abuses.

courts. It is less clear that corporations headquartered in other jurisdictions are exposed to liability. See, for example, Peter Muchlinski, 'The provision of private law remedies against multinational enterprises: a comparative law perspective', in *Journal of Comparative Law*, Vol. 4, No. 2, 2009, pp. 148–170.

- 28 For example, plaintiffs have sought to sue corporate defendants for 'aiding and abetting' human rights abuses perpetrated by foreign governments or other third parties under the US Alien Tort Claims Act, 28 USC § 1350 ("ATS") which provides that '[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States'. Courts in the United States have disagreed as to whether the ATS establishes jurisdiction over corporations, a question which the US Court of Appeals for the Second Circuit answered in the negative in 2010 in *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010) ("*Kiobel*"). On appeal, although the US Supreme Court appeared poised to answer this question, its long-awaited decision issued on 17 April 2013, addressed instead the broader issue of whether the ATS applies extraterritorially; that is, whether US courts have jurisdiction under the ATS over claims involving foreign plaintiffs, foreign defendants, and conduct occurring outside the US. A majority of the Court held that a presumption against extraterritoriality applies to the ATS and that the presumption is not displaced in circumstances where all the relevant conduct took place outside the United States (see *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. (2013)). The Court did not reach the question for which permission to appeal was initially granted: i.e. whether corporations can be liable under the ATS at all.
- 29 See, Norman Farrell, 'Attributing criminal liability to corporate actors: some lessons from international tribunals', in *Journal of International Criminal Justice*, Vol. 8, No. 3, 2010, pp. 873, 877–878, 883, and 889–891.
- 30 Of course, part of the reason for the Guiding Principles advocating a legal compliance approach is the grave nature of abuses that may occur in conflict-affected countries. The message is that companies should take the risk of gross human rights abuses very seriously, even if there is no immediately obvious link with their operations or proposed operations.

The recommendation in the Guiding Principles that companies should adopt a 'legal compliance' approach to human rights risks in conflict-affected countries may create the danger that risk-averse companies, on advice from risk-averse lawyers, decide not to invest there. In saying this, it is assumed that responsible companies are likely to be more risk-averse (and vice versa). If this assumption is correct, overstating the risk of legal liability may have the undesirable effect of discouraging responsible companies from investing in conflict-affected countries, leaving the door wide open for cowboy operators.

The question of equipment transfers provides a useful illustration of the complex issues that may arise in the course of identifying and assessing risks. A businessperson reading the Guiding Principles and accepting that she would not wish her company to be involved in human rights abuse might decide it was not a good idea to provide equipment to security forces where there was a risk that those security forces might commit human rights abuses. In this regard, a lawyer might advise her that provision of equipment or any form of material support and assistance to security forces also exposed her company to the risk of legal liability if human rights abuses were committed by those forces.

Companies seeking to apply the Voluntary Principles have grappled with these kinds of problems since 2000. The Voluntary Principles acknowledge that companies may provide equipment to public security but go on to say that if they do so, they should 'take all appropriate and lawful measures to mitigate any foreseeable negative consequences, including human rights abuses and violations of international humanitarian law'.³¹ In practice, companies may have no realistic alternative but to provide equipment and other forms of support to security forces. In particular, companies may determine that risks to the security of their personnel and property would be increased if equipment or support were not provided.

It may also be the case that provision of equipment and material support can help to prevent human rights abuses. For example, companies may decide to provide food or shelter to under-resourced security forces on the basis that soldiers who are fed and housed properly are less likely to commit abuses than soldiers who are not. Host governments may also (and not infrequently do) request that companies provide vehicles, equipment, and other resources for security forces whose main role is to protect their operations. Such requests expose companies to risks, but they also open up the possibility of engaging the host government in dialogue regarding the conduct of security forces.

Consultation, influence, and leverage

The Voluntary Principles emphasise the importance of consultation between companies and governments regarding security and human rights issues. In relation to transfers of 'lethal and non-lethal equipment', the Voluntary Principles state that

31 Voluntary Principles, above note 3.

companies should consider the risks as well as ‘the feasibility of measures to mitigate foreseeable negative consequences, including adequate controls to prevent misappropriation or diversion of equipment which may lead to human rights abuses’.³²

The Voluntary Principles also recommend that companies should, ‘to the extent reasonable’, monitor the use of such equipment and investigate any cases in which it is used inappropriately. If companies receive credible reports of human rights abuses by government security forces in their areas of operation, they should ‘urge investigation and that action be taken to prevent any recurrence’.³³

More importantly, the Voluntary Principles envisage that companies should ‘use their influence’ to promote human rights principles, including the principle that ‘the rights of individuals should not be violated while exercising the right to exercise freedom of association and peaceful assembly, the right to engage in collective bargaining, or other related rights of Company employees’.³⁴ Similarly, the Guiding Principles refer to the concept of ‘leverage’ in explaining how companies can discharge the responsibility to respect human rights in cases where they have identified a risk that their activities may ‘contribute to’ human rights abuses committed by third parties.³⁵ However, the case studies in the next section suggest that individual companies acting alone, or in a crisis situation, may lack sufficient leverage to mitigate the risk of human rights abuses in conflict-affected countries.

Lessons from experience: three case studies

The first two case studies in this section involve examples of risk assessment and mitigation and seek to demonstrate the practical utility of the recommendations contained in the Voluntary Principles and the Guiding Principles, as well as some of their limitations, particularly with regard to the concept of leverage. These two case studies do not identify the companies or countries involved for reasons of client confidentiality. The third case study, which is based on public sources, concerns Anvil Mining in the Democratic Republic of Congo (DRC): Anvil’s experiences point to the difficulties that private sector actors can encounter if they fail to conduct effective human rights due diligence. The Anvil case study also shows that responsible corporate behaviour in conflict-affected countries is not sufficient in

32 *Ibid.*

33 *Ibid.*

34 *Ibid.*

35 Guiding Principles, above note 4, p. 18: ‘Where a business enterprise contributes or may contribute to an adverse human rights impact, it should take the necessary steps to cease or prevent its contribution and use its leverage to mitigate any remaining impact to the greatest extent possible. Leverage is considered to exist where the enterprise has the ability to effect change in the wrongful practices of an entity that causes a harm.’

itself; it must be complemented by security sector capacity-building and governance reform.

Case study 1: the importance of pre-entry risk assessment

In this case study, a multinational company found itself caught up in a violent but relatively short-lived internal conflict in a developing country. The company owned an important infrastructure asset and had operated it without incident for more than five years. It had entered the country during peacetime following the resolution of a long-running civil war. When the conflict flared up again, parties on both sides were accused of committing serious human rights abuses and war crimes.

The company depended on public security forces to protect its employees and property, and was party to an agreement to supply the security forces with equipment, including radios and petrol. In addition, the company would make small cash payments to individual members of the security forces to cover the cost of food and drink while they were deployed at the company's facilities. The contract did not include any provisions relating to the use of the equipment and resources provided by the company or, more broadly, relating to the conduct of the security forces.

When the conflict erupted, the company initiated a crisis management plan leading to the evacuation of most of its foreign staff. Concern was raised that the security forces might be involved in the commission of human rights abuses or violations of international humanitarian law. In this regard, it was suggested that the contract to provide the security forces with equipment and other resources created a risk that the company would be accused of complicity if human rights abuses occurred. Attention then turned to how this risk might be mitigated.

One of the options considered was whether it would be feasible for the company to suspend the provision of payments and equipment to the security forces. A risk identified with this approach was that if the payments were stopped, the security forces would be likely to abandon their duties. The company was also concerned that without transport supplied by the company, it was likely that security personnel would be unable to travel between their barracks and the company's facility.

Having concluded that suspending the provision of resources to the security forces would expose its personnel and property to unacceptable risks, the company considered whether there were alternative ways to mitigate the risk that the provision of resources would, to use the language of the Guiding Principles, 'contribute' to human rights abuses. In this regard, the company also took account of the recommendations regarding consultation with governments and state actors included in the Voluntary Principles.

The company sought to consult with its home government. Although it is a participant in the Voluntary Principles, the home government in question appeared ill-equipped and unprepared to provide meaningful advice or assistance to the company. In particular, the home government stated that it was unable to help the company make formal contact with international agencies, local government

officials, or representatives of other governments who had maintained a diplomatic presence in the country throughout the conflict.

The first lesson of this case study is, therefore, that home governments will not always be prepared or equipped to assist companies (even though both the Voluntary Principles and Guiding Principles recommend that companies may benefit from advice and assistance from their home governments). The second and more important lesson relates to the importance of early and thorough risk assessment. When the contract for provision of resources to the security forces was signed, it appears that no adequate risk assessment was undertaken.

The company had originally invested in the country during a peaceful period, but it was certainly not the case that the risk of violent internal conflict could have been discounted at that time (the fact that security was required itself was an indicator of conflict risk). Moreover, the human rights record of the public sector security forces was far from ideal. In that context, attempting to implement appropriate risk management mechanisms in the midst of a crisis was extremely difficult. If a risk assessment had been undertaken at an early stage (as is recommended in the Voluntary Principles and Guiding Principles), it might have been deemed appropriate, for example, to include provisions in the security contract expressly stating the company's expectations that the security forces should comply with international standards such as the UN Basic Principles on the Use of Force and Firearms.³⁶ In addition, the company could have sought to establish a dialogue with the host government regarding security, or a training programme for the security forces, to minimise the risk of human rights abuses or inappropriate use of force.³⁷

Case study 2: using government leverage to mitigate human rights risks

This case study concerns an extractive sector project in a conflict-affected country. The project was to be financed by a syndicate of international banks, and finance was subject to compliance with the IFC Performance Standards.³⁸ The project sponsors and lenders were advised by a number of international law firms and various risk consultants.

The project sponsors had commissioned a social and environmental impact assessment, which was provided to the prospective lenders. This assessment indicated that members of the host country's armed forces would be deployed to provide security at the project site or to protect project-related infrastructure. The assessment failed to observe that the host country's armed forces were composed

36 See United Nations Rule of Law, *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials: Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990*, available at: <http://fr.unrol.org/files/BASICP~3.PDF> (last visited 14 June 2012).

37 The events referred to in this case study took place prior to the publication of the Guiding Principles. A company seeking to implement the Guiding Principles in a similar context might also decide that establishing some form of grievance mechanism to allow stakeholders to raise issues regarding the conduct of security forces would also assist to mitigate risk.

38 IFC, *Performance Standards*, above note 6.

mainly of persons undertaking compulsory national service and that there were reports of national service personnel working on civilian projects. The assessment also failed to note that various foreign governments and international organisations, including the International Labour Organization (ILO), were concerned that the national service programme in the country contravened international law relating to forced labour.

These matters raised the concern that the project sponsor and lenders would be exposed to allegations of complicity in human rights abuses if national service personnel undertook any civilian work connected with the project. This concern arises, in particular, because the ILO Forced Labour Convention (No. 29) of 1930 prohibits a government or state agency from imposing or permitting the imposition of forced or compulsory labour 'for the benefit of private individuals, companies or associations'.³⁹ The OECD Guidelines for Multinational Enterprises also call on business enterprises to 'contribute to the elimination of all forms of forced or compulsory labour'.⁴⁰

A labour expert was engaged to visit the country in order to assess the risk, among others, that national service personnel would be forced to undertake work which benefited the project company, such as the construction of project-related infrastructure. This additional risk assessment established that there was no risk that national service personnel would work directly for the project, but some risk that they might be forced to work constructing or providing security for project-related infrastructure. In view of this risk assessment, the lenders determined that they could only support the project if the host government provided guarantees that no national service personnel would be forced to work in relation to such services.

Negotiating the relevant guarantees involved significant effort and required foreign governments and international financial institutions to assist the company in its negotiations with the host government. The host government ultimately agreed to give a written undertaking to the project sponsor addressing the concerns regarding national service personnel. The host government also agreed to participate in a monitoring mechanism involving regular inspections by an independent expert. It is unlikely that the host government would have agreed to these measures if foreign governments had not exercised their influence.

As with the first case study, one of the main lessons is that early and thorough risk assessment is crucial. This case study additionally demonstrates that consultation with host governments and appropriate use of influence and leverage can help mitigate the risk that private sector activities will cause or contribute to human rights abuse. However, the challenges and sensitivities associated with the use of leverage should not be underestimated. The case study also shows that risks of human rights abuses linked to the conduct of security forces are not the only risks that may arise in conflict-affected countries: the human rights of security personnel, for example, must also be taken into account.

39 International Labour Organization (ILO), Convention concerning Forced or Compulsory Labour, Art. 4, adopted on 28 June 1930.

40 OECD, *Guidelines for Multinational Enterprises*, above note 5, p. 35.

Case study 3: equipment transfers in a conflict zone

An incident in October 2004 involving Anvil Mining also illustrates the importance of thorough risk assessment and the need for companies to act with extreme caution in relation to equipment transfers in high-risk areas. Anvil acquired a copper and silver mine in Dikulushi in Katanga province, DRC, in 1998, and it came into production in 2002. Anvil subsequently applied for political risk insurance from the World Bank's Multilateral Investment Guarantee Agency (MIGA). After protracted negotiations, the company's application was approved in September 2004. A few weeks later, the DRC armed forces suppressed a minor rebellion in Kilwa, some 50 kilometres from Dikulushi, with widespread loss of life.⁴¹

Anvil was implicated in alleged abuses committed at Dikulushi because it had provided logistical support to the DRC armed forces. In particular, Anvil had permitted soldiers to travel on airplanes chartered by the company and in company vehicles.⁴² In June 2005 an Australian Broadcasting Corporation documentary drew international attention to the episode and implied that the company had been involved in human rights abuses. In response to the subsequent public outcry, then World Bank President Paul Wolfowitz asked the bank's Compliance and Advisory Ombudsman (CAO) to conduct an enquiry into MIGA's due diligence procedures concerning the Dikulushi project.⁴³

The CAO report is revealing for what it says about the approach to risk assessment on the part of both MIGA and the company. It is obvious that MIGA and the company were aware that the DRC was particularly unstable (hence the need for political risk insurance) and that the company was aware that it was exposed to risks associated with the conduct of the DRC armed forces. For example, the CAO report refers to an earlier episode in March 2004 when DRC armed forces had forcibly requisitioned three vehicles. A senior Anvil manager who initially refused the request was threatened, had an AK-47 rifle thrust into his stomach and was struck by a rifle butt.⁴⁴ According to information provided to the CAO by Anvil representatives, the company did not protest at the requisitioning of its vehicles in October 2004 but 'did express to the military its concerns that the soldiers should not engage in looting'.⁴⁵

MIGA's assessment of Anvil's application for political risk insurance took place at a time when the agency was reassessing its own role in light of the World Bank's Extractive Industries Review. An important outcome of the Extractive

41 An enquiry by the United Nations Peacekeeping Mission in the Democratic Republic of Congo and local human rights groups estimated the death toll at more than 100. See International Crisis Group (ICG), *Katanga: The Congo's Forgotten Crisis*, Africa Report No. 103, 9 January 2006, p. 10.

42 *Ibid.* See also World Bank Office of the Compliance Advisor/Ombudsman (CAO), *CAO Audit of MIGA's Due Diligence of the Dikulushi Copper-Silver Mining Project in The Democratic Republic of the Congo*, 2005, available at: www.cao-ombudsman.org/cases/case_detail.aspx?id=94. The CAO report (at p. 4) notes that 'the broad facts of Anvil Mining's involvement in the October 2004 Kilwa incident, in terms of the provision of logistical support to the Armed Forces of the DRC, are not in dispute'.

43 *Ibid.*

44 *Ibid.*, p. 5.

45 *Ibid.*, p. 6.

Industries Review was that MIGA undertook to ensure that its clients in the extractives sector complied with the Voluntary Principles. The CAO report notes that Anvil, in its application to MIGA, confirmed that there were no recommendations in the Voluntary Principles that were at odds with the company's existing *modus operandi*.⁴⁶ However, the CAO report concluded that MIGA itself lacked the capabilities to assess whether Anvil 'had the requisite skills in place to understand and operationalize' the Voluntary Principles, and that this was a crucial gap in MIGA's due diligence procedures.⁴⁷

The CAO report concludes that if the Voluntary Principles had been applied in a systematic manner:

they would have provided an essential bridge across the current disconnect between the treatment of conflict as an insurable risk, and the potential for a project to influence the dynamics of conflict in a way that might cause harm to local communities'.⁴⁸

However, the report does not claim that events in Kilwa would have taken a different course if the Voluntary Principles had been applied and notes that 'in volatile operating environments there is a residual risk that abuses may happen even where the [Voluntary Principles] have been followed'.⁴⁹

MIGA and Anvil accepted the CAO's critique on the need for more careful risk assessment and, as part of their response, jointly commissioned a report offering guidance on the implementation of the Voluntary Principles.⁵⁰ Not surprisingly, the report treads carefully with regard to the question of equipment transfers, noting that 'the ideal situation is to avoid direct transfer of equipment from the company to public security forces and government'.⁵¹ It would be preferable for the company to insist that the government provide whatever equipment is needed, thus avoiding the need to become involved in public security matters that in normal circumstances would be outside its mandate. If this is not feasible, an alternative approach is to deal with resource shortages through a public sector security reform programme supported by international donors.

The MIGA/Anvil Voluntary Principles implementation toolkit was written in general terms, but its reference to the need for internationally supported security sector reform was particularly apposite in the DRC. In early 2006, a report by the

46 CAO, above note 42, p. 20.

47 *Ibid.*, p. 20.

48 *Ibid.*, p. 21.

49 *Ibid.*, p. 51. In 2007 a Congolese military court acquitted three Anvil employees of complicity in war crimes. However, a group of NGOs who joined together to form the Canadian Association Against Impunity launched a class action suit against Anvil in the Canadian courts. On 1 November 2012 the Supreme Court of Canada turned down an appeal against an earlier judgment ruling that it was inappropriate to hear the case in Canada, see *Association canadienne contre l'impunité c. Anvil Mining Limited*, 2012 CanLII 66221 (SCC), available at: <http://canlii.ca/t/ftlpg>. See also 'Supreme Court won't hear appeal in Congo massacre case', in *CBC News*, 1 November 2012, available at: www.cbc.ca/news/canada/montreal/story/2012/11/01/quebec-anvil-mining-appeal-refused-supreme-court.html.

50 MIGA/Anvil Mining, *The Voluntary Principles on Security and Human Rights: an Implementation Toolkit for Major Project Sites*, July 2008, available at: www.miga.org/documents/VPSHR_Toolkit_v3.pdf.

51 *Ibid.*, p. II-17.

International Crisis Group (ICG) argued that no issue was ‘more important than security sector reform in determining the [DRC]’s prospects for peace and development’.⁵² The ICG called for coordinated action by the Congolese authorities as well as by international aid donors and the UN. The ICG report went on to argue that ‘[b]oth the army and police have enormous work to do to become modern and professional, but only if they do will the country’s economic and political life gain the breathing space needed to begin a return to normality’.⁵³ Companies have a clear interest in working with ‘modern and professional’ security forces but, other actors – mainly governments – need to be involved in achieving this professionalisation.

Conclusion: the importance of collective approaches

The three case studies above underline the need for effective pre-entry risk assessments that identify both the risks to companies and the potential impacts on local communities and other stakeholders resulting from private sector activities in conflict-affected countries. To the extent that risks exist, it is likely to be easier to address them effectively before a company has committed to an investment.⁵⁴ Particularly in the case of major projects, this is the period when foreign investors and their backers have the most leverage in relation to human rights issues, because they still have the option to walk away.⁵⁵ It is harder to exert the same degree of influence or leverage once companies have already invested significant amounts of capital in fixed assets, and are no longer in a position to pull out without incurring major costs.

At least among leading Western companies, some of the lessons of past experience are beginning to be absorbed, and more responsible approaches to risk are evident. Ten years ago, in an off-the-record interview, a company director reflected with rueful honesty on an investment made in a brief period of comparative peace in an African conflict zone: ‘Let’s be honest: we just jumped into it!’⁵⁶ Arguably, we would be less likely to hear such an observation today.

Nevertheless, pre-entry risk assessments are far from being a panacea. Circumstances change. They may change as a result of wider developments in the host country, as in the first case study above, or they may change because of local reactions to the activities of individual companies. Once companies have made their

52 ICG, *Security Sector Reform in the Congo*, February 2006, p. 1.

53 *Ibid.*, p. 2.

54 The importance of addressing concerns with respect to human rights when contracts with host governments are being negotiated is also emphasised in an Addendum to the Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises. See John Ruggie, ‘Addendum – principles for responsible contracts: integrating the management of human rights risks into State-investor contract negotiations: guidance for negotiators’, UN Doc. A/HRC/17/31/Add.3, 2011.

55 A similar dynamic may exist with respect to the balance of bargaining power over purely commercial issues.

56 Interview with John Bray, November 2002.

investments, they have to use whatever influence and leverage they may possess in order to respond to changed circumstances implying risks to human rights. The first case study shows that this is far from straightforward, particularly in a crisis. The Guiding Principles refer to the need for responsible use of company leverage, but the leverage of an individual company acting on its own in a conflict zone may be very limited.

This consideration points to the need for a collective approach that involves host governments as well as home governments, companies, and international organisations or other multilateral agencies. In principle, this was the approach taken by the governments and other actors who came together to create the Voluntary Principles. As noted above, the Voluntary Principles were a tripartite initiative from the outset, involving the US and UK governments as well as a select group of companies and NGOs. However, the Institute for Human Rights and Business has pointed out that the limited involvement of governments from conflict-affected countries in the Voluntary Principles process may 'reinforce a perception that *companies* are the problem *and* the solution, while doing little to encourage governments of high-risk countries to eliminate abuse or impunity for abuse.'⁵⁷

Happily, there is one positive example to the contrary in that the government of Colombia is now a full participant in the Voluntary Principles process.⁵⁸ In this case, the key success factors included the active participation and commitment of the host government as well as an important industry group, the *Asociación Colombiana del Petróleo*. This example gives cause for cautious celebration but at the same time points to problems elsewhere: Colombia is still the only government from a developing country to be a full participant in the Voluntary Principles process.

In his 2008 report to the UN Human Rights Council, Professor John Ruggie noted that '[t]he root cause of the business and human rights predicament today lies in the governance gaps created by globalization – between the scope and impact of economic forces and actors, and the capacity of societies to manage their adverse consequences'.⁵⁹ Where governance gaps exist, it is critically important to emphasise the corporate responsibility to respect human rights, and this is rightly a key focus of the Voluntary Principles and the Guiding Principles. Arguably, it is

57 Institute for Human Rights and Business, *From Red to Green Flags: The Corporate Responsibility to Respect Human Rights in High-Risk Countries*, 2011, p. 81, available at: www.ihrb.org/pdf/from_red_to_green_flags/complete_report.pdf.

58 See Voluntary Principles on Security and Human Rights, *Voluntary Principles: Colombia Case Study*, available at: http://voluntaryprinciples.org/files/vp_columbia_case_study.pdf. Colombia's participation in the Voluntary Principles began with a meeting at the US embassy in Bogota in 2003. Following this meeting, the *Asociación Colombiana del Petróleo* established a working group whose activities included improving information-sharing, coordinating responses to human rights abuses, drafting performance indicators, and organising risk assessment guidelines and workshops. The outcomes of this process have included greatly improved coordination between companies and government officials and a general improvement in company standards.

59 See Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, UN Doc. A/HRC/8/5, 7 April 2008, p. 3.

even more important to fill those gaps. In conflict-affected countries, security sector reform and good governance are essential, not just as a means of reducing the risks of human rights abuses but also to enable equitable and sustainable economic development.

Responsible companies will not invest in conflict-affected areas unless they see a commercial opportunity, but this is not the only factor. In 2003, the World Bank commissioned a series of papers on *Natural Resources and Violent Conflict: Options and Actions*.⁶⁰ John Bray's contribution discussed ways of attracting responsible companies to risky environments, on the understanding that they would be more likely to make a positive contribution than cowboy operators.⁶¹ A senior executive from an international oil company offered a succinct answer: 'It's governance, stupid'.⁶² Leading companies with high standards of accountability find it difficult to operate in countries with unpredictable governance, including, for example, countries where there is widespread corruption.

This observation on the importance of good governance has wider application. Smaller local companies may not be able to choose where they operate, but their chances of success are affected by, for example, access to equitable dispute resolution and a functioning legal system.⁶³ In the context of the current discussion, the same principle applies also to human rights. There is no prospect of a lasting solution to endemic human rights problems or to conflict unless the country concerned can establish equitable and sustainable governance that protects the rights and interests of companies and individual citizens.

The World Bank's *World Development Report 2011: Conflict, Security and Development* makes a similar point on the need to strengthen government institutions, but at the same time offers a note of realism: 'Creating the legitimate institutions that can prevent repeated violence is, in plain language, slow. It takes a generation.'⁶⁴ While substantive change may take decades, neither companies nor individual citizens can afford to wait. This means that private sector actors will continue to find themselves operating in circumstances that are far from perfect, and where their business activities may have consequences that – even with the most thorough due diligence – are impossible to predict. In these circumstances, the easiest solution for responsible, risk-averse companies is to confine their activities to predictable if unexciting business environments in developed countries.

As noted in the first part of this article, companies may be more likely to decide not to invest in conflict-affected countries if human rights due diligence is seen primarily as a legal compliance issue. While staying at home may be the easy answer, it is not necessarily the ideal approach either from a commercial point

60 Ian Bannon and Paul Collier (eds), *Natural Resources and Violent Conflict: Options and Actions*, World Bank, Washington D.C., 2003, available at: <http://go.worldbank.org/MSS8O5RVN0>.

61 John Bray, 'Attracting reputable companies to risky environments: petroleum and mining companies', in I. Bannon and P. Collier, above note 60, pp. 287–352.

62 *Ibid.*, p. 291.

63 For a discussion of this and related points, see World Bank, *World Development Report 2005: a Better Investment Climate for Everyone*, Washington DC, 2004.

64 World Bank, above note 7, p. 10.

of view or from a social development perspective. Responsible risk-taking should be encouraged, not suppressed. To say this is not to water down the business and human rights agenda, but rather to seek more effective ways of fulfilling it.

Responsible risk-taking undoubtedly requires due diligence by business enterprises on human rights as well as other issues. It also requires an ability to adapt to changing situations. The role of governments is to provide an enabling environment for local and international companies to operate responsibly and successfully, and this task requires a concerted effort on the part of both national and multilateral agencies. The primary responsibility for establishing the institutions and mechanisms required to protect human rights lies with host governments, but assistance from home states and other actors can be very helpful. Particularly in conflict-affected countries, it is critically important that governments, business, and civil society work together.