



SUSTAINABLE MINING

PROTECTING HUMAN RIGHTS IN HIGH RISK ENVIRONMENTS

COMMUNIQUÉ, MAY 2014

INTRODUCTION

Oxfam Australia and the Melbourne Business School partnered to host the fifth Sustainable Mining Symposium. The symposium was held in May 2014 and focussed on protecting human rights in high-risk environments. The event was held under Chatham House rules.

The theme reflects Oxfam Australia's view that the issue of human rights remains a critical issue for the mining sector and that "uptake" by the sector of the "respect" pillar of the United Nations (UN) Protect, Respect and Remedy Framework on Business and Human Rights is limited.

The symposium provided information and stimulated discussion on the following areas:

- Key human rights standards, including for redress and access to remedy.
- Human rights challenges and opportunities for companies operating in high-risk, conflict-prone and weak governance states, with a focus on Papua New Guinea, Indonesia and the countries of Africa.
- Specific challenges and opportunities for companies operating in emerging markets, with a focus on Myanmar.
- Investor perspectives on human rights due diligence.

The event was well attended by 80 people, including representatives from mining, oil and gas companies, industry associations, financial institutions, legal firms, the Australian Government, academia and civil society.

The opening session set the scene. Participants heard from Oxfam that the UN Protect, Respect and Remedy Framework — which was

developed in 2008 — and the more recent Guiding Principles on Business and Human Rights remain the authoritative focal point on the issue of business and human rights. The framework is absolutely clear that the business responsibility to respect human rights exists independently of a state's ability or willingness to fulfil its obligations. Oxfam noted that high-risk environments are often characterised by weak human rights protections and where the actions of government pose the largest barrier to the realisation of human rights.

It is against the expectations set in the Protect, Respect and Remedy Framework that companies will be judged — including by Oxfam. Companies must be able to demonstrate a commitment to respecting human rights, and have in place due diligence procedures designed to achieve this commitment, as well as remediation processes should things go wrong. If they can't, companies are then exposed to reputational, legal, financial, and other risks.

Participants heard from the Melbourne Business School that many in the private sector do understand the reputational risk of breaching human rights. Despite this, research conducted by Oxfam and CAER in 2013 found that of the 53 largest mining, oil and gas companies listed on the Australian Securities Exchange, only 14 had a publically disclosed policy commitment to respect human rights. Clearly more work is needed by the mining sector at the policy level. That said, the symposium provided participants with numerous examples of good human rights practice at a corporate and operations level.

HUMAN RIGHTS STANDARDS

As noted earlier, the UN Protect, Respect and Remedy Framework and the Guiding Principles on Business and Human Rights are the key standard on business and human rights. The framework articulates the roles and responsibilities of both governments and businesses in relation to preventing and addressing business-related human rights abuse. This framework has the support of governments, business and civil society.

The framework has three interlinked pillars:

1. The state duty to protect against human rights abuses by third parties, including business.
2. The corporate responsibility to respect human rights.
3. The need for greater access by victims of business-related human rights abuse to effective remedy.

The guiding principles explain that the corporate responsibility to respect human rights means business should avoid involvement in adverse human rights impacts, including through their business relationships. In other words, business should do no harm. This requires that businesses:

- have a human rights policy that commits them to respect all human rights;
- implement a human rights due-diligence process (requiring identification and assessment of impacts, integration of the findings of those assessments throughout corporate processes, and tracking and communicating human rights performance); and
- work to remedy any adverse impacts they may have caused or contributed to, such as through a formal grievance mechanism.

The state duty to protect, and corporate responsibility to respect, relate to all internationally recognised human rights, including the rights of women and indigenous peoples. There is no hierarchy of rights here — all human rights matter and all human rights require equal protection.

In situations of armed conflict, companies should also respect international humanitarian law. The guiding principles note that in high-risk environments, such as conflict-affected areas, that companies should treat the risk of being complicit in gross human rights abuses as a legal compliance issue. This is because of the expanding web of potential corporate legal liability arising from extraterritorial civil claims, and from the incorporation of the provisions of the Rome Statute of the International Criminal Court in jurisdictions that provide for corporate criminal responsibility.

The Organisation for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises are another key standard. They complement the UN framework and importantly, from the perspective of potentially affected communities and civil society, contain a grievance mechanism. A large number of complaints made that allege breaches of the OECD Guidelines relate to mining operations in high-risk environments.

Participants heard that there is no avoiding the fact that companies have a responsibility to respect human rights, including through their supply chains and when operating in high-risk environments. It is because of the scale, scope and often irreversible nature of the potential impact of mining that mining companies must put in place corresponding safeguards consistent with the standards described above. This will benefit communities directly impacted, and minimise risk for companies.

Participants also heard that companies face challenges when compliance with the national laws of the host government falls short of international human rights standards. This is exacerbated when companies operate in high-risk jurisdictions.

In addition to meeting the human rights obligations contained in these standards, companies must meaningfully engage with communities, recognising that community members are both stakeholders and rights holders. Too often deals are made between companies and governments without any community consultation. This can lead to social conflict that is harmful for both the company involved and the local community.

CHALLENGES AND OPPORTUNITIES FOR COMPANIES OPERATING IN HIGH-RISK, CONFLICT-PRONE AND WEAK GOVERNANCE STATES

This panel session focused on the human rights challenges and opportunities of operating in Papua New Guinea, Indonesia and the countries of Africa, and mostly drew on the experiences and perspectives of mining companies operating in these countries.

The panellists identified the following characteristics of high-risk environments:

- poverty;
- lack of transparency and poor governance;
- corruption;
- limited capacity of government to deliver essential community services;

- the interests of the political and business elite clashing with the interests of the wider community;
- intimidation and harassment of community members and community activists;
- formal justice systems that do not deliver justice to victims of human rights abuse; and
- restrictions on civil society and the press.

In some states, armed conflict is an additional risk for companies to assess and manage. This includes conflict between government forces and rebel groups, or between government forces and its citizens. Armed conflict may be directly linked to mining — as various groups fight for control of mining rents or



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those opposing mining are targeted by government forces — or mining may occur in an environment that is broadly characterised by conflict or the risk of conflict. There are clear links between conflict and human rights abuse.

So how do companies manage risk and ensure they meet their human rights responsibilities when operating in such high-risk environments? The participants heard that companies have developed human rights standards and policies, undertaken human rights risk assessment, conducted human rights training for staff, and implemented or conducted audits against the Voluntary Principles on Security and Human Rights. It was noted that the perspectives of community members must be considered when developing human rights policy and targets, and when measuring progress against these targets.

The importance of engaging with local communities before an operation starts was emphasised, noting that without a social licence to operate, problems will arise, including in relation to human rights protection. Social and landowner mapping, building social capital, taking a local approach rather than company approach, and learning from good practice elsewhere in the country of operation (or similar contexts), were identified as essential building blocks for community engagement. The importance of engaging with women and ensuring their participation in mine-related decision-making was emphasised and is consistent with a rights based approach.

It was noted that many communities have undertaken their own human rights, social, and environmental impact assessments. Companies should embrace these as it provides an opportunity to understand the potential impact of a mine project on a community from the perspective of that community, and is a process that is free from government interference.

As noted above, formal justice systems do not always deliver justice for the victims of human rights abuse. Company-based grievance mechanisms form an important part of the company

responsibility to respect human rights. Participants heard an example of a grievance mechanism developed by a company in response to serious and systemic human rights abuse committed by mine security providers in an environment where the formal justice system was judged as not functioning and therefore unable to provide justice to victims. In this example, the grievance mechanism was developed with the input of local women and was considered by the company to be consistent with the effectiveness criteria for non-judicial grievance mechanisms as outlined in the UN guiding principles on business and human rights.

The importance of involving a range of staff in human rights work was also highlighted — this includes staff with responsibilities for communities, land, security, and contractors (including but not limited to security providers). The challenge of implementing the principles and commitments adopted by head office with local realities, including when working with local companies as either joint venture partners or contractors, was noted.

In situations of armed conflict, or where the presence of state security forces presents risks to companies and communities, the importance of formalising engagement protocols (and ensuring transparency around these) with the military or police was identified as a way to reduce human rights risks. The critical importance of understanding the nature of conflict to avoid triggering or exacerbating conflict was also noted. Specific security and human rights policies should be developed and human rights due diligence on security arrangements undertaken. Participants heard that independent oversight and grievance mechanisms are of critical importance to ensure that mine security (including that provided by states) does not commit human rights abuses. Finally, in situations where state forces have committed human rights abuse, or companies have concerns about the conduct of state security providers, companies should raise this directly with the state.

THE VOLUNTARY PRINCIPLES ON SECURITY AND HUMAN RIGHTS

The participants heard that Australia has joined the Voluntary Principles on Security and Human Rights — this has been widely supported by mining companies, civil society organisations including Oxfam and other Governments.

It was agreed that by implementing the Voluntary Principles, companies can build trust with stakeholders, open up business opportunities, and contribute towards companies meeting their human rights responsibilities. It was also noted that large and small companies can implement the Voluntary Principles and that a number of smaller companies participating in the symposium are using these principles or have formally joined the Voluntary Principles Initiative.

CHALLENGES AND OPPORTUNITIES FOR COMPANIES OPERATING IN EMERGING MARKETS

This panel session focused on Myanmar and provided participants with some insights into the human rights challenges of operating in other high-risk, emerging markets.

Myanmar is rich in oil, gas and mineral resources and has experienced significant and recent investment in the extractives sector, particularly oil and gas. While there is some optimism

for progressive development from a human rights perspective, significant challenges remain. For example, the stoking of religious tensions and subsequent internal displacement of people is directly linked to land grabbing by the military for economic projects including extractives projects. It was also noted that there are risks for the offshore oil and gas sector (as well as the mining sector) because offshore projects



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almost always have an onshore component. Land is often the most important asset for rural communities. The legal basis and compensation process for voluntary and involuntary land acquisition and use is unclear for both communities and companies. Further, complaints and grievance mechanisms are mostly absent. Development of regulatory frameworks has not kept pace with the speed and scale of investment, particularly involving land and the issuing of concessions.

The question posed was: what can companies do in such circumstances? Can companies operate in such a country without inevitably becoming complicit in human rights abuse? Should companies avoid operating in such countries? It was suggested that companies should note the concerns of, and take guidance from, local civil society organisations who reflect local community concerns and interests. It was noted that in the case of Myanmar there is a desire for responsible business rather than no business at all, and that communities do want to engage directly with companies rather than doing so via government authorities. Further, communities often want a share of the benefits of extractives industry development particularly employment and infrastructure. This has the potential to foster development that benefits all citizens, rather than a few, and can help mitigate the risks of conflict that can occur when investment happens rapidly but poverty remains.

Participants heard that companies must take a rights based approach including when undertaking environmental and social impact assessments (where good practice is well established). Participants also heard that the Extractives Industries Transparency Initiative (EITI), which is being implemented in Myanmar, will lead to better development outcomes and therefore human rights outcomes. Companies should not wait for the EITI though (experience from elsewhere shows that EITI implementation is inevitably slow) and should disclose payment information now.

THE INVESTOR REFLECTIONS ON HUMAN RIGHTS DUE DILIGENCE

Participants heard that investor interest in environmental, social and governance issues has grown exponentially in recent years, and that, at least for some investment funds, ethical portfolios have experienced rapid uptake. It was noted that good governance is critically important for investment attractiveness. If there are gaps in governance — and this must include governance around human rights issues — problems are guaranteed to occur. Social issues have a direct impact on investment, for example project delays, project shutdowns and reputation risks.

A recent survey of global investors found that over 90% would withdraw from a project if the company developing the project had governance issues, and that 85% would reconsider an investment if risks in supply chains were not addressed. In the mining sector, the provision of security services is a major risk in this regard. Mining sector participants noted that due diligence in joint venture partners is very common practice.

CONCLUSION

Participants heard that there have been advances in human rights promotion in high-risk environments. Yet significant challenges remain particularly for those companies that operate in countries where the state is a human rights violator. However, companies can play a positive role in such situations; for example, by promoting their own human rights policies, by being a public champion for human rights, and through including human rights protections in contracts and benefit sharing agreements.

It must be understood that human rights is about power — who has it, how it is exercised, and how it is shared. A critical challenge is to address the power imbalance between companies and communities. Victims of human rights abuse often feel powerless. It was also noted that the power that can be exercised by civil society is huge, and that too often companies only act when confronted by a critical NGO report or bad media. However, in high-risk environments, human rights defenders face significant risks. As was noted at the start of the symposium, companies will be judged against their human rights commitments and record.

Finally it was noted that companies must operate within a framework that prioritises community participation, accountability and sustainability to ensure protection of human rights in high-risk environments.

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RESOURCES

Oxfam Australia mining-related reports and other materials can be found at www.oxfam.org.au/explore/mining

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Cover Photo: oil companies are undertaking exploration in arid and semi-arid areas of Kenya, like Turkana. Here, high-rates of poverty, ongoing conflict and environmental stresses are everyday experiences. Photo: Kieran Doherty/Oxfam.



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