Conducting Heightened Human Rights Due Diligence assessments

Overview

This Brief provides an overview of how to undertake key elements of heightened human rights due diligence (hHRDD). hHRDD is a standard of responsible practice for companies that operate or have value chains in conflict-affected and high-risk areas (CAHRAs[1]); it may become a legal expectation for companies that fall under the mandate of the European Corporate Sustainability Due Diligence Directive.

A brief of this length on hHRDD is necessarily highly simplified. More expansive descriptions of hHRDD as a practice may be found in a report issued in 2020 by the UN Working Group on business and human rights (UNWG) and in a Guide published jointly in 2023 by the UNWG and the UN Development Programme.

This brief is based on experience performing hHRDD and, in particular, applying TrustWorks' integrated framework for responsible business (the Responsible Business in Conflict Assessment methodology), which includes International Humanitarian Law-related considerations, as well as conflict and human rights impacts through the lens of hHRDD and conflict-sensitivity.

Steps of hHRDD

Heightened human rights due diligence is a stepwise process of analysis, action planning, implementation, and disclosure that aims to address adverse impacts that a company might have upon human rights and conflict in operational contexts and throughout value chains. hHRDD includes human rights due diligence (HRDD) as a subset of its processes. **hHRDD goes well beyond HRDD, however, in several ways that will become clear in this brief**. The brief assumes the reader is familiar with HRDD and, therefore, does not offer guidance on HRDD; it focuses in particular on the conflict-focused elements of hHRDD and on the field-level activities that are essential to performing hHRDD.

About this series:
The Responsible business in conflict-affected areas series, led by TrustWorks, provides timely insights to questions raised by our company clients and partners; the briefs are designed to support company representatives navigate the responsible business in conflict agenda. This is the third brief in the series.

The brief is structured to cater for both busy and avid readers: on the left hand column, busy readers can skim through the main messages of the brief. Avid readers, with a bit more time on their hands, can read the right-hand side for a more in-depth understanding of the issues at hand.

Check out the other briefs in this series on our website **trustworksglobal.com**

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1 Although some countries are recognised in international law as being "conflict-affected", there is a relatively small number of such countries. The status of other countries with respect to conflict and the risk of conflict is ambiguous. There is no universally agreed list of countries that qualify as CAHRA, nor is there a single, universal standard for determining whether or not a country, or a region of a country, is a CAHRA. Different international institutions – the OECD, the World Bank, the Fund for Peace, and TrustWorks Global itself, for example – have different risk indices and classify countries in slightly different ways. This brief focuses on how hHRDD is performed, not when it should be performed, and it therefore does not address this issue in detail.

1. Conflict analysis

hHRDD is predicated on an understanding of the conflict itself.

Conflict analysis is a deliberate and systematic analysis process that seeks to understand how a conflict "works". There is no single "right way" to perform conflict analysis, and there are a number of reputable tools, frameworks, and approaches to conflict analysis that are in the public domain. All approaches have several elements in common, and these should be regarded as indicative of the aims and benchmarks of good conflict analysis:

The scope of the analysis depends on the conflict and on the business activities in question.

- The analysis should be scoped and scaled initially to focus on geographical areas where a company has business activities. As the analysis progresses and the dynamics of the conflict become clearer, the scope and scale of the analysis should be revised according to the emergent findings of the analysis. Some companies may require a country – or even international-level analysis, whereas others may require only far more narrow, local-level analyses.

Engagement with stakeholders and experts is the foundation of conflict analysis.

- Collect and analyse a broad diversity of perspectives on the conflict, the issues that animate it, and the people involved in it. This entails sustained engagement with context experts and with a range of actors that are involved in and/or affected by the conflict. Engagement – which must be undertaken in a manner that is itself conflict-sensitive – can be performed through interviews, focus group discussions, analysis workshops, or a combination of these. Conflict actors, including non-state armed groups, should be engaged directly, if it is safe and legal to do so.

Good conflict analysis should indicate: the factors that are driving the conflict; the factors that may drive peace and stability; the actors involved in the conflict; and, interrelationships between the factors and the actors.

- A good conflict analysis should identify:
  1. Factors driving conflict at a relatively granular level. For example, "high levels of poverty", often identified as a factor associated with conflict, is not granular enough and needs to be unpacked further. More detailed analysis might indicate, say, that patronage networks constrain opportunities and cement the control of economic elites, or that widespread corruption enables political elites to control wealth an opportunities.
  2. Factors that act as brakes on conflict, such as community-level peace initiatives or committees, or favourable changes to the political landscape (such as an election or the promulgation of a new constitution) that might ease or relieve tensions or pressures.
  3. Actors who are involved in the conflict and in issues that are tied to the conflict, and how those actors relate to each other. These include individuals with the formal and/or informal authority to decide whether conflict ends or continues (such as leaders of armed groups or political elites who underwrite or sponsor conflict).
  4. The interrelationships between the factors and the actors of conflict.

Once the factors and actors of conflict are identified and their interrelationships understood, it is possible to move onto the next step of hHRDD.

2. Assessment of ways in which the company's activities impact the factors and the actors of conflict

A second step in hHRDD is to identify the ways in which the activities of the company or its business partners might drive, sustain, or enflame conflict through its impacts upon the factors and the actors that are implicated in the conflict.

Business activities and value chains may differ very substantially from one company to the next. A detailed mapping of a company's value chain in the CAHRA in question should identify business activities and business associates that might have conflict-related impacts, as well as the actors who might be impacted by those activities.

Engagement with actors inside the value chain should illuminate the practices of the company and/or its business partners. Engagement with impacted stakeholders should focus on how those impacts are experienced and what effects they are having on factors and actors involved in the conflict.

The analysis should seek to understand the nature and significance of the impacts and the manner in which they occur. Three kinds of impacts and risks are of concern:
- Impacts and risks that might intensify or sustain issues that animate the conflict;
- impacts and risks that might enable, incentivise, or motivate actors to enter into conflict or persist in conflict; and
- impacts and risks that undermine or diminish the factors that mitigate or contain conflict.

Adverse impacts on conflict are not always harms. They can also include phenomena that sustain animosity or create distrust.

It is useful to bear in mind that, whereas impacts on human rights are typically harms to individuals or to groups, impacts on conflict may consist of a range of phenomena that are not always in themselves harms. They might be practices that diminish levels of trust between social groups experiencing tension with each other, impacts that undermine people's sense of security, or in some cases simply misunderstandings about the company's plans or the actions that the company is undertaking.

Triangulation is key not only to verify information from stakeholders but also to identify potential biases and perceptions towards certain actors and/or events.

Because conflict can be motivated by beliefs and perspectives that are partial, one-sided, and even entirely counterfactual, it is important to understand stakeholders' subjective perspectives and experiences in assessing impacts on conflict. In analysis, divergent views and accounts of events among stakeholders can be triangulated to understand both events themselves and how different stakeholders are positioned with respect to the events and to each other.

Stakeholder engagement is the central element of Step 1 and Step 2, and it should be performed in the field and in person to the greatest possible extent.

3. Human Rights Impact Assessment

Human rights impact assessment is a discrete element of hHRDD and should be performed as a step in hHRDD.

In parallel to the 2 analysis steps described above, companies should identify and assess human rights risks and impacts of the same business operations and in the same value chain. A Human Rights Impact Assessment (HRIA) may be performed either conjointly, with the identification and assessment of conflict risks and impacts, or sequentially, beforehand or afterwards.

The two analysis processes are likely to require engagement with overlapping groups of stakeholders, although the two forms of assessment entail different approaches to inquiry and to the modality in which evidence is analysed. It may be worthwhile to minimise "assessment fatigue" among stakeholders by performing conjointly the stakeholder engagement necessary for both analyses. This might entail developing interview or focus group agendas that serve the needs of both assessments, which would most likely be addressed in a sequential manner in each engagement with stakeholders.

4. Prioritisation for mitigation

hHRDD entails a specific hierarchy of mitigation priorities for addressing risks and impacts.

Once Steps 1 and 2 and the HRIA have been performed, risks and impacts can be prioritised for mitigation planning.

hHRDD includes a characteristic schema for prioritising risks and impacts. These are spelled out in the 2020 UN Working Group report and in the 2023 joint UN Working Group and UN Development Programme Guide to performing hHRDD.

a. **Priority 1:** Impacts and potential impacts upon both conflict and human rights;

b. **Priority 2:** Impacts and potential impacts upon conflict that are not impacts on human rights; and

c. **Priority 3:** Impacts and potential impacts upon human rights that are not impacts on conflict.
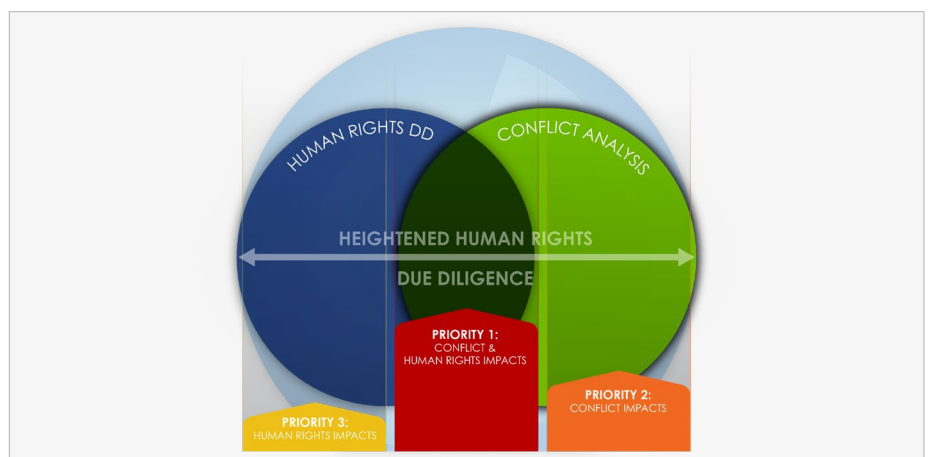
Whether an impact effects both conflict and human rights can be determined in the context of the analysis and through a careful consideration of the relationship between human rights risks and impacts, on the one hand, and conflict related risks and impacts, on the other.

Practically, determining mitigation priorities entails:

a. Analysing the conflict risks and impacts to determine which of them, if any, are also human rights risks and impacts. For example, if analysis suggests that the conduct of company security personnel drives conflict between the company and local communities, ask: does the conduct of security personnel also violate the human rights of community members?

b. Comparing the human rights risks and impacts, as identified in the HRIA, and the conflict risks and impacts, as identified in the analysis of the risks and impacts of the company's activities. Conflict risks that drive human rights violations or vice versa are Priority 1 impacts. Risks and impacts that are not identical are either Priority 2 (if they are related to conflict but not to human rights) or Priority 3 (if they are related to human rights but not to conflict).

c. Combining the two sets of risks and impacts into a single list or register, with the risks and impacts sorted into the three categories of mitigation priority.

The output of this step in the process is a list or register of risks and impacts, with the risks and impacts sorted into the three mitigation categories.

5. Defining mitigation actions

Approaches to addressing risks and impacts should be based substantially on prior analysis steps.

Mitigation options are changes in practices, procedures, or policies, or a broad range of different kinds of initiatives, that are designed to prevent or mitigate adverse impacts on conflict and/or on human rights. Mitigation planning begins from the analysis of conflict and human rights risks and impacts, taking into account the sources of the impacts and risks and the manner in which they are generated.

In developing mitigation options, companies should consider the possibility of partnering with external entities that can play roles that the company itself might not be able to play. For example, an NGO might be a more appropriate implementer of a community development initiative; a host-state Ministry of Health might need to be involved in a health-related initiative; and community input or consent may also be necessary for planning and/or implementing initiatives that directly affect local communities.

Mitigation plans should be feasible according to normal project planning criteria and tested with stakeholders.

There is no formula for developing mitigation impacts, but there are often factors that meaningfully limit options, and mitigation planning should above all be realistic. It should consider not only the nature of the risks and impacts in question but also factors such as the plausibility of certain third-party partnerships, cost, political sensitivities, security risks, internal capacity, and so on.

Mitigation options should always be discussed and tested with stakeholders in the field. This can be done during a follow-up field engagement, if necessary.

6. Disclosure

Disclosures about a company's activities in CAHRAs should be screened for sensitivity.

In general, companies are expected to disclose to shareholders and to rights-holders their material human rights risks and the measures that they are undertaking to mitigate them. The same disclosure principles apply to hHRDD. CAHRAs, however, are often marked by high levels of polarisation and tension and significant security risks to both companies and to their stakeholders.

As a step in scoping and framing disclosures that might touch on actors and issues linked to or bound up in conflict, therefore, companies should perform a careful sensitivity review of all proposed disclosures that could be made public. Disclosures that might enhance risks to (internal or external) stakeholders, or that might jeopardise their safety and security, should be revised so as to eliminate those risks.

A note on IHL

In conflict-affected settings, International Humanitarian Law (IHL) applies to companies and may generate legal obligations and proscriptions.

International Humanitarian Law (IHL) is the specialist body of law that applies in situations of armed conflict and occupation. These legally binding rules apply to all parties to a conflict (i.e. States and other armed actors) as well as to any individual whose actions are connected in some way to an armed conflict. It protects certain groups of people and property (including companies, their personnel and assets) from some of the consequences of armed conflict, but it also proscribes certain actions that companies might undertake, knowingly or unknowingly, in CAHRAs (such as acquiring land from which populations have been displaced by armed conflict or receiving goods that have been acquired through acts of plunder, or providing support to a warring party that is engaged in violations of IHL or war crimes).

Companies that are operating in jurisdictions in which IHL is in force should incorporate an assessment of IHL-related risks into their hHRDD activities or into their compliance portfolio. As a matter of best practice, in settings where IHL does not apply – such as fragile, high-risk and conflict-prone areas – companies should consider doing the same. TrustWorks' integrated framework does just that.

About TrustWorks

No more business as usual.

TrustWorks Global (TrustWorks) is a Geneva-based social enterprise – in operation since 2013 – enabling public and private actors to engage responsibly and effectively in FCAS.

We work diligently and discreetly to support our public and private sector clients and partners to minimise their negative impacts on conflict and, where possible, to maximise their positive impacts on peace.

We protect our clients' interests by managing their risks, impacts and opportunities in line with legal requirements, normative expectations and evolving best practices across the following three key pillars of work:

- We enable **companies** to operate, source and supply in line with legal requirements, normative frameworks and best practices on International Humanitarian Law, heightened human rights due diligence and conflict-sensitivity; where possible, we support companies to go beyond 'minimum standards' to have positive impacts on the lives and livelihoods of those affected by violence and conflict.

- We enable **investors** – including development finance institutions (DFIs), private/institutional and impact investors, as well as private banks – to manage conflict risks and impacts in line with legal requirements, normative frameworks and best practices; where possible and leveraging conflict-sensitive approaches, we support investors to go beyond 'minimum standards' to have positive impacts on the lives and livelihoods of those affected by violence and conflict.

- We equip **governments**, **international**, **regional and local organisations** to address pressing, highly complex challenges to peacebuilding and peacemaking; our support creates bridges across diverse constituencies and organisations, public and private sectors, local and global actors with a view to fostering relevant, responsible and risk-informed initiatives in the contexts where they are needed the most.

In the context of our work with both our public and private sector clients, our work is practical, our approach is pragmatic, and our ethos informed by our commitment to improving the lives and livelihoods of those affected by violence and conflict.

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