

ABOUT THIS BROCHURE

This is the second in a series of Due Diligence Papers offered by the Human Rights and Business Project. The series attempts to clarify business responsibilities vis-à-vis human rights, and serve as a dialogue platform between NGOs, governments and business.

A version of this publication was first written by Margaret Jungk and published in 2001 with the support of The Confederation of Danish Industries and The Danish Industrialization Fund for Developing Countries. This brochure has been updated by Mike Baab to reflect the changing legal standards, operating conditions and institutional frameworks that have developed since its original publication.

ABOUT THE DANISH INSTITUTE FOR HUMAN RIGHTS

The Danish Institute for Human Rights is one of the world's largest National Human Rights Institutions, and was established by the Danish Parliament in 1987. DIHR manages research and capacity building projects in more than 20 countries under the topic areas of rule of law, access to justice, equal treatment, and business.

For more information, see humanrights.dk

ABOUT HUMAN RIGHTS AND BUSINESS AT DIHR

The Human Rights and Business Project applies human rights expertise to the practical needs of business. The team performs research, builds tools and offers strategic advice for businesses to maximize their positive impact and minimize their negative impact as they operate around the world. The Project also conducts programs with businesses and civil society organizations in developing countries to build their capacity to address private-sector impacts on human rights.

For more information, see www.humanrightsbusiness.org.

General information regarding this brochure, the Due Diligence Papers series or the Human Rights and Business Project should be directed to Mike Baab at

The Danish Institute for Human Rights
56 Strandgade, 1401 Copenhagen K, Denmark
(+45) 32 69 88 88. mba@humanrights.dk

This brochure and other Human Rights and Business Project publications are available at humanrightsbusiness.org.

DECISION MAP:

Doing Business in High-Risk Human Rights Environments





The present article in this series aims to help companies consider human rights issues systematically before undertaking operations in states with poor human rights records.

This brochure and this series seek to provide the business community with a consistent framework for viewing their human rights responsibilities abroad. The principles and approaches discussed in this publication are formulated to give business and human rights communities a common point of reference for discussing the human rights impacts of businesses and their responsibilities where they operate.

It is one of the cold realities of the modern world that companies do business in states and regions where human rights violations take place. As the world has globalised with increasing speed, companies have sought resources and operating conditions in regions further and further removed from stability and the rule of law.

This new reality of global business has brought with it new challenges. Corruption, poverty and security have become issues for businesses that once restricted their expertise to production and distribution efficiencies.

Businesses are under increasing pressure to contribute to development and, at the very least, do no harm in the countries where they do business. This pressure is coupled with repeated calls for

companies to suspend their operations in certain countries, or to take a stand on the human rights conditions in their local operating context.

No country on Earth has a completely clean record on human rights. Every society contains poor practises and entrenched human rights challenges. How can companies draw the line between imperfect yet allowable human rights environments and 'no go' countries where local conditions make respecting human rights impossible?

This brochure aims to help companies systematically assess the human rights environments in which they do business and decide whether local conditions preclude positive impacts and make negative impacts inevitable.

Introduction

Although there are no objective criteria for determining when a company ought to avoid working in a state, two questions are consistently raised:

1. Can a company contribute positively in a state with a poor record by maintaining good human rights practices, or does its very presence amount to complicity with, and tacit endorsement of, the host government?
2. If the company withdraws its operations, will this benefit human rights by demonstrating the limits of tolerance, or might it hurt the very population it intends to help by contributing to or perpetuating economic deprivation?

These questions are underpinned by a fundamental principle: In cases where a state government sustains or perpetrates human rights violations, foreign businesses should not be complicit in the repression of the population or prop up an oppressive regime.

All of the considerations presented in this brochure begin with the recognition of this premise.

This graphic illustrates the process of deciding whether to engage in a country or region where human rights violations are thought to take place. Each consideration is explained in the following pages. ▶

A Decision Map for Business

The purpose of this brochure is to break down the issue of corporate complicity in state-perpetrated human rights violations into specific, step-by-step considerations. This brochure begins with a decision map illustrating principles for consideration when engaging or withdrawing from a state that is known to commit human rights violations. After the full decision map is presented, each individual consideration is explained. Each stage of the decision-making process, as well as the resulting decision, is illustrated with examples and indicators.

The chart on the next page identifies and highlights the human rights issues that a company should take into account when considering operations in a challenging country. After each step, the company is advised to take one of three courses of action:



GO:
The company can operate without substantial negative impact on human rights

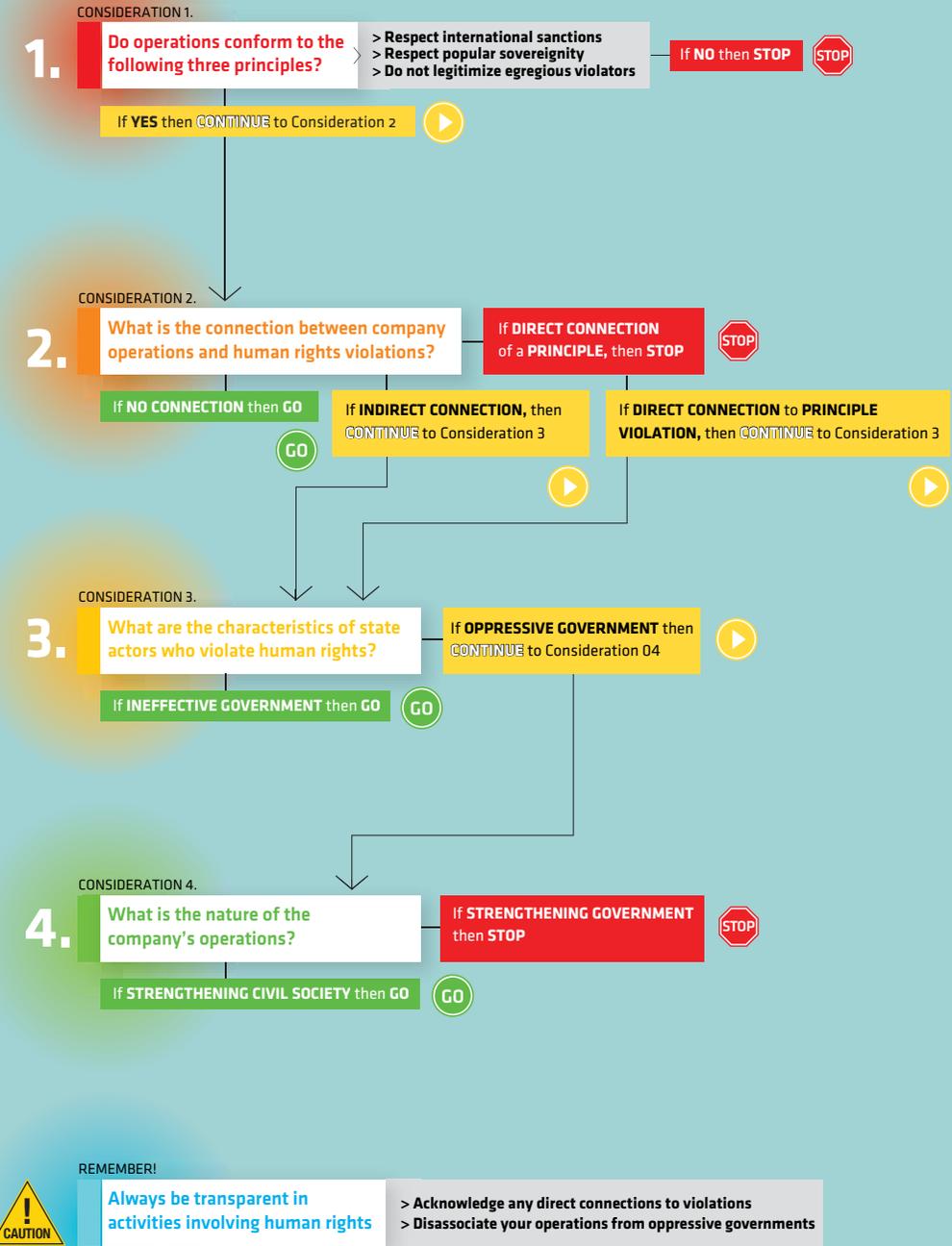


CONTINUE:
The company should continue to the next consideration in the chart



STOP:
The company should refrain from operating in the area

As the old adage warns, the devil is in the details: Answers to the questions in the chart should be based on detailed information and a reliable understanding of local conditions. Companies are encouraged to work with independent human rights organisations when undertaking decisions in the field.



CONSIDERATION 01:

The Minimum Bottom Line

CONSIDERATION 1.

1.

Do operations conform to the following three principles?

- > Respect international sanctions
- > Respect popular sovereignty
- > Do not legitimize egregious violators

If NO then STOP



If YES then CONTINUE to Consideration 2



Businesses do not always undermine human rights conditions. Blanket prohibitions against private sector investment in states with poor human rights records are often unhelpful, and the withdrawal of foreign investment could result in restrictions that ultimately damage the human rights conditions of the country's citizens.

By adhering to international human rights standards, foreign businesses can spread the concept of rights and raise demands for good practices in states where more straightforward, government-focused human rights efforts are prohibited.

Nonetheless, there are some situations in which prohibitions on business are necessary. For a state to be suitable for investment it must, at minimum, meet three criteria:

1. Respect international sanctions

As responsible members of their political community, companies should not undermine international sanctions by instituting commercial relations with an isolated government.

Economic sanctions are a tool used to pressure states to change their behaviour, including compelling compliance with international human rights and humanitarian law. Sanctions can be imposed by single states, by groups of states or regional organisations and by the UN. Unilateral and multi-lateral sanctions have been imposed against states like Burma and Sudan for their poor human rights records, and the UN has imposed item-specific sanctions against warring parties in Sierra Leone and Angola, among others.

The subject of economic sanctions is controversial, particularly when they are imposed on humanitarian grounds. A company may think that economic isola-



Civil Society Reflecting Popular Will

In Burma, for example, the National League for Democracy (NLD), headed by Nobel laureate Aung San Suu Kyi, won a landslide victory in the 1990 elections. The NLD was prevented from taking power by the military regime, which had forcibly installed itself in government in a coup in 1988.

While the regime itself invites foreign companies, the NLD continues to call for economic sanctions against the state until the government recognises the election and works toward democracy. Companies have an obligation to respect the NLD's request.

tion is an ineffective tactic, it may question whether the sanctions are justified or it may be uncomfortable with the effect of the sanctions on the country's population. These concerns, while indisputably important, are not a matter for individual companies. They should be addressed at the appropriate political level, and while companies are encouraged to contribute their knowledge and concerns to the debate, individual companies should not bypass the decisions of the international community.

2. Respect popular sovereignty

Companies should not undertake operations in a state in which there is a clear expression of popular sentiment against foreign commercial activities.

The Universal Declaration of Human Rights maintains that 'the will of the people shall be the basis of the authority of government'. The prevailing presumption upon which international relations are

conducted is that governments represent and speak on behalf of their populations. International law is structured to incorporate this presumption, and is designed to support governmental sovereignty and enforce government decrees. Companies operating in foreign states must act in accordance with their host government's wishes and according to local law.

Unfortunately, reality does not always correspond to these principles, and popular sovereignty—the will of the people—is ignored or usurped by governments. In such cases it can be difficult to determine what the 'will of the people' entails, especially where a government represses all opposition or suppresses information.

In countries where this is the case, independent groups are sometimes able to represent and convey popular will. The company has an obligation to respect the wishes of the population at large as if they represented legally binding government directives.

It can be difficult to see which regimes ought to be avoided as events unfold in real time.

3. Do not legitimize egregious human rights violations

Companies should not undertake operations in states which have a clear record of severe violations of human rights. Investment and operations risk legitimizing an abusive regime.

This category applies to governments where the potential for the company to act for the good of the population is outweighed by the need to de-legitimize the regime.

This distinction applies only to a handful of states. Cases include Germany under the Nazi regime, Cambodia under the Khmer Rouge or Rwanda in 1994 under the interim government of Théodore Sindikubwabo.

In the present day, it can be difficult to see which regimes ought to be avoided as events unfold in real time. So how can a company identify the extreme cases to which this category applies? Identification of these avoid-at-all-costs regimes includes:

Evidence of genocide

Many governments at one time or another will be condemned for causing the deaths of some of their population, perhaps as a result of police brutality or inadequate social welfare. There is a difference in degree and kind, however, between these deaths and situations where a government is actively and directly responsible for the deaths of defined social groups within its population.

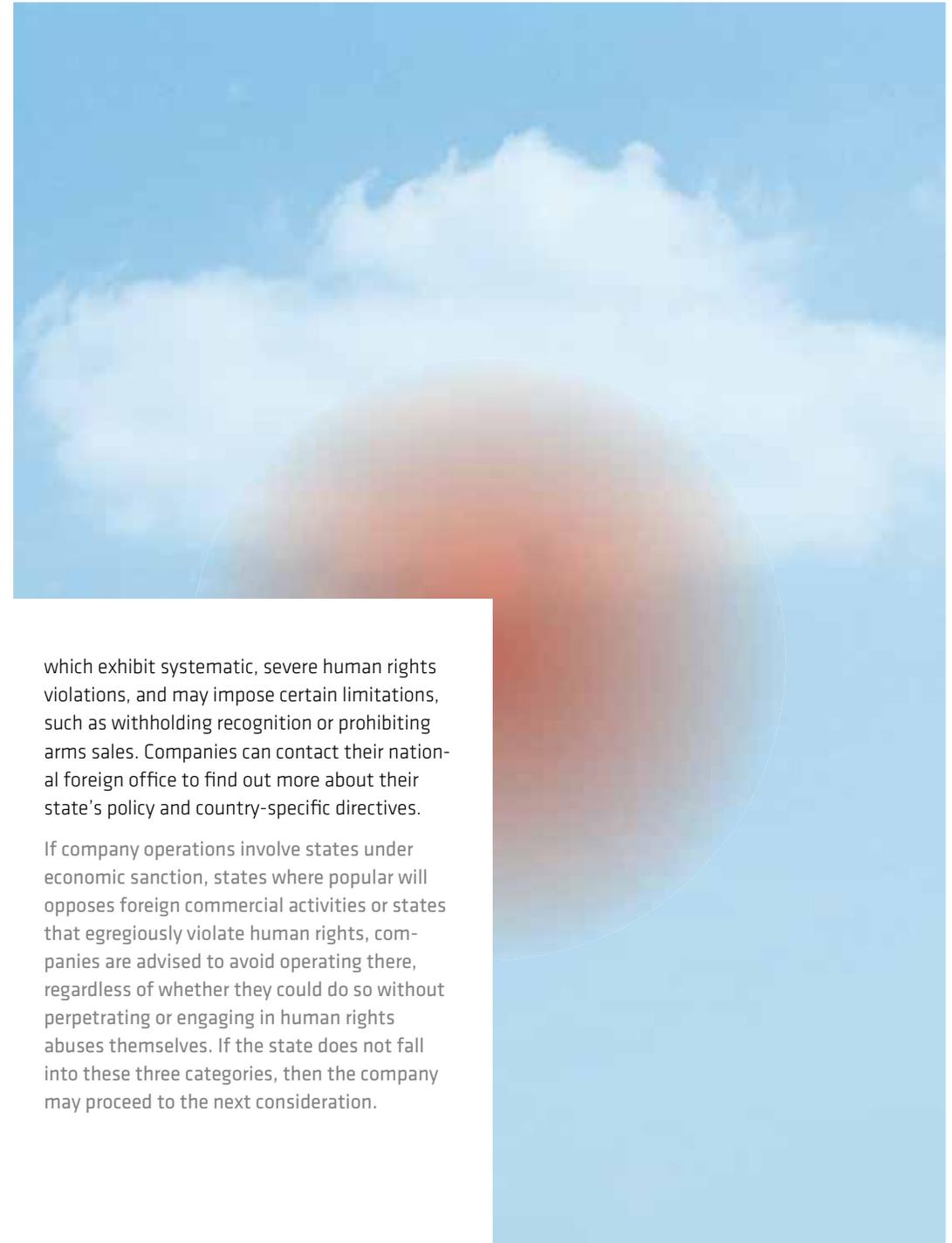
Where there is active and direct responsibility, there is generally universal and undisputed condemnation by human rights organisations and the international press, and widespread condemnation may serve as the point of departure for companies looking to identify egregious violators.

Identification by home state

Another way a company might distinguish the most egregious human rights violators is to follow its own government's identification of states falling within this category. Many governments identify states

which exhibit systematic, severe human rights violations, and may impose certain limitations, such as withholding recognition or prohibiting arms sales. Companies can contact their national foreign office to find out more about their state's policy and country-specific directives.

If company operations involve states under economic sanction, states where popular will opposes foreign commercial activities or states that egregiously violate human rights, companies are advised to avoid operating there, regardless of whether they could do so without perpetrating or engaging in human rights abuses themselves. If the state does not fall into these three categories, then the company may proceed to the next consideration.



CONSIDERATION 02:

Company Connection to Human Rights Violations

CONSIDERATION 2.

2.

What is the connection between company operations and human rights violations?

Of **DIRECT CONNECTION** of a **PRINCIPLE**, then **STOP**



If **NO CONNECTION** then **GO**



If **INDIRECT CONNECTION**, then **CONTINUE** to Consideration 3



If **DIRECT CONNECTION to PRINCIPLE VIOLATION**, then **CONTINUE** to Consideration 3



In the real world, the majority of dilemmas addressed by this brochure do not take place in states where egregious human rights violations are taking place. As such, these cases require a more nuanced assessment. This begins with a consideration of the relationship between the company's planned or ongoing operations and the human rights conditions in the state where the operations take place.

The connection between these two factors can be divided into three categories:

1. Weak connection

This category refers to conditions in which the company has a negligible effect on the human rights situation in a country. The company does not contribute to or benefit from human rights abuses in any way.

Examples of 'weak connection' relationship include a company operating outside of the geographical region where violations take place, or in an unrelated industrial sector. A government's restriction of internet freedom, for example, would have no connection to a company that operated an apparel factory. Smaller companies and those that are geographically or sectorally limited are most likely to fall into this category.

 'Weak connection' relationships are given a 'go' in the diagram.



2. Indirect connection

This category refers to a situation in which a company contributes to violations but does not directly initiate or perpetrate them. Large companies in the developing world, for example, may have an 'indirect connection' relationship to child labour in supplier factories.

Indirect connections to human rights violations commonly occur in the following areas:

Core business: The company might be indirectly connected to violations through dealing in strategic commodities like oil or other natural resources subject to power conflicts. Or the company might unwittingly undertake an operation for an abusive government, such as providing public utilities which the regime only offers to members of a dominant ethnic group.

Business network: Companies should be wary of possible indirect connections when conducting secondary business processes such as purchasing land, procuring supplies or hiring security forces.

States in which large commercial sectors are state owned or operated are especially likely to result in indirect connections to human rights violations.

Products: Companies become indirectly connected to human rights violations through intentional misuse, such as when a purchasing government uses a product in an illegal military application, or unintentional wrongful use, such as incorrectly disposed pesticides contaminating water supplies.

In certain contexts, some business activities are so interlinked with human rights violations that they must be addressed as direct connections. Companies supplying weapons to an oppressive government or dealing in products which are the source of conflict, such as diamonds in central Africa, cannot distance themselves from the fundamental relationship between their products and human rights abuses.

 If an indirect connection is established, then the company should move on to Consideration 3 and assess the state's human rights record in more detail.

Companies should take human rights risks as seriously as the economic risks of entering a new market.

3. Direct connection

This category refers to cases in which the company directly initiates or carries out a violation of human rights. Examples include implementing discriminatory hiring practices or recruiting child labourers.

Sometimes companies are forced into direct connections to violations because of laws or policies where they do business. For example, a company might purchase land from a government that forcibly relocates a population from the land. Or a company carries out violations by following state laws prohibiting independent trade unions.

In addressing the consequences of investing in an area where a direct connection to human rights violations is likely, the company should evaluate whether its activities violate the principle of the right or the standard of the right.

Rights principles are the fundamentals upon which specific human rights laws are based. Standards are the way in which such principles are expressed and implemented in individual situations.

For example, the forcible transfer of a population from company land—the first example above—encompasses the violation of several fundamental principles: arbitrary deprivation of property, deprivation of means of subsistence and violations of the right to bodily security.

In contrast, the second example above, in which the company cannot allow its workers to unionise, violates a standard—the right to form a union—that emerges from the principle that workers should be able to organise and bargain collectively, to obtain representation and to influence the production in which they play a part.

While principles generally have near universal acceptance, standards do not, and are subject to various cultural and pragmatic considerations. For example, few governments would deny the principle that workers should have the right to represent their interests regarding their working conditions. However, the traditional standard



associated with that principle—workers forming independent unions—is not universally accepted. Some governments regulate negotiations between employees and employers through state bodies, for example.

Sometimes it is impossible for companies to guarantee their workers fully independent trade unions as their European subsidiaries would recognise them. It is unacceptable, however, for the company to operate in a context where worker representation was prohibited entirely.

When principles are violated, it is unlikely that a company can achieve any positive protection or promotion of human rights. When a standard is violated, however, this harm can generally be counterweighted by beneficial company performance under the relevant principle, and can serve as a model for company peers and state bodies. A company should assess its direct connections to human rights violations in these terms.

Contexts where human rights principles are violated, and where a company will find itself directly connected to such violations, are unacceptable for business operations. Countries and regions where human rights standards are lacking in law or application are sometimes acceptable for businesses.

▶ If operations in a country or region would put the company in direct connection to the violation of a rights standard, then it should strive to protect the principle of the right and continue to Consideration 3.

CONSIDERATION 03:

Human Rights Violations and State Actors

CONSIDERATION 3.

3.

What are the characteristics of state actors who violate human rights?

If **OPPRESSIVE GOVERNMENT** then **CONTINUE** to Consideration 04



If **INEFFECTIVE GOVERNMENT** then **GO**



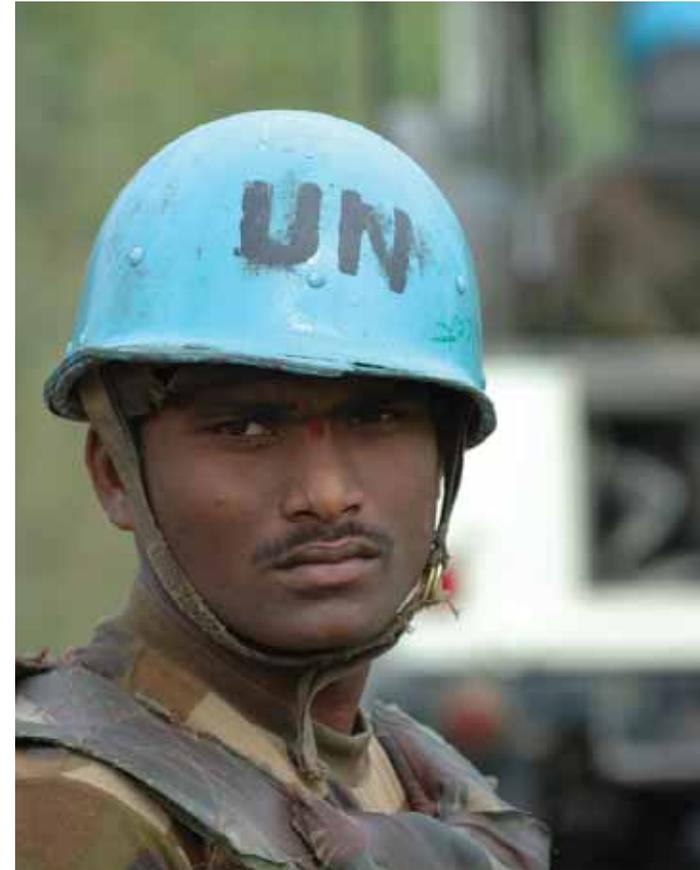
Businesses operate within the confines

of the each state's governing system and structures, and should be concerned with their connection to, and possible tacit endorsement of, the government's human rights record. In many countries, poor human rights practices have more to do with the activities of rebel groups or traditional societal practices than the government itself. It is therefore necessary to distinguish between oppressive governments, which endorse and perpetrate human rights violations through their laws and practices, and ineffective governments, where the government acknowledges and respects human rights but is unable or unwilling to fully secure them.

For example, women encounter discrimination in

both Malawi and Saudi Arabia. In Malawi, gender discrimination is endemic to the culture, but the government has taken legal steps to secure and uphold women's equality, and is generally supportive of initiatives to enable women to secure their rights. In Saudi Arabia, gender discrimination is also generally practised, but it is sanctioned by the state and reinforced in law and governmental programs.

While there is no centralised body that can be relied upon to apolitically assess the manner and severity of human rights violations perpetrated by a government, a number of sources can be used to build a general picture of whether the government of a state is oppressive or ineffective.



The UN

Despite its shortcomings as a quintessentially political body, the United Nations is the best starting point when seeking human rights information. Among its many other roles, the UN is a central international institution with a human rights mandate. Several bodies within the UN investigate, report and monitor states' human rights records.

The newly formed Human Rights Council, for example, conducts reviews of state performance on civil, political, economic, social and cultural rights that highlight ongoing violations. Eight specialised treaty bodies, including the Committee on the Elimination of Discrimination Against Women and the Committee Against Torture monitor states' adherence to issue-specific UN conventions.

Special Rapporteurs and Representatives

Beyond the Human Rights Council responsible for reviewing states overall human rights conditions, the UN system also includes a number of Special Rapporteurs and Special Representatives who conduct investigations and report on human rights challenges in practice around the world.

These include 24 Special Rapporteurs on specific rights issues such as Health and Food, and Special Representatives on particular countries, regions and topics, including one on the human rights responsibilities of transnational corporations. Representatives and Rapporteurs perform country visits, hold consultations, report developments in the field and support institutional actors, among other duties. They publish regular reports, and can be an invaluable resource on conditions and emerging challenges in particular regions and countries.



Other sources of human rights information

A number of independent human rights groups publish consolidated country information.

Amnesty International (amnesty.org) publishes annual reports on the human rights situation in over 140 countries, with a focus on civil and political rights.

Freedom House (freedomhouse.org) reports on an annual basis on civil and political rights in approximately 187 countries. Freedom House produces a numerical-based index which enables comparative ranking of states.

Human Rights Watch (hrw.org) issues a World Report annually covering human rights abuses in approximately 70 countries.

The U.S. State Department (state.gov) publishes annual State Reports on Human Rights Practices, which provide in-depth and systematic accounts of human rights in 194 countries.

As shown at left, general information on human rights risks is readily available.

It should be noted, however, that specific human rights violations are often difficult to document and can be influenced by political agendas. Additionally, though major human rights violations in each country are generally recorded, this may come at the expense of a systematic appraisal of other human rights conditions. In a country with severe ethnic discrimination, for example, it may be difficult to find information on religious discrimination or working conditions. This is especially relevant for companies, as violations related to working conditions are often systematically underreported in countries with harsh civil and political rights practices.

With this in mind, companies should use several sources to assess a government's record, and should contact human rights organisations in states where they intend to do business.

If research indicates that the government is ineffective rather than oppressive, the company can continue to pursue investment. The need for company security and stability, combined with the company's policies and procedures that respect human rights throughout its operations, will promote rule of law and is likely to have a positive effect on the state's human rights record.

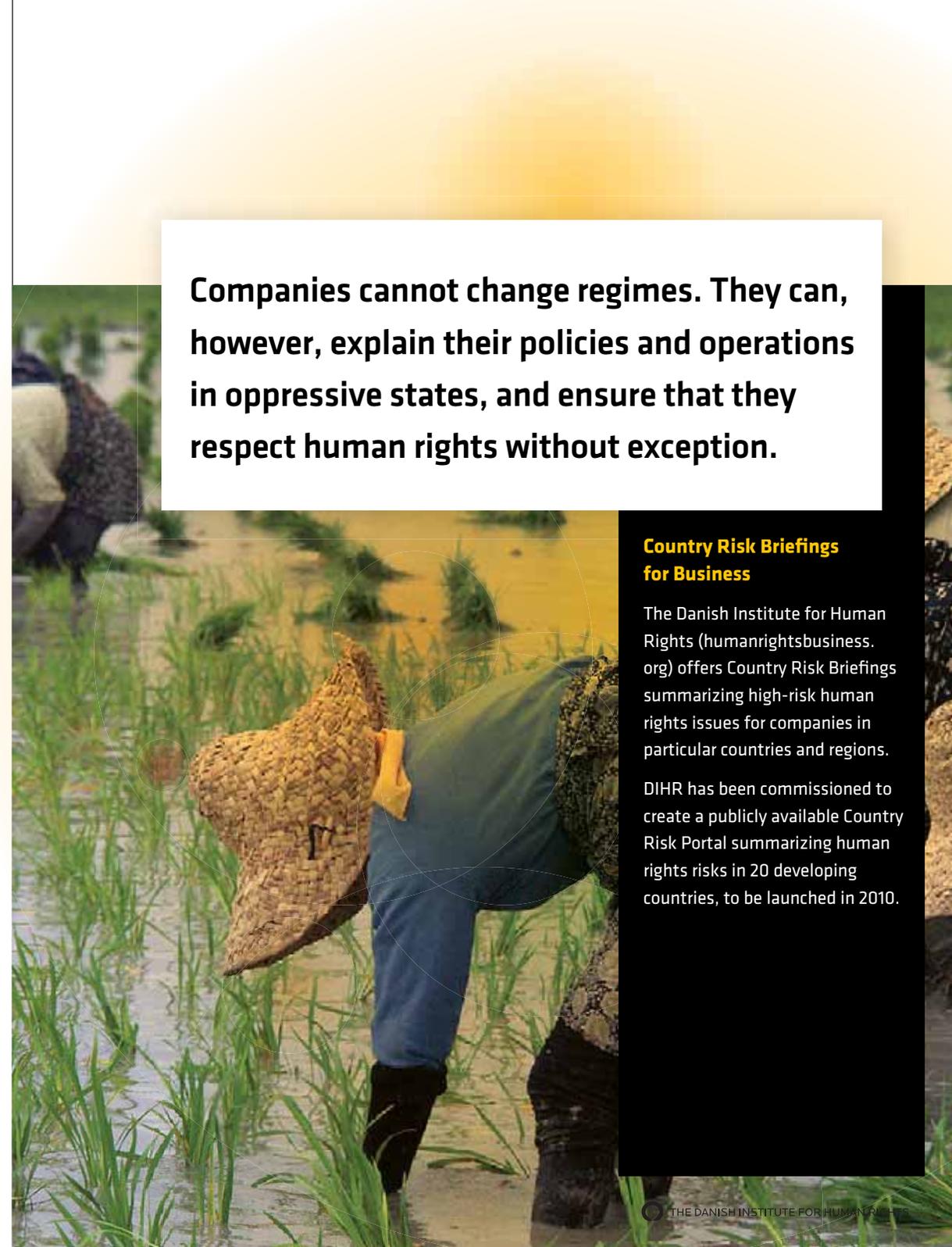
▶ If the government appears to be oppressive, however, the company should be more cautious about its connections with the regime and should proceed to Consideration 4 for further checks.

Companies cannot change regimes. They can, however, explain their policies and operations in oppressive states, and ensure that they respect human rights without exception.

Country Risk Briefings for Business

The Danish Institute for Human Rights (humanrightsbusiness.org) offers Country Risk Briefings summarizing high-risk human rights issues for companies in particular countries and regions.

DIHR has been commissioned to create a publicly available Country Risk Portal summarizing human rights risks in 20 developing countries, to be launched in 2010.



CONSIDERATION 04:

Does The Company Empower Civil Society or Government?

CONSIDERATION 4.

4.

What is the nature of the company's operations?

If **STRENGTHENING GOVERNMENT** then **STOP**



If **STRENGTHENING CIVIL SOCIETY** then **GO**



If a company has determined in the preceding section that the government itself is responsible for violations, the next step is to consider how the nature of the company's operations and products affect the government relative to civil society.

If a company has determined in the preceding section that the government itself is responsible for violations, the next step is to consider how the nature of the company's operations and products affect the government relative to civil society.

Civil society refers to the self-organised communal groups acting independently of government. Civil society is the population's counter-balance to the government. Civil society groups can be political, such as NGOs or lobbying groups, or non-political, such as educational societies, private foundations or religious groups.

In an oppressive regime, simply conducting business operations and paying taxes may support an unjust government at the expense of its citizens'

rights. Companies operating in such regimes must ensure that their actions are aimed at the strengthening and support of civil society. In some contexts this will consist only of providing local populations with employment and fair wages. In other contexts, supporting civil society will entail the promotion of rights deficiencies specific to the local context, such as women's rights or literacy. Each local operating area is different, but the principle of erring on the side of democratic, community initiatives rather than oppressive government structures should be upheld.

Given the broad nature of civil society and the multifaceted nature of company activities and operations, it can be complex for a company to assess its overall impact on civil society relative to its impact on government. Managers should look in detail at all areas and aspects of their business, including:

Company relationships:

The company should assess who it will interact with in the local area, and how those interactions are likely to affect suppliers, partners and local popula-

In many countries, poor human rights practices have more to do with the activities of rebel groups or traditional societal practices than the government itself.

tions. This includes considerations related to local procurement, expatriate vs. local workers and the company's effect on migration patterns.

Company products:

The company should assess the human rights implications of its product offerings. This includes issues related to equitable distribution—especially in the case of essential products such as medicines—and pro-poor product stewardship.

Company practices:

The company should assess to what extent its actions—both in connection to its core business and beyond—empower government and civil society. This encompasses corruption and bribery, which are not human rights issues per se, but can undermine civil society groups by diminishing their role in the democratic process. The company must also assess its influence in connection with government revenue.

Transparency International ([transparency.org](https://www.transparency.org)) is a valuable source of information on corruption and revenue transparency.

 If a company concludes that its overall operations amount to the strengthening of an oppressive government, stop and consider: Can these operations be restructured, the product line altered, or the relationships adjusted to alter the balance in favour of civil society? The company may only continue if it determines that the operations amount to a net strengthening of civil society.

THE FINAL CONSIDERATION

Transparency in Activities Involving Human Rights

REMEMBER!



Always be transparent in activities involving human rights

- > Acknowledge any direct connections to violations
- > Disassociate you operations from oppressive governments



One of the most damaging things a business can do while working under poor human rights conditions is to legitimise or endorse the undermining of human rights by appearing complacent in the face of violations. A company should therefore mitigate any legitimacy it might lend to an oppressive government by being transparent throughout its operations. This entails two major actions:



1. Acknowledge any direct connections to violations

The company should acknowledge its direct connections to human rights violations (referred to in Consideration 2) by publicly recognising the right, expressing regret that it cannot fully comply with the right in the present circumstances and describing the company's special procedures for preventing and mitigating the negative impact of its operations on the right.

A company operating in Vietnam, where unions are outlawed, might make the following statement:

We recognise the rights of our employees to form company unions, and regret that we cannot fully comply with this right in our operations in Vietnam.

We have put in place special consultative procedures for our workers to represent their interests to management. We are also working with local human rights groups to ensure that these procedures work in practice, and that we meet our duties to the fullest extent possible in regard to the rights of our employees.

2. Disassociate operations from oppressive governments

If a company is indirectly connected to an oppressive government (as identified in considerations 2 and 3) a transparent policy should acknowledge the state's poor human rights record.

This does not necessarily require direct condemnation of the regime, as this could put business operations and personnel in a difficult position. Instead, the company should recognise that reputable human rights groups have found a consistent pattern of poor human rights practices in the country, and state that in light of this finding, the company is taking particular care to ensure that its operations comply with human rights and the general welfare of the population.

This way, the company avoids taking the dangerous line of condemning the regime itself, but rather acknowledges human rights groups' condemnations and contributes to their legitimacy.

When making such public statements, a company should not risk promising more than it can deliver. Companies cannot change regimes, and few have enough economic leverage to force a government to adopt or implement human rights policies. Companies can, however, explain their policies and operations in oppressive states, and ensure that they respect human rights without exception in these areas.

Conclusion

Human rights are violated or fulfilled within national political contexts. Companies are not political actors, and as a general rule they should not interfere in the internal political affairs of the countries in which they operate.

Nonetheless, though human rights are exercised within a domestic political context, they are founded on principles that extend to a much wider setting, and may interact with legitimate international concerns.

In this context, the company's minimum requirements—or duties, even—are clear: Ensure that it is not involved in the violation of human rights. Where the political system of a state sustains or perpetrates severe human rights violations, a business should not be complicit in the exploitation of the population or contribute to propping up the repressive regime.

Fulfilling this requirement is difficult in practice. The sheer scope of foreign company operations

can be extremely far-reaching, and this often this means that purely commercial activities are not wholly apolitical or neutral in their impact on human rights. Simply discouraging businesses from operating in such complex situations is temptingly straightforward, but total exclusion is not the best solution, and risks squandering the potentially beneficial effects of private-sector operations in states where human rights are not fulfilled.

In such contexts, the best a company can do is 'proceed with caution'. It must be mindful of human rights, and should consider the risks contained in the considerations above as seriously as it considers the economic risks of entering a new market. This need for caution is particularly important where states have oppressive governments and the population lacks the protection of rule of law. The company that operates with this caution will be acting as a responsible representative of its own society and a responsible member of all the societies in which it takes part.



The sheer scope of company operations means that commercial activities are not wholly apolitical.