



## HUMAN RIGHTS IMPACT ASSESSMENT AND LEGAL ADVISORY WORK: FREQUENTLY ASKED QUESTIONS

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### Contacts:

Nora Götzmann, Senior Adviser, Danish Institute for Human Rights, [nog@humanrights.dk](mailto:nog@humanrights.dk)

Daniel D'Ambrosio, International Business and Human Rights Associate, DLA Piper, [daniel.dambrosio@dlapiper.com](mailto:daniel.dambrosio@dlapiper.com)

# HUMAN RIGHTS IMPACT ASSESSMENT AND LEGAL ADVISORY WORK: FAQ

This note seeks to demonstrate the connection between human rights impact assessment (HRIA), as a growing area of practice, and legal advisory work. The note works through several common questions that HRIA practitioners and lawyers may have regarding HRIA, providing practical advice and insights into how such questions may be answered.

## OBJECTIVES:

- to enable business lawyers and in house legal counsel to better understand HRIA as a tool that can support businesses to identify and manage human rights impacts; and
- to provide HRIA practitioners with an understanding of how a HRIA process might interact with legal advisory work.

## TARGET AUDIENCE:

- individuals within companies and other institutions who have responsibilities for implementing human rights due diligence as envisaged by the [United Nations Guiding Principles on Business and Human Rights](#) (“UNGPs”), in particular in the area of impact assessment;
- in house counsel and lawyers who advise companies;
- impact assessment practitioners; and
- organisations working with, or on behalf of, affected rights-holders, who may also find the note useful to inform their advocacy work.

The format of the note is Q&A style, addressing frequently asked questions about the connections between HRIA and legal advisory work (see Box I), for an explanation of HRIA see Box 2 below.

The note is not intended to be instructive, rather it is intended to contribute to a discussion on this developing area of practice by using illustrative examples.

## BOX I: OVERVIEW OF FAQS ADDRESSED

1. How can HRIA assist businesses to meet the requirements of emerging governance and regulatory initiatives?
2. What sources should inform and constitute the benchmark for HRIA?
3. How is the concept “severity” used in the UNGP relevant to analysing impacts and how does it differ from “significance” in standard impact assessment practice?
4. How can legacy issues be meaningfully addressed in impact assessment mitigation and management?
5. How is HRIA relevant in the context of corporate transactions, for example, mergers and acquisitions (“M&A”) and early business development?
6. What types of legal strategies can be used to contribute to the effective implementation of HRIA mitigation measures?
7. How can HRIA support effective and ongoing human rights governance and management?
8. How can State actors be meaningfully included and addressed in HRIA, in particular in the area of impact mitigation and monitoring, without blurring the boundaries between the State duty to protect and the corporate responsibility to respect?
9. How can transparency and confidentiality be balanced in HRIA reporting – i.e. what type of information should be disclosed and where is confidentiality justified?



# INTRODUCTION

In the business context “due diligence” generally refers to the checks and investigations a business might conduct to identify risks in relation to a specific project or transaction or as an ongoing process more generally. For instance, the [Handbook for Lawyers on Business and Human Rights](#), (International Bar Association Legal Policy and Research Unit, 2016) defines due diligence as a comprehensive assessment to determine:

- whether the price sought by a seller for the shares or assets is a fair one (and whether any price adjustments should be sought by the buyer);
- what risks and liabilities may exist (or may subsequently crystallise) for which the buyer/merger company/joint venture party/partner could become liable; and
- in light of the above: the steps that could be taken to address these potential sources of liability and/or allocate legal risk or its consequences.

The UNGP outlines the concept of “human rights due diligence” as a process businesses should undertake to identify, prevent, mitigate and account for how they address their human rights impacts. Identifying human rights risks is part of the human rights due diligence process and requires business enterprises to 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.

Human rights risks are to be understood as a business enterprise’s potential adverse human rights impacts. This is the key difference between traditional concepts of due diligence and the concept of human rights due diligence. Whereas traditional due diligence focuses on risks to the business, for example, legal, financial, commercial or reputational risks, human rights due diligence focuses on risks to people.

Whilst framed differently, the two concepts are related for businesses. As such, human rights risks, framed as a business enterprise’s adverse human rights impacts, should be understood as risks to a business. They may also lead to legal, financial, commercial and reputational risks. However, as made clear by the UNGP, even where there is no clear link between an adverse human rights impact and business risk, the human rights impact requires investigation and mitigation or remediation.

The UNGP identifies impact assessments as processes that business enterprises can undertake to identify, prevent and address human rights impacts. Human rights impact assessments are a tool that businesses can use as part of their human rights due diligence process.

## BOX 2: WHAT IS HRIA?

In the business context, HRIA can be defined as a process for identifying, understanding, assessing and addressing the adverse effects of a business project or activities on the human rights enjoyment of impacted rights-holders such as workers and community members.

According to the UNGP businesses are expected to assess their human rights impacts as part of their due diligence process. Notably, the UNGP does not necessarily require that businesses conduct “human rights impact assessment”, but HRIA is one approach that may be taken.

HRIA can have a number of objectives, including to:

- identify and address adverse human rights impacts (through meaningful engagement with stakeholders, data gathering and analysis, prevention, mitigation and remediation);
- contribute to effective human rights due diligence;
- facilitate meaningful dialogue between stakeholders in a particular context; and
- empower rights-holders to hold businesses to account for their adverse human rights impacts.

To ensure that human rights impacts are addressed comprehensively, the full suite of human rights applicable to a context should be considered. It is also important that the content, process and outcomes of the assessment apply, and are compatible with, international human rights standards and principles. This means that international human rights standards must constitute the benchmark for the assessment, and the assessment process should respect human rights by paying particular attention to the principles of non-discrimination, participation, empowerment, transparency and accountability.

Based on [Human Rights Impact Assessment Guidance and Toolbox](#) (DIHR, 2016).

# FREQUENTLY ASKED QUESTIONS

## I. HOW CAN HRIA ASSIST BUSINESSES TO MEET THE REQUIREMENTS OF EMERGING GOVERNANCE AND REGULATORY INITIATIVES?

International human rights standards and principles, which constitute the basis and benchmark for a HRIA, are articulated in various sources of international law and jurisprudence. Showing respect for human rights is an increasingly authoritative normative standard of expected business conduct. This is the basis of the “corporate responsibility to respect human rights”, elaborated in the UNGP, which was unanimously endorsed by the UN Human Rights Council in 2011.

Elements of the corporate responsibility to respect human rights, such as the concept of human rights due diligence, have gained increasing political and legislative support across a number of jurisdictions. In terms of political support, for example, both the European Commission, through its [2011 Communication on Corporate Social Responsibility](#), and the Council of Europe, through a 2016 [Recommendation of the Committee of Ministers](#), have taken steps to encourage and support the implementation of the UNGP, encouraging states to implement due diligence principles in national law. For examples of legislative efforts see Box 3 below.

### BOX 3: EXAMPLES OF LEGISLATIVE EFFORTS TO IMPLEMENT THE UNGP

The EU [Non-Financial Reporting Directive](#), that has been transposed across all EU Member States, will require certain businesses to report on due diligence processes relevant to human rights. Including information on due diligence processes is considered best practice for the purposes of reporting under the [UK Modern Slavery Act 2014](#). Other legislative initiatives like the French “[Vigilence Law](#)” and the proposed Dutch Child Labour Bill will also require businesses to identify and manage human rights risks. As governance and regulatory initiatives in this area continue to develop, HRIA will become a key tool for businesses to comply with legislative standards and keep up with best practice.



Whilst international human rights standards do not create direct legal obligations for businesses under international human rights law, they provide the foundation for businesses to understand internationally recognized human rights norms and give concrete meaning to individual rights. This helps businesses to identify and manage involvement in adverse human rights impacts and show respect for human rights in alignment with the requirements of the UNGP. Legal obligations can be created where international human rights apply in domestic legal standards that are relevant to corporate conduct.

The corporate responsibility to respect human rights means businesses should avoid infringing on the rights of others and address adverse impacts where they occur. The responsibility exists independently of States' human rights duties. For businesses, the scope of the responsibility to respect human rights is determined by a businesses' involvement in adverse human rights impacts through its own activities or relationships with other parties, including business partners and entities in its value chain.

Confusion sometimes exists about why companies should be concerned with international human rights standards if those standards do not create legal obligations on them directly. This can be resolved by considering that businesses must look to international human rights standards to understand whether they are involved in any actual or potential human rights impacts and understand what human rights due diligence might look like – which is part of meeting the corporate responsibility to respect. International human rights standards also create a benchmark by which businesses' human rights performance will be judged by a range of stakeholders.

Understanding the various sources of international law and jurisprudence that elaborate human rights standards therefore becomes very relevant for businesses. HRIA can support businesses to understand human standards and equip them to comply with this fast developing governance and regulatory space.

## 2. WHAT SOURCES SHOULD INFORM AND CONSTITUTE THE BENCHMARK FOR HRIA?

International human rights standards and principles should constitute the basis and benchmark for the assessment. A number of sources can be helpful to understand the content of internationally recognized human rights, for instance, what do specific rights mean, what elements or component parts make up individual rights, how can they be identified and how adverse impacts on rights-holders can be effectively addressed and mitigated.



A HRIA should ensure that human rights content is addressed comprehensively in an assessment and is compatible with all internationally recognised human rights, which at a minimum, is understood as those expressed in the [International Bill of Human Rights](#) and the principles concerning fundamental rights set out in the International Labour Organisation's [Declaration on Fundamental Principles and Rights at Work](#) ("ILO Declaration"). It should be emphasised that this is a minimum baseline; depending on the specific context additional international human rights standards will be relevant and should be considered. Sources that provide useful interpretive guidance on these internationally recognised human rights include, for example:

- United Nations Human Rights treaty bodies
- United Nations Human Rights special procedures
- Universal Periodic Review process
- ILO Supervisory System
- Judicial decisions and doctrine
- Other sources.

An overview of these sources is provided in Table I below. Information from these sources can be helpful to ensure a clear understanding of the content of human rights to be assessed, as well as providing contextual interpretation and information for a particular HRIA. To ensure an assessment is comprehensive, however, the assessment should complement international human rights standards and interpretive guidance with fieldwork and diverse resources such as national statistics, reports by non-government organisations (NGOs) and national human rights institutions, and other relevant resources, to ensure a full picture of the actual human rights situation on the ground.

## TABLE I: OVERVIEW OF KEY HUMAN RIGHTS SOURCES FOR HRIA

<b>UNITED NATIONS TREATY SYSTEM</b>	<p>The United Nations (UN) treaty system is a key component of the international human rights system. UN treaty bodies are made up of committees of independent experts that monitor the implementation of, and provide guidance on, the interpretation of the core international human rights treaties.</p> <p>Treaty bodies publish <b>concluding observations</b> or <b>recommendations</b> that comment on positive aspects of treaty implementation, identify gaps or deficiencies in domestic compliance with obligations under the treaty and make recommendations to States for action to improve compliance. This can be a useful source of information on specific human rights risk areas in a country and can help businesses identify gaps between the domestic legal framework and international human rights standards, which may be a potential red flag for businesses operating in that local context.</p> <p>Treaty bodies also provide authoritative guidance to State parties on how human rights obligations should be interpreted in <b>general comments</b> or <b>general recommendations</b>. These are a key source of guidance on internationally recognized human rights and can inform a HRIA with practical information regarding particular rights. General comments and recommendations do not relate to a specific country but to thematic issues or the interpretation of specific articles of a treaty.</p> <p>For example, in 2016 the Committee on Economic, Social and Cultural Rights adopted <b>General Comment No. 24 on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities</b>, addressing, in particular, the topics of non-discrimination, extraterritorial obligations and remedies.</p> <p>Treaty bodies also have a complaints procedures that are either part of the core treaty or contained in an optional protocol, i.e. a supplementary treaty that accompanies the core treaty. Where a State has signed on to the complaints procedure, <b>complaints</b> or <b>individual communications</b> can provide information on the factual and legal context relating to a particular complaint and can also contain useful guidance on how human rights standards may or may not apply. Because they can also contain recommendations on legislative change they can be a useful way to identify human rights risk areas in a particular jurisdiction.</p>
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<b>UNIVERSAL PERIODIC REVIEW</b>	<p>Universal Periodic Review (UPR) is a recent development of the UN Human Rights Council (HRC) where all States undertake a periodic review of their fulfilment of human rights obligations. Unlike the treaty body processes – which provide technical, legal guidance on international human rights standards – UPR is a political process that is undertaken by States themselves. Nonetheless it can provide useful guidance to businesses on the human rights context in a particular country and can therefore assist when screening specific countries as part of a HRIA.</p> <p>Useful information can be contained in the “compilation of UN information” documents, which contain information prepared by the Office of the High Commissioner for Human Rights (OHCHR) and other relevant UN agencies. Other useful information is also provided by “other relevant stakeholders”. This includes information submitted by national human rights institutions and civil society.</p> <p>Businesses can refer to documents produced during the UPR process to identify human rights risk areas in a particular country, and gaps between local law and international human rights that could increase the chance of being involved in adverse human rights impacts. Businesses might also be informed a State’s failure to fulfil their UPR responsibilities – States that refuse to participate in the UPR process may not be committed to human rights, even if they have ratified international human rights treaties.</p>
<b>SPECIAL PROCEDURES</b>	<p>Special procedures are independent human rights experts that monitor, report and advise on a thematic or country-specific human rights situation. Special procedure mandate holders undertake a number of activities including country visits, individual complaint reviews, studies on thematic issues and convening expert consultations. They can be a key source of guidance to businesses on specific human rights issues and country situations. For example, the <a href="#">UN Working Group on Business and Human Rights</a> is a special procedure; the <a href="#">Special Rapporteur on safe drinking water and sanitation</a> and the <a href="#">Special Rapporteur on the rights of indigenous peoples</a> have dealt in some detail with business responsibilities in their respective thematic areas.</p> <p><b>Thematic studies</b> look at specific human rights issues and develop the interpretation of human rights standards and how they might apply in a particular situation. Reports produced on thematic studies can be a useful source of guidance to businesses to understand what specific human rights mean and how they should be understood in a more practical way.</p> <p><b>Country visits</b> are conducted by thematic and country specific mandate holders. During a country visit a mandate holder will assess the human rights context and identify gaps or inadequacies in the legal framework protecting human rights. Findings from country visits, including recommendations, are published in reports and provide a key source of guidance for specific country-level human rights risks. Beyond country-specific information they also provide a key source of guidance to support the interpretation of specific human rights issues more generally.</p>

<b>ILO SUPERVISORY SYSTEM</b>	<p>International labour standards are adopted and implemented through Conventions and Recommendations of the International Labour Organisation (ILO). The implementation of Conventions and Recommendations is monitored by two bodies, the Committee of Experts on the Application of Conventions and Recommendations, and the International Labour Conference's Tripartite Committee on the Application of Conventions and Recommendations. Both of these bodies produce reports that might assist businesses to understand gaps between domestic and international labour standards that might create risks for businesses. See, for example, the <b>Committee of Experts Annual Report</b> and the <b>Report of the Conference Committee on the Application of Standards</b>.</p> <p>The ILO Declaration on Fundamental Principles and Rights at Work, adopted in 1998, commits Member States to respect and promote principles and rights in four categories, whether or not they have ratified the relevant core Conventions; freedom of association and the effective recognition of the right to collective bargaining, the elimination of forced or compulsory labour, the abolition of child labour, and the elimination of discrimination in respect of employment and occupation.</p> <p>The ILO Declaration is supported by a <b>follow-up procedure</b> whereby Member States that have not ratified one or more of the core Conventions must report on the status of the rights contained in those core Conventions, outlining any obstacles to ratification and areas where assistance might be required. This can provide businesses with a useful overview of risk areas in relation to core labour rights.</p>
<b>JUDICIAL DECISIONS AND DOCTRINE</b>	<p>Judicial decisions and teachings of the most qualified international legal scholars are considered to be a subsidiary means for determining international law. This means that they are not in and of themselves sources of law, but evidence what the current state of the law is. They can be a useful means of understanding international human rights standards.</p> <p>Judicial decisions are not limited to international decisions, for example, the International Court of Justice (ICJ), but also include decisions of the African, American and European regional human rights courts. Decisions of national tribunals can also be used to understand the current state of the law.</p>
<b>OTHER SOURCES</b>	<p>Whilst those sources outlined above are key sources of information in relation to internationally recognised human rights, businesses should also be guided by sources such as reports by civil society and NGOs, national human rights institutions, other relevant local and international organisations, academic sources, sector and industry associations, and other relevant resources that could inform the particular HRIA. Considering these resources together will allow for comprehensive assessment.</p>

### **3. HOW IS THE CONCEPT “SEVERITY” USED IN THE UNGP RELEVANT TO ANALYSING IMPACTS AND HOW DOES IT DIFFER FROM “SIGNIFICANCE” IN STANDARD IMPACT ASSESSMENT PRACTICE?**

The concept of “severity”, in the context of business and human rights, is established in the UNGP. Whilst businesses should seek to address all adverse human rights impacts, the UNGP acknowledges that this may not be possible simultaneously. Thus, severity is a way of determining which impacts should be addressed first and the order in which they should be addressed. In the process of identifying the rights and rights-holders impacted by a particular business project or activity, assessors will investigate the scale, scope and remediability of an impact. Scale, scope and remediability, in combination, determine the “severity” of a human rights impact. HRIA methodologies elaborate this concept, which is rooted in environmental impact assessment laws adopted worldwide – although environmental impact assessment uses the terminology of “significance” rather than “severity” (see further Box 4 below).

#### **BOX 4: SEVERITY AND SIGNIFICANCE**

Severity and significance differ in that the concept of severity prioritises focusing on scale, scope and remediability, while significance also includes consideration of likelihood. This facilitates a shift from the “sphere of influence” to the “sphere of impact”, emphasising that, for example, severe impacts “outside the fence”, such as in the supply chain, may need to be prioritised over less severe impacts “inside the fence”. In short, the concept of severity prioritises focusing on the experience of the impacts from the perspectives of affected rights-holders.

The concept of human rights “core content” can assist businesses to identify the content and elements of individual rights. “Core content”, or its various iterations, is an evolving concept that has been developed as an interpretive tool to guide States to give effect to economic, social and cultural rights in international jurisprudence.

The concept of “core content” and related principles such as availability, accessibility, acceptability and quality, can be used to guide the identification of economic, social and cultural rights. These principles can provide useful parameters for businesses when thinking about analysing a situation in a particular context. The interpretive sources identified in question two above, e.g. general comments, can assist to identify relevant elements of economic, social and cultural rights’ core content.



## **4. HOW CAN LEGACY ISSUES BE MEANINGFULLY ADDRESSED IN IMPACT ASSESSMENT MITIGATION AND MANAGEMENT?**

“Legacy issues” can be understood as human rights impacts associated with the activities of previous business operators where a new operator is in place. For example, where a company leases a piece of land from a government to develop an infrastructure project and a local community was forcibly moved from that land two years prior to the lease being granted, continuing adverse human rights impacts might be referred to as “legacy issues”.

Addressing legacy issues can raise questions about how limitation periods should be dealt with. Here, we refer to limitation periods as what is generally a fixed period of time during which legal claims might be available. Limitation periods will vary depending on, among other things, the nature of the claim involved and the jurisdiction, who the parties are, and others.

Whilst limitation periods might be relevant in the context of some legal risks, this does not mean a business that has taken on legacy issues will not be affected by other risks, for example, financial, commercial, reputational. In this context reducing the impacts on individuals is the most effective way of protecting against risks to the business.

For example, a company may be legally entitled to land it has accessed; and a process of due diligence may have been undertaken to ensure a government had legal title to the land and that the lease was validly granted. Despite this, legacy issues will be relevant to the company not least because of its corporate responsibility to respect human rights but also because it should be concerned with continuing involvement in adverse human rights impacts and the potential this has to impact its operations. The company should use the UNGP as a guide to determine its involvement and any appropriate action that it might take.

A HRIA might be a useful tool to identify and assess the extent of the impacts on the individuals that were forcibly removed. This could also assist the company in its negotiation with the government in clarifying and agreeing on the responsibilities for the prevention and mitigation of human rights risks associated with

the project and its activities before the contractual arrangements for the investment are finalised.

The [Principles for Responsible Contracts](#), developed under the auspices of the UNGP, provide useful guidance both on the negotiation and content of such agreements.

In these scenarios, before a deal between a government, company and the banks that are financing the project can be completed, the company will usually ask the government to make certain commitments. These promises will be contained in the terms of its contractual arrangement with the government, a “concession agreement”, and might include commitments from the government, for example:

- that the government provide evidence that the land is acquired peacefully, in accordance with local law and international human rights law;
- that the government undertake to deal with any law suits, protests, claims, etc. arising out of any land claims in a peaceful way, respecting its human rights obligations arising out of international human rights law; and/or
- communicate to the company how it is dealing with any land claims as they may pose financial risks or risks to the reputation of the company.

Companies should also carefully consider whether it is likely that the government will take actions that violate human rights in order to meet its contractual obligations to the company, for example, by passing legislation that clamps down on protests or human rights defenders, or by restricting civil society and civil freedoms to facilitate the business activity going ahead. Any contractual term will need to be defined and carefully negotiated between the parties. Furthermore, the company will need to consider how likely it is that the government commitments made will be duly upheld and what types of additional due diligence measures it may need to put in place if there are doubts about the government upholding its commitments.

A HRIA can be a useful tool to equip the company to understand any potential involvement in adverse human rights impacts and strengthen its ability to negotiate and make an arrangement that reduces the impact on individuals, which will reduce potential adverse consequences for the business.

## 5. HOW IS HRIA RELEVANT IN THE CONTEXT OF CORPORATE TRANSACTIONS, FOR EXAMPLE, MERGERS AND ACQUISITIONS (“M&A”) AND EARLY BUSINESS DEVELOPMENT?

M&A due diligence, or transactional due diligence, is focused on identifying risks to businesses and their assets based primarily on legal risks. “Human rights due diligence” refers to the process by which businesses should identify and assess, track, monitor and report on involvement in adverse human rights impacts.

M&A due diligence processes could incorporate additional elements to identify and address legacy and other human rights related issues. The practical reality of an M&A transaction, such as tight timescales, may not always allow for a comprehensive HRIA to be undertaken, and human rights risk assessment may be a more suitable tool than HRIA in this context. Strict confidentiality also applies to the M&A process to protect the position of the parties, thus some aspects of a HRIA, like engaging stakeholders, may prove difficult to incorporate. Nevertheless, steps should be taken to increase consideration of human rights impacts related to the transaction.

The approach may also vary depending on the nature of the transaction and the parties. For example, in the context of an merger both parties might provide a HRIA of their own company or request that one is undertaken by the other company so that human rights risks are identified and can be addressed through the merger process. In the context of an acquisition, for example, a seller may prepare itself by conducting a HRIA to become more attractive to a potential buyer whereas a buyer may request a HRIA be undertaken by the seller to better understand the position in relation to human rights risks of the target company.

In relation to the M&A process itself the parties will generally enter into an agreement in the preliminary stages of an acquisition to clarify the nature and scope of the proposed transaction. This might be referred to as the “heads of terms” agreement. In this agreement it might be useful to consider:

- Preconditions: Certain preconditions will need to be met in order for signing of the transaction to occur, including, generally, “financial, commercial and legal due diligence”. Consideration might be given as to whether it is possible to explicitly mention the identification of human rights risks or a HRIA here.



- Due diligence: The “heads of terms” agreement will generally specify the documents, information and personnel that the purchaser will have access to in the course of the due diligence process. Consideration should be given to whether the wording and timescales allow the purchaser to carry out adequate investigations into human rights risks.

From a practical point of view it is important to try and incorporate, as much as possible, human rights expertise into existing systems to ensure that the identification and management of human rights is effectively integrated into the transaction. In relation to due diligence investigations, human rights risks may converge with legal compliance of related issues, for example, environmental, labour, health & safety and consumer rights. Due diligence questions on these issues will already exist and it may be possible to amend these questions or include additional questions to identify potential human rights risks and legacy issues. Obviously, careful consideration will have to be given to the adequacy of existing questions as it is unlikely they will be framed in a way that will specifically address risks from a human rights perspective, i.e. the perspective of risks to people. Furthermore, the human rights competence of those completing the questions will be critical, stressing the need to involve those with environmental, social and human rights expertise in M&A processes.

In relation to an asset or share sale, specific questions relating to the target company and company assets might include questions relating to a company’s approach to human rights generally, or specific areas that might create risks, for example, suppliers, land, security operators. Table 2 below sets out some examples of the types of questions that might be asked on specific issues. These questions are illustrative only. They can be modified to address specific legal issues in a particular context. Reference can be made to resources like the [Handbook for Lawyers on Business and Human Rights](#), which informed this note.

**TABLE 2: EXAMPLE QUESTIONS TO STRENGTHEN HUMAN RIGHTS CONSIDERATION IN M&A DUE DILIGENCE**

EXAMPLE ISSUE AREA	EXAMPLE QUESTIONS
<b>COMPANY'S APPROACH TO HUMAN RIGHTS GENERALLY</b>	Does the company have a human rights policy commitment? Does the company have a process to identify involvement in adverse human rights impacts? Has the company identified its areas of involvement in adverse human rights impacts? Does the company take any steps to prevent, mitigate or remedy adverse human rights impacts? What are those steps? Does the company report on human rights? What mitigation measures have been adopted to date? Has the company been subject to criticism in relation to human rights impacts arising from its business activities, products or services? Does the company have mechanisms in place to receive and resolve grievances with workers and communities?
<b>STAKEHOLDER ENGAGEMENT</b>	Does the company regularly engage with workers and community representatives with respect to human rights issues related to its operations? If so, how? What information is collected in relation to this engagement? How does the company identify groups and individuals for engagement and does the company engage with marginalised and vulnerable groups to ensure their voices are heard? Which individuals and groups have been engaged within the last six months and how?
<b>WORKERS</b>	What percentage of workers are employees, contract workers and/or migrant workers? What are the company's policies and procedures in relation to the different categories of workers? What are the company's policies and procedures on living wage? Do workers receive the training on health and safety and other operational risks? Do workers receive appropriate personal protective equipment? Are there up to date accident/injury reports available for review? Is there a history of conflicts between the company, workers or trade unions?
<b>SUPPLIERS</b>	What steps are taken to ensure that suppliers comply with relevant labour standards, including international labour standards, environmental and other safeguards? What steps are taken to ensure there are adequate policies and processes in place to regularly monitor supplier compliance with such standards?
<b>ACQUISITION, LEASE AND USE OF LAND</b>	Have inquiries been made into the prior use of land? Were any individuals relocated in order for the site to be acquired/used? If so, was due process followed and was adequate compensation given in relation to any relocation? How is adequate compensation defined and determined? Do those individuals include indigenous peoples? Has the cultural significance of the land been considered and accounted for?
<b>BUILDINGS/ SITES/ANCILLARY INFRASTRUCTURE</b>	Does the location of buildings, plants or operations impact local water and other natural resources essential for local communities? What investigations were conducted to determine whether and to what extent water and resources will be affected? Were local residents consulted in these studies?
<b>PUBLIC AND PRIVATE SECURITY OPERATORS</b>	Are private security operators used at the site? How is their compliance with relevant international standards on conduct and use of force monitored? What are their policies and processes in relation to human rights and the use of force? Do they receive adequate training in relation to the use of force? Does it comply with human rights standards? Is there a history of violent conflict in the area? What, if any, is the relationship between private security providers, public security providers and the military/police in the country?

## 6. WHAT TYPES OF LEGAL STRATEGIES CAN BE USED TO CONTRIBUTE TO THE EFFECTIVE IMPLEMENTATION OF HRIA MITIGATION MEASURES?

Legal strategies, for example, contractual clauses and sanctions, should be part of a range of measures that can contribute to the effective implementation of HRIA mitigation measures. They should be framed in a way that reduces impacts on individuals as the most effective way of minimising risks to business, i.e. risks to people should be understood as risks to business. It is important

that any legal strategies are considered in terms of their practical effectiveness, for example, including contractual clauses alone will not be sufficient but will need to be combined with effective on-going contract management. Some examples are set out below.

### Supply Agreements

Legal strategies employed in relation to supply agreements should include provisions for obtaining certain assurances with respect to human rights performance (for examples see Box 5 below).

### BOX 5: EXAMPLE CONTRACTUAL PROVISIONS FOR SUPPLY AGREEMENTS TO PROMOTE HUMAN RIGHTS PERFORMANCE

Illustrative examples could include representations and warranties dealing with:

- implementation of the UNGP;
- compliance with relevant human rights management standards, for example, ISO 26000;
- compliance with codes of conduct, for example, that align with the UNGP;
- compliance with relevant regulatory schemes; and/or
- purchasing regime allows commercial needs of purchaser to be met without infringing on the rights of workers downstream under domestic law and/or international standards.

Contractual terms might also address the ongoing commitments that a business could seek from suppliers in relation to the monitoring, management and mitigation of human rights impacts. Similar commitments might be sought from suppliers of their own suppliers. Examples of covenants that might be included (in relation to a supplier of goods):

- to maintain relevant licenses, certifications and management standards for the duration of the contractual relationship;
- to notify the purchaser of any non-compliance or compliance related issues in relation to those licenses, certifications and management standards;

- to ensure rights of audit are adequate to allow access for the purpose of inspection of premises, including ad hoc inspections by independent third parties. Consideration should also be given to how access may be granted to premises of sub-contractors;
- to ensure regular access to information, reporting and response to requests for information regarding the management of human rights risks and impacts;
- to ensure purchasing protocols and lead times do not cause pressure on downstream suppliers that might lead to abuses of labour rights of suppliers' employees or contractors. A purchasing code of conduct could be included as part of the contractual obligations with the supplier; and
- not to use certain raw materials, components or products produced using certain methods or originating from certain sources.

In relation to a supplier of services covenants that might be included by the purchaser could include, for example:

- not to use services for certain prohibited purposes; and
- to take reasonable steps to ensure that the services outcomes are not used for the same prohibited purposes by third parties.

Businesses may wish to seek indemnities from their suppliers for breaches of any warranties, covenants or failure to abide by minimum human rights standards in the performance of the supplier's contractual obligations.

Businesses may also wish to include events that would trigger termination of the contract in the event that efforts to prevent or mitigate impacts and/or use or increase leverage fail. It is important that parties also understand that the priority should be to consider how the human rights impacts might be addressed, rather than terminating the contract because of the fact that human rights risks have been identified.

Contractual arrangements may differ depending on the nature of the relationship. For example, supply agreements will reflect different commercial realities to a distribution or franchise agreement. This might mean additional consideration should be given to issues that are specific to the nature of the agreement. For example, in franchise agreements where the operation of a franchisee business creates the potential for human rights risks the franchisor could seek to require minimum human rights standards be included in a franchise operating manual. Furthermore, contractual provisions must never be considered in isolation as the due diligence processes governing their implementation will be critical for ensuring effectiveness.

### Joint Venture Agreements

Addressing human rights risks generally, and implementing any HRIA mitigation measures specifically, in relation to joint venture agreements, can assist companies to reduce the risk of involvement in adverse human rights impacts associated with co-venturers.

Notwithstanding the practical, commercial reality that might make it challenging to undertake, a HRIA process can help to ensure that due diligence conducted on co-venturers adequately assesses risk factors, including, for example:

- their human rights policies and procedures;
- their human rights performance, i.e. their track record. This might also include identification of adverse publicity in relation to human rights impacts, litigation and/or advocacy by civil society and other stakeholders on the basis of human rights performance;
- their capacity to address any potential human rights risks, i.e. what systems do they have in place for the management of human rights risks;

- the scope of their operational authority and the potential for involvement in adverse human rights impacts on this basis; and
- any unique skills they bring to the joint venture and the potential this has to prevent and mitigate human rights impacts.

The joint venture agreement should make provision for systems and processes that will enable the joint venture to identify and manage human rights risks, including policies, due diligence and remediation processes. This might include reference to third party standards, for example, requiring project financing from the International Finance Corporation or an "Equator Principle" financial institutions, which, in principle, require some form of human rights due diligence as part of the financing application.

The joint venture agreement might also include specific corporate governance provisions to enable them to influence the joint venture's human rights performance. These might include:

- rights to monitor, require reports and information, and audit as well as assess the human rights performance of the joint venture;
- rights to place employees in certain management positions that might be relevant to areas of potential human rights impacts, for example, health and safety or environmental management; and/or
- requirement of majority voting thresholds on critical issues that might be relevant to areas of potential human rights impacts, for example the choice of security providers.

In practice, the window of opportunity to use leverage and influence the human rights performance of a joint venture is greatest whilst the contractual arrangements are being negotiated. A strong focus on appropriate governance provisions can help to ensure there is an ongoing ability to monitor and influence the joint venture's human rights performance. This must be properly reflected in the joint venture agreement.

In relation to a HRIA process specifically, issues of timing, confidentiality and commercial sensitivity will make it difficult for this process to be undertaken prior to, or during, the negotiations establishing the joint venture. It is more likely that a HRIA could be undertaken after the joint venture is established and businesses might consider including this as a term of the joint venture agreement.

## 7. HOW CAN HRIA SUPPORT EFFECTIVE AND ONGOING HUMAN RIGHTS GOVERNANCE AND MANAGEMENT?

Whilst HRIA mitigation measures will seek to address specific impacts that have been identified, businesses should also seek to use a HRIA, and the internal momentum around human rights that it can create, to review the company's approach to human rights more generally and refresh corporate governance and risk management systems (see further Box 6 below). Specific mitigation measures outlined in a HRIA should be included in contractual arrangements to ensure that they adequately reflect the nature of the obligations and responsibilities of the parties. Examples are given above in relation to supply agreements and joint venture agreements.



### BOX 6: HOW HRIA CAN SUPPORT EFFECTIVE AND ONGOING HUMAN RIGHTS MANAGEMENT

- Ensuring a policy commitment on human rights is in place;
- Reviewing risk management systems for evidence that:
  - a) HRIA findings are effectively and meaningfully integrated into risk monitoring and risk identification systems; and
  - b) risk identification systems assess actual and potential human rights impacts on an ongoing basis (i.e. after an initial HRIA is conducted);
  - c) risk management systems integrate human rights findings, monitor the company's interventions, and track the effectiveness of risk management measures; and
  - d) risk management systems provide for an internal communication process designed to generate broad oversight and decision-making over human rights-relevant issues. Although the "human rights due diligence" process outlined in the UNGP is modelled on enterprise risk management processes that businesses will be familiar with, some modification will be needed e.g. not all human rights risks will fit neatly with other ESG risk profiles, KPIs and approaches to non-financial risk management.
- Reviewing governance processes to ensure that there is appropriate senior management or board level understanding and oversight of human rights risks, and that decision making processes are focused on reducing risks to people as the most effective means of reducing risks to the business.
- Ensuring adequate training of managerial and commercial decision makers and that it is specific to the nature of their role and its potential connection to human rights risks such that they can be identified and managed in the course of business transactions and dealings.
- Reviewing remediation processes, including whistle-blowing policies and complaints mechanisms, which might include developing operational-level grievance mechanisms.

## **8. HOW CAN STATE ACTORS BE MEANINGFULLY INCLUDED AND ADDRESSED IN HRIA, IN PARTICULAR IN THE AREA OF IMPACT MITIGATION AND MONITORING, WITHOUT BLURRING THE BOUNDARIES BETWEEN THE STATE DUTY TO PROTECT AND THE CORPORATE RESPONSIBILITY TO RESPECT?**

States have the duties to respect, protect and to fulfil human rights, whereas business enterprises have the responsibility to respect human rights. Given the State's role as primary human rights duty bearer, how State actors are included in HRIA and subsequent impact mitigation and monitoring warrants some consideration (for example strategies see Box 7 below). In particular, it will be important that impact mitigation and monitoring measures support, rather than undermine the State's role as primary duty bearer; this is particularly important to bear in mind in remote, fragile, rights-averse or weak governance operating contexts.



### **BOX 7: EXAMPLE STRATEGIES FOR COMPANY AND STATE COLLABORATION IN IMPACT MITIGATION**

- Joint and participatory impact monitoring, involving the company and government actors, as well as local rights-holders and independent parties as relevant. The State has a primary role in monitoring business operations' compliance with legal standards, so where businesses put in place measures for monitoring impacts these should be compatible with State initiatives wherever possible, e.g. through the use of common indicators. Joint monitoring can also contribute to capacity building of State actors in those contexts where such capacity is limited; as well as contributing to better company-State-community relations through collaborative fact finding.
- Similar collaborative approaches may also be useful for specific purposes, such as land use mapping, with the objective of coming to a common understanding of land use patterns and potential impacts caused by business activities; or collaboration on human rights training for government security forces where these are stationed to protect company assets.
- Regional planning to ensure consistency between multiple operators, including with the view to addressing cumulative impacts. Again, it is usually helpful if such regional planning initiatives are multi-stakeholder, involving not only government and company actors but also impacted rights-holders and other relevant stakeholders to ensure long-term sustainability of any measures determined. As part of engaging in any multi-stakeholder initiatives, companies should also carefully consider the human rights reputation of the other parties and take measures to avoid complicity in human rights violations.

## 9. HOW CAN TRANSPARENCY AND CONFIDENTIALITY BE BALANCED IN HRIA REPORTING – WHAT TYPE OF INFORMATION SHOULD BE DISCLOSED AND WHERE IS CONFIDENTIALITY JUSTIFIED?

Transparency of a business enterprise's human rights performance is a key component of ensuring stakeholder confidence. Reporting publicly on a HRIA process and findings can be important in demonstrating a commitment to transparency and accountability, as well as providing a platform for ongoing dialogue between the different stakeholders involved. There is a clear trend towards public reporting and disclosure of HRIA processes and findings, and this is considered to be a part of good practice HRIA.

In order to account for how they address their human rights impacts, business enterprises should be prepared to communicate this externally, particularly when concerns are raised by or on behalf of affected stakeholders. However, the UNGP recognises that communications should not in turn pose risks to affected stakeholders, personnel or to the legitimate requirements of commercial confidentiality.

While human rights due diligence should be as transparent as possible, transparency must be balanced with confidentiality, particularly to protect impacted rights-holders, in particular human rights defenders, personnel, and other relevant stakeholders, or to address the legitimate requirements of commercial confidentiality.

Businesses might wish to keep the following considerations in mind in deciding when and how to communicate HRIA findings, or when accounting for how they addresses their human rights impacts in line with Guiding Principle 21.

- The processes in place should be designed to facilitate reasoned and defensible judgments on when and how a company should communicate publicly.
- Reporting can take a variety of forms. As such, it is important to consider the purpose of the communication and, consequently, the forum and

format for which reporting is intended. Aspects such as language and physical accessibility need to be considered. For example:

- in-person meetings with relevant stakeholders, in particular rights-holders and vulnerable groups, may be critical to ensure that the information reaches affected individuals who may not find a public report easily accessible;
  - communications may focus on the enterprise's general approach to addressing human rights risks most salient to its operations for companies with particularly large and diverse value chains, or they may entail publication of full or summarised HRAs;
  - communications specific to a company's management of an individual impact will likely be distinct from its general reporting on human rights and may be issued with greater frequency than broader human rights reporting.
- As a general rule, even when informed consent has been obtained from rights-holders for the use and reporting of information, assess the risk of harm to the rights-holder providing the information before including it in the report.
  - Reporting should not be allowed to compromise a criminal investigation or public inquiry.
  - Should different versions of the same report be produced for different purposes?
    - It might be appropriate to share more information with regulators, rights-holders and/or prospective investors than made available in a public report. Politically sensitive findings may need to be excluded from the public domain report when companies are considering operations in complex or rights-averse contexts, but other human rights findings can and should still be made public.
  - Are there any parallels which can be drawn with relevant environmental protection or freedom of information laws applicable to public authorities (if any)?

- Most countries have environmental impact assessment (“EIA”) laws requiring public disclosure and comment on assessments. Whilst there was strong pushback against this initially it is now standard practice and can be a key driver for companies to work hard to mitigate environmental risks before publishing EIAs.
- Many jurisdictions expressly recognise that there are circumstances in which public authorities might hold information with the potential to prejudice its own or another enterprise’s

commercial interests, and provide exemptions from disclosure of such information in certain circumstances.

- The legitimate requirements of commercial confidentiality would typically extend to information crucial to negotiations regarding a significant business transaction, for the duration of those negotiations. They would also include information legally protected against disclosure to third parties.

Factors such as those outlined above should be carefully considered in HRIA reporting, aiming for maximum transparency of both process and outcome of assessments.



# CONCLUSION

This note has sought to demonstrate the connection between HRIA and legal advisory work. As businesses are working towards implementation of the responsibility to respect human rights, including through exercising human rights due diligence, processes such as HRIA will be increasingly useful as one tool through which to identify and address adverse human rights impacts. As such, many HRIA practitioners and lawyers have questions regarding the intersection and connections between HRIA and legal advisory work. This note has attempted to make a contribution to discussing and answering some of these questions by using a few illustrative examples.

Going forward, it will be important that HRIA practitioners and business lawyers and in house legal counsel establish and maintain a dialogue that continues to foster mutual understanding with the view to maximising the complementarities of HRIA and legal advisory work.





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