

Due Diligence for Human Rights: A Risk-Based Approach



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October 2009 | Working Paper No. 53

A Working Paper of the:
Corporate Social Responsibility Initiative

A Cooperative Project among:
The Mossavar-Rahmani Center for Business and Government
The Center for Public Leadership
The Hauser Center for Nonprofit Organizations

Citation

This paper may be cited as: Taylor, Mark B., Luc Zandvliet and Mitra Forouhar. 2009. "Due Diligence for Human Rights: A Risk-Based Approach." Corporate Social Responsibility Initiative Working Paper No. 53. Cambridge, MA: John F. Kennedy School of Government, Harvard University. Comments may be directed to the authors.

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Due Diligence for Human Rights: A Risk-based Approach

Abstract

What does it mean in practice for a company to respect human rights? The paper examines the operational implications of a “corporate responsibility to respect human rights”, a pillar of the recent framework put forward by UN SRSG John Ruggie under the title “Protect, Respect and Remedy”. The authors define an approach to due diligence based on assessing the risk of company involvement in human rights violations. The authors draw on the work of StatoilHydro in developing a human rights risk assessment method for its global operations and argue that due diligence and risk are proven approaches to guarding against social harm by companies. The paper outlines a practical approach to human rights due diligence based on the assumption that the nature of a company’s business activities and relationships decides the environment of human rights risk in which the company must operate. The authors argue that companies are able to exercise greater control over their exposure to human right related risk than generally assumed possible and that an empirically-grounded, risk-based approach to due diligence permits companies to more effectively manage their responsibility to respect human rights and their responsibility to turn a profit

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In recent years, the private sector has faced increasing demands for social responsibility with respect to human rights. Yet the definition of those responsibilities has been a source of contention between the private sector and non-governmental organizations (NGOs), as well as states. The debates have recently been transformed by the work of Harvard professor John Ruggie, in his capacity as United Nations Special Representative of the Secretary-General on Human Rights and Transnational Corporations and other Business Enterprises (SRSG). In 2008, Ruggie received unanimous acceptance of his notion of a “corporate responsibility to respect human rights”.²

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² Ruggie’s three-fold framework of a state’s duty to protect human rights, a corporate responsibility to respect human rights and access to remedies was unanimously accepted by member states of the Human Rights Council in June 2008. The framework was welcomed in a joint statement by human rights NGOs as well as by the International Organization of Employers, International Chamber of Commerce and the Business and Industry Advisory Committee to the OECD (BIAC). See the 2008 report and reactions to it at <http://www.business-humanrights.org/Documents/RuggieHRC2008> (accessed 2 June 2009)

For many companies this development in international policy has made more urgent the question of what it means in practice for a company to respect human rights. The Ruggie framework answers this in part, stating that “the corporate responsibility to respect human rights...in essence means to act with due diligence to avoid infringing on the rights of others.”³ Discharging “this responsibility to respect requires due diligence” and “(b)ecause companies can affect virtually all internationally recognized rights, they should consider the responsibility to respect in relation to all such rights”.⁴ In short, not only have company responsibilities been clarified in theory, there is now also an international consensus that good human rights performance is the conduct of company operations without causing harm to people, either directly through company activities, or indirectly through the company’s relationships to others who cause harm. A key step towards ensuring good human rights performance by the company is the conduct of human rights due diligence.

What is entailed in human rights due diligence, however, remains unclear. In this article, drawing in part on work conducted for StatoilHydro in 2007,⁵ we propose an operational approach to human rights due diligence by marrying the concepts of human rights and risk. We first outline due diligence as it is understood in many companies today and describe how the concept of human rights risk is suitable for the due diligence process. We then explore the operational implications of risk-based due diligence, briefly outlining the basis of an approach to human rights risk due diligence that would be applicable across a variety of businesses, and outlining what we think are some of the benefits of due diligence based on an approach which seeks to identify and mitigate⁶ the risk of human rights abuse. We then present a framework for conducting human rights risk assessments in an operational field setting.

The Concept and Process of Due Diligence

The origins of the concept of due diligence can be traced back to the U.S. Securities Act of 1933, which provided for a “due diligence” defense for broker-dealers when accused of inadequate disclosure of material information to investors.⁷ The Act protected against legal liability if the broker-dealer could demonstrate that the missing information was not discovered despite having had conducted a good faith due diligence on the issuer of securities. At the heart of this method lies the principle that an investigative process must be undertaken for the purpose of preventing harm. As such due diligence has become a key element of risk control, and this realization has

³ “Business and human rights: Towards operationalizing the “protect, respect and remedy” framework” UN Doc A/HRC/11/13 para 2.

⁴ “Protect, Respect and Remedy: a Framework for Business and Human Rights”, UN Doc A/HRC/8/5, para 24 and para. 56.

⁵ The conclusions and recommendations described in this paper are the sole responsibility of the authors and do not represent the views of StatoilHydro as a company.

⁶ By mitigation we mean preventive or remedial action.

⁷ See 15 USC 77a *et.seq.*, section 11.

facilitated its subsequent propagation to other business activities such as anti-corruption and mergers and acquisitions..

The due diligence process fuses two conceptually distinct processes; one is an investigation of facts, and the other is an evaluation of the facts in light of the relevant standard of care. Conduct of due diligence is not a mechanical process and requires exercise of informed and seasoned judgment by the investigator. The investigator must know what information to seek and how to assess the facts revealed. In fields where conduct of due diligence is a legal requirement, the investigator's failure to exercise reasonable judgment may lead to legal liability for her. Similarly, the person appointing a less than competent investigator may be liable for negligence. To sum up the concept in simple terms, due diligence is application of a method by a person who possesses competence in the underlying subject matter.

In order to fulfill the responsibility to respect human rights, corporations can conduct due diligence to assess the human rights risks that may be associated with their activities, operations and relationships. The scope of a human rights due diligence depends on its context and timing, and ensuring respect for human rights is a dynamic activity that moves with time, normative developments, facts and circumstances. For example, as we shall describe below, human rights due diligence should be conducted in connection with proposed projects for early identification of potential risks, as well as for ongoing activities such as procurement. It should involve implementation of risk control mechanisms early in these process. In addition, the periodic conduct of human rights due diligence as a one-off risk assessment is useful for monitoring risks and identifying potential new risks.

Regardless of timing, context and scope, the method for conducting human rights due diligence is similar to due diligence as conducted in other fields: (1) identifying relevant facts and (2) evaluating those facts in light of a standard of care. The evaluative aspect of conducting due diligence is not dissimilar to the legal analysis method known as IRAC (issue, rule, analysis, conclusion) which is taught to every first year law student in the United States. Because the hard and soft laws governing corporate human rights responsibilities are evolving, respecting the letter and the spirit of international human rights is the appropriate standard of care to apply in human rights due diligence. This does not exclude the inclusion of a company's own values and ethical standards as part of that standard of care that due diligence should cover. However, it should be stressed that conducting due diligence is not in itself compliance, but a preventive measure against the potential for violating a standard of care. The analysis and conclusion emanating from a due diligence investigation should not be strictly legal in nature, but rather one that presents a realistic assessment of the situation and offers creative ways for managing risk of harm to people as well as to the company.

These two basic steps – identification and analysis - are the foundation for both of the two key risk management tools required to implement a due diligence approach: control systems and investigations into specific risks. Investigation into risks - a human rights risk assessment - is best carried out by a person with a sound knowledge of human rights or with a strong grasp of how business activities impact people. As we describe below, an assessment of human rights risk is similar to other assessments of ethical, social or environmental risk: investigators get expert input, go to the field, conduct interviews, meet stakeholders, and report back. Just as with other

forms of risk assessment, human rights competence, whether retained in-house or out-sourced, is necessary in order to uncover relevant facts in complex situations, to evaluate their scope and relevance, and to help the company formulate effective responses.

The investigative logic of identification/analysis requires that once the facts have been identified, the question then becomes how those facts measure up against the relevant standard of care. In this case, the relevant standard is the international proclaimed human rights of workers, consumers, or other individuals affected by the business. Responding to that question requires an analysis of the relevant facts in light of international human rights standards and other company standards compatible with these. The analysis should then lead to a conclusion regarding the quality and scope of the impact as well as ways to avoid or mitigate the adverse impact. Devising workable solutions can include an adaptation or revision of company policies and practices or may require a collaborative effort involving a range of stakeholders such as business partners, local or international NGOs or IGOs, host governments and/or home governments. For large companies, there will be a range of internal stakeholders as well.

In practice, the method of human rights due diligence – identification and evaluation – is conducted on an on-going basis, both at the organizational level and as one-off assessments to evaluate a particular situation. For this reason, guidance for non-specialists, in the form of questions to ask and patterns to look for is an important part of integrating human rights risk due diligence to company operations. Checklists aimed compliance may be useful as an auditing tool, but they will have limited effectiveness in the actual management of risk: it is not possible to anticipate every possible situation and, while completion of a checklist can often create a sense of security about one's compliance, latent risks may go undetected. It is always possible that human rights risks arise as soon as the checklist is finished. For these reasons, human rights expertise will be an important part of effective human rights due diligence and risk management, particularly for larger companies or those with the potential for widespread social impacts resulting from their activities.

Based on management systems designed to satisfy the internal control risk requirements⁸ it is possible to identify three basic attributes of a sound control system that can be utilized to integrate the human rights due diligence process into business operations. Those basic management system attributes are: (1) assignment of authority and responsibility to a person with necessary knowledge and experience who can conduct human rights due diligence; (2) the exercise of internal control over the risks identified and oversight of the implementation of mitigating measures; (3) the organizational structure and communication processes should facilitate unimpeded flow of critical information; and (4) a process for monitoring the continuing effectiveness of the system.

One of the benefits of a risk-based approach to human rights due diligence is that the outcomes of the due diligence process can be fed into the existing corporate risk control system, rather than adding a separate system that managers must comply with. This positions the due diligence process as one of several inputs to the larger risk management of a company and

⁸ For example, systems designed to meet the requirements of the U.S. Sarbanes-Oxley Act of 2002 ([Pub.L. 107-204](#), 116 [Stat.](#) 745, enacted July 30, 2002) to implement accounting reform and investor protection in the wake of major corporate accounting scandals in the U.S., most famously Enron.

locates it alongside other inputs that managers need in order to both meet basic standards and improve business performance. In addition, as implied by the origins of due diligence defense in the U.S., it is possible that due diligence, properly carried out and acted on, may protect companies against the risk of civil and criminal liabilities for alleged participation in human rights violations.

However, a challenge in deriving full benefit from the use of the human rights due diligence method is its integration into corporate control risk systems. Corporations are accustomed to centralized and sophisticated risk management systems in their legal and financial functions, but many have yet to adopt the same approach across the board in managing non-financial or non-legal risks. Controlling risk may begin with a sound corporate policy (governing documents) and an ethical culture. But policies do not implement themselves. An ethical culture is not sufficient to prevent harm that can arise from complex and often distant corporate activities and relationships. Like due diligence against corruption, human rights due diligence should be permanent posture for any company that takes it seriously. It involves asking basic questions about human rights risk at all the appropriate decision-making moments in the business's processes, as well as conducting in-depth investigations into identified sources of risk. Thus, integration of due diligence to a control system is required to identify and assess risks and prevent risks from materializing as harm.

Human Rights Risk

The due diligence process looks at the facts of a company's operations and relationships in its social, political and economic context, and the evaluation process interprets these facts in light of international human rights standards, guided by the existing body of national and international human rights law. This two-step due diligence process generates a picture of what we call 'human rights risks' which the company must manage.

Human rights and risk are different concepts, with different pedigrees, but in practice they work well together. Human rights are universal freedoms and protections for human beings provided under international law and enshrined in several international covenants. As such human rights are normative standards for the dignified treatment of people by states and other organs of society, in other words a universally accepted standard of care. Risk is a functional concept applied across a range of disciplines, from finance to human development, which seeks to identify and mitigate a threat, or the potential for harm or damage. Therefore, human rights risk can be understood as harm to people, or the potential for harm to people, where that harm constitutes a violation of internationally proclaimed human rights.

The notion of harms and violations is what links the principle of respect for human rights with concepts of risk and due diligence. The avoidance of harm is a normative obligation emanating from the human rights regime which creates a responsibility on the part of companies to respect the rights and freedoms of people. Corporate approaches to risk – technical risks to the implementation of projects, political risks arising from the politics or laws of host countries, financial risks found in markets – all rely on detection as a first step. As we have described above, the steps taken to detect risk are called due diligence, in particular when the steps taken

are taken in response to a legal or company standard of care. An assumption underlying both the notion of the responsibility to respect and risk-based due diligence is that the potential for harm should be identified and that, once identified, steps should be taken to mitigate the harm.

Of course, the concept of risk, for a company, is not primarily about people. It is primarily about managing the risks which threaten to undermine a company's core task, which is to turn a profit. From this standpoint, the demands of human rights and private sector risk would appear to conflict. Our contention is that they do not. Far from it, for in fact one implements and reinforces the other: due diligence for human rights risk, as we describe below, provides the information for company decision-makers to attempt to reconcile the demands of doing business with the demands of respecting human rights. There is in this view a conceptual hierarchy in which human rights is the standard and risk due diligence is a means to ensure respect for that standard.

At the conceptual level, this operates in the same way as due diligence against corruption or environmental damage, which requires company decision makers to weigh the competing imperatives – both rules and opportunities - and decide what to do. The normative requirement that companies respect human rights implies a definition of responsibility based on behavior, or company acts or activities, and demands that companies should literally *do* no harm to the rights of others. This principle is a familiar one in standard business practices with respect to managing other sources of risk. When the risk concept is deployed in support of meeting other ethical standards in business, such as in the field of anti-corruption or in social and environmental impact, it triggers actions by companies to ensure the company respects - i.e. does not violate - a standard of care. While company responses to risks will be different depending on the harm involved, it is on this common understanding of respect as 'do no harm' that the concept of human rights risk finds significant affinity with the notion of due diligence.⁹

It is the notion of responsibility as being derived from company acts – what we will call 'involvement' - which gives the notion of human rights risk its power to help companies understand their responsibilities. Involvement in human rights abuse can be defined as any company act which directly or indirectly contributes to human rights abuse. This definition makes clear that the risks in question are risks to people and that the responsibilities being invoked are the company's responsibility to respect the human rights of people. A risk-based approach to human rights due diligence requires assessing company activities - what it does, its operations and relationships - in a particular context and against the standard of international human rights norms, as codified in conventions and treaties. For a company, human rights risk occurs when an existing practice, relationship or situation places the company at risk of involvement in human rights abuse,¹⁰ either directly through company acts or indirectly through

⁹ Risk has less affinity with the positive responsibilities of protecting or fulfilling human rights, which are the responsibilities of states under international human rights law. A risk approach may be helpful in operational ways in identifying threats that protection might guard against, but risk does not itself entail the concept of *protecting* against harm in the same way that its inherent notion of avoidance of harm overlaps significantly with the normative demand to respect human rights.

¹⁰ An abuse is an act which causes harm or damage, or threatens harm or damage. In human rights language, a violation is an act which breaches a legal provision or some other formal human rights standard. Usually a violation is in fact an abuse which breaches a provision of international human rights law. For the purposes of company due

the actions of contractors, joint venture partners, government agencies and others with whom the company is associated through its business activities.¹¹ To put it another way, a company's responsibility for human rights arises when an existing company practice or relationship gives rise to a risk of the company's involvement in human rights abuse.

The causes or situations which give rise to risk – the sources of human rights risk – are likely to be such things as patterns of abuse, a partner with a poor human rights record, or a situation which places people at risk of harm. A due diligence process begins by looking for these sources of risk in company activities and relationships. This involves a process of investigation which seeks to generate the empirical basis for the identification and evaluation of risk, i.e. a risk assessment. The evidence sought concerns company activities, both operations and relationships, in a specific country or operational context. These are, of course, different from company to company and country to country and this specificity is a fundamental assumption built into a risk-based approach to due diligence.

While the focus of due diligence should be to identify risks to the rights of people, it also enables the company to simultaneously identify risks to the company that arise from human rights abuse committed by others. These risks may arise from company involvement in human rights abuse, or from the perception on the part of stakeholders that the company is a participant in abuses.¹² Thus, a risk-based approach permits the company to identify where it might be participating in violations that are actually occurring, as well as where there is a likelihood, or the perception, that it is involved in violations. It is all these forms of involvement – potential, actual and perceived – that human rights due diligence procedures should seek to guard against. In this way, due diligence for human rights risk can both maximise a company's respect for human rights, i.e. help to protect people's rights, and minimize the threat to company interests.

As indicated in the discussion of due diligence above, to be effective in ensuring against doing harm, due diligence should be implemented both as one-time assessments, e.g. during project development or implementation, as well as part of standing procedures, e.g. as part of standard contract, or supply chain management procedures. The benefits of a risk approach are several:

diligence, whether an act involves a technical "violation" of human rights or not is less significant than whether it causes or threatens harm. Translated into risk terminology, an abuse or violation would be an 'event'.

¹¹ The concept of responsibility deriving from a company's relationships is based on the understanding that the relationship consists of company acts which create a relationship with others (agreements, contracts, investments, transactions, etc). These relationships, in addition to the principle function in that relationship, may be a source of human rights risk to the company. The distinction between direct and indirect involvement hints at the concept of complicity. Although much discussed, the simplest statement of the concept of complicity of use to a company in conducting due diligence is that the company provides material or other forms of support to a second party in acts which violate human rights. In other words, complicity is something the company does to support violations or harms by others.

¹² As a senior executive of a major multinational told a conference on business and human rights in December 2007, "we may not be responsible for child labour or other human rights (violations) in a supply chain, at least the lawyers may say we are not responsible; but it is still our problem (in some form or another)."

1. Potential (i.e. future) human rights abuses and even the perception human rights violations can be taken into account. Standard impact or compliance assessments can be useful tools to highlighting risks, but they are designed as one-time assessments and are not well suited for ongoing risk assessment.
2. The risk approach leaves no ambiguity about the scope of company involvement or association. It focuses on both direct and indirect involvement, for example through association with contractors, clients, joint venture partners and host government.
3. A risk approach allows for easier prioritization of the issues a company should focus on. As a result, it has a better chance to mitigate the most important issues.
4. A risk based approach to human rights due diligence is based on international human rights standards. Some of these standards have been incorporated into various multiparty frameworks organized for corporations such as the Voluntary Principles on Security and Human Rights (VPs), the Global Compact (GC), the OECD Guidelines for Multinational Enterprises and the IFC Performance Standards.
5. For larger companies, a risk approach can help integrate human rights to existing management systems (integrity due diligence, country risk analysis, security monitoring, HSE, etc.) by strengthening the information inputs to – and outputs from - those management systems. In this way, human rights assessments are able to add value to the work of the Country Manager and increase the effectiveness of the overall operation. Since the company's management systems are already risk-oriented, taking a risk approach to human rights has the best chance to resonate with company management and be absorbed into site specific practices.

It is important to emphasize that, just like other forms of operational risk assessment, an assessment of human rights risk is not a statement about compliance or a lack of compliance. The point of a risk approach enables adaptation to changing context and operations.¹³ Those implementing the assessment must adapt the analytical framework suggested below to the specific activity and country in question, be it supply chain management across several countries or project implementation in one locale.

Assessing Human Rights Risk

Taking a risk approach to human rights due diligence means answering the question "What is the actual, potential or perceived risk of company participation in human rights abuse in the country?" By breaking down this question into its various parts, human rights due diligence

¹³ For the company, human rights compliance tools are useful source of information and as a cross-check of risk analysis. Perhaps the most useful in this regards is the Danish Centre for Human Rights' Human Rights Compliance Assessment (HRCA). However, the danger with compliance tools is that compliance may provide a sense of false security: reality is constantly changing and in the risk environment along with it. There is no guarantee that the company will remain in compliance from one day to the next. Risk analysis assumes change and is less static than implied by an approach that promises compliance with human rights.

deploys a kind of lens in order to identify and assess the key human rights risks from the data gathered. The ‘lens’ consists of four basic sets of questions, listed below, which are of necessity quite general to begin with. These questions are intended to overlap so that the analysis is less likely to overlook key risks and they are intended to prompt further questions as the analysis deepens and the specific risks and/or potential mitigations become clearer.

Company Operations: What company activity or relationship is in question? What is the company actually doing in the country? What are its business relationships? What projects are in place or in development? Be sure to map both project activities and relationships and business development activities and relationships. It is helpful to focus on core business activities in the country first and work out from there to more peripheral partners or activities.

Context: What does the record of human rights in the country tell us about existing violations/abuses in general? Who are the most vulnerable and/or the likely victims of human rights abuse? Whose rights should we be worried about (local staff? expats? local communities? migrant workers?)? Who are the most likely perpetrators of abuse? Is there a gap between local law and international law standards? Is local law effectively enforced?

Involvement: What company acts or relationships might result in company involvement in a human rights violations or abuse? Remember, involvement can be direct, i.e. through the actions of the company itself, or indirect, i.e. through the actions of contractors, joint venture partners, government agencies and others with whom the company is associated through its business activities. This includes material, logistical or other forms of support to a second party who commits a violation or abuse.

Association: What set of abuses might be associated with the company? What are the perceived impacts of company operations on people? Even though the company may not in fact be involved in a particular abuse or series of events, the perception on the part of stakeholders may be that the company is somehow associated with the abuse or violation. The importance of association is relevant from a company perspective: regardless of whether a company is legally liable for such alleged violations or not, stakeholder perceptions will no doubt affect their behavior towards the company or its interests and, thus, potentially pose a risk to the company.

These sets of questions should help company staff quickly and effectively identify significant human rights risks in a variety of activities, including in supply chain management, contracting, project development, security etc. Asking these questions in a systematic way is crucial to getting it right. There are four simple steps to follow: desk-top research and preparation, field visits, reporting and implementation.

Desk-top Research and/or Preparing Field Visits

The empirical work of risk assessment can be done through desk-top research and by going to the field. In fact, desk-top research is both an important first step on its own as well as in preparation for field work. The work conducted during this desk-top preparation phase serves as an initial scoping, looking for potential sources of risk. It looks at both the status of human rights in a particular country and at the status of human rights in the company’s operational

environment. The objective is to establish good background information about the human rights situation relevant for the company's operations and to identify priorities for deeper investigation. Our experience indicates preparation takes 3-5 days depending on the availability of information, the number of people interviewed and the complexity of the company's operational footprint.

The step-by-step approach outlined below can be a useful way to structure the research/preparation, but practitioners should adapt to company practice and country context. We have written what follows with a large company in mind, in order to flag the need for consultation with the wide range of stakeholders involved in multinational operations. However, the method outlined below is easily adapted to smaller companies.

Desk-top investigation consists of a review of the relevant documentation as well as targeted phone interviews. In particular, the assessment should review publicly available documents (e.g. country reports on human rights, studies on corporate impacts in the country) as well as company documents. Once the basic documentation has been reviewed, phone interviews with key country-based or regional company staff should be conducted. In addition, phone interviews with key stakeholders or experts, in country or based abroad, are crucial to getting outside perspectives on the environment relevant for human rights risk.

Step 1: Read the international human rights reports on the country available on the web and list what seem to be the most important human rights issues in the country.¹⁴ These won't have all the answers to specific questions about the corporate operations but they will provide important information about the sources of human rights risk that the human rights community has been able to identify.

Step 2: Map or list the company's operations, both underway and planned, in that country.¹⁵ Look for such internal documentation as country risk assessments, environmental and social impact assessments, security reports, health and safety reports, business development plans, etc. Make sure to visit the company web site as well as the websites of partners. Be sure to conduct a search on the www.business-humanrights.org web site to see if there are issues specific to the company or its particular sector or industry in that country.

Step 3: Cross check 1 and 2 looking for obvious connections. Example questions include: Are there towns or regions of the country mentioned in the human rights reporting which are also operational sites for the company? Are there agencies or persons noted as problematic that the company relates to? Are other companies in trouble for human rights (Why? Are they operating in the same area? Are they a partner?).

¹⁴ The Country Risk Assessment (CRA) of the Danish Centre for Human Rights is a comprehensive reflection of the human rights community's best country analysis and therefore are a good reference for the country context.

¹⁵ Appendix A includes an overview of the type of internal documents that would provide a better perspective on the human rights related risks; Appendix B is a suggested list of who to talk to.

Step 4: Draw up a list of tentative risks, involving the nature of the harm and/or violation involved, the affected people, and potential connections to the company. Check your initial findings against www.redflags.info for any risk of legal liability. Consult immediately internally if any should arise.

Step 5: Engage with relevant company personnel. Explain the objective of the assessment. Remember that in-country staff will almost always have a better understanding of the situation on the ground than external assessors, especially with respect to company operations and relationships. Start with open questions: What do they think the main issues are? Let them know what seem to be the main issues to you and ask them what they think about the issues you have identified so far. Do they have any suggestions with regard to risk mitigation options? From these open questions, move towards more specific concerns based on what you have found so far or what emerges from during the course of the. Remember, this dialogue may not occur in one exchange or meeting, but over the course of several interactions.

Step 6: Contact trusted external experts. What do they know about the situation in the country? Is a particular sector of industry under particular scrutiny for some issues? Are these human rights issues?

Field Visits

For companies operating projects abroad, or for companies with complex supply chains or networked operations, human rights due diligence will require field work. Human rights specialists with good investigative skills are most likely to prove effective in identifying risks based on field visits.

In many ways, the field visit is the foundation of getting the risk identification correct. The purpose of a field visit is either to conduct an extensive in-country field visit for the first time or to focus on previously identified risks that require more study. It involves site visits and observation, as well as interviews with a wide range of stakeholders. Based on the desk-top research and preparation, the field visit takes a more detailed look at conditions on the ground. It both broadens and deepens the analysis of human rights risk especially with regard to potential and perceived risk. These are difficult to obtain from a desk-top study or without speaking to people in the area of operation. As well, a field visit is crucial for identifying practicable mitigations in consultation with, for example, colleagues based in the country or put forward by those stakeholders whose rights may be violated or at risk.

A field visit involves visits to at least three locations:

- The capital of a country to visit the company head office, government offices, NGOs etc.
- The operational site(s) where the company (or its joint venture partner or contractor) is active
- The nearest local community (or communities) to the operational site.

Depending on the context, the location of important stakeholders or the issues at play, other places need to be included. For example, if many of the local authorities with whom the company needs to engage are, in fact, located in a regional capital, it is worth visiting these authorities as well. On a local level, visit off-site locations that are related to the corporate activities such as waste dumps, places of cultural value, locations of community projects etc.

The best information with regard to gaining people's perceptions is when people feel relaxed and comfortable. Discussions at the local coffeehouse often bring up entirely different aspects compared to a discussion with the same person in an office setting. The same goes for discussions with staff at night over dinner compared to their work setting. Take this into consideration when selecting where to sleep (on site with the company, or in a nearby village), when to travel etc. Take the opportunities as they arise.

Step 7: Prepare the staff of the company site for the visit. The preparation of the field visit generally requires a step-by-step approach. Especially in large companies, or where country managers or key managers at the corporate headquarters are skeptical, assume that it will take them time to adjust to the idea of human rights related assessments. Some of this will have been achieved during the desk-top/preparation work, but you should not assume familiarity with your objective or methods: a field visit focuses the minds of in-country colleagues to a greater degree than a phone call from headquarters. Human rights are a sensitive topic in some countries and asking about them can be perceived as creating extra problems in the relationship between country management and host governments. A country representative will often want to know how the team will get its information without raising hackles. This is where assessor needs to explain how it will engage with local stakeholders, how questions will be asked and invite suggestions from the in-country colleagues about how to approach specific issues. Consult with the relevant managers well in advance of arrival. Explain upon arrival in the country to all concerned within the company, the scope of the assessment and the implications this will have for the in-country program, the approach taken and who the assessors will meet with. Be sure to include those who may be in the field outside the head-office in the capital as they will be key to your access to field sites, local authorities, and possibly local communities. The purpose of these in house discussions is to instill confidence that, first and foremost, a field visit will not upset the status quo and make life more unpredictable for the country manager. On the contrary, if prepared well, the field work can be an opportunity for the country team to take up certain important issues with partners.

Step 8: Speak with internal stakeholders. These include representatives of various departments in the company such as human resources, contracting department, security, HSE and other departments that, whether they know it or not, are directly tasked with functions which in fact help ensure respect for many key human rights. The purpose of these discussions is to understand the challenges that the company faces with regard to the human rights affected by their functions. This requires asking questions about potential harms (rather than questions about human rights *per se*), the level of control over these risks that the departments may have, the obstacles that some departments face in their human rights

related efforts etc. Discussions with internal company departments can also reveal practical suggestions for improvement in the company policies and practices. In addition, it is essential to also speak with company employees to verify labor related issues. Prioritize speaking with potentially the most vulnerable employees such as contract workers, migrant workers, women (in some countries) etc.

Step 9: Speak with external stakeholders both in the capital, the region and in the local footprint area of the company. These stakeholders include a wide range of groups and people such as government officials (military, police, labour office, office for indigenous peoples, human rights ombudsman etc.), human rights NGO, unions, journalists and other civil society groups. Outside stakeholders also include contractor (employees) joint venture partners and other companies working in the same context. If the company has a physical footprint at a particular site, speak with the surrounding community representatives, youth, local businesses, and communities that are *not* impacted by the corporate presence. As human rights are often a sensitive topic to be asking questions about, be creative in obtaining access to relevant information. Ask questions in different ways and to multiple stakeholders to ascertain that the information is accurate. As with your questions to internal stakeholders, often the best way is not to ask questions about human rights *per se* but to ask about potential harms or problems people face. Your job will be to link the answers you get to the standard of care, i.e. human rights standards.

The Assessment Team

Human rights risk assessments can be conducted by a range of team configurations. The team may consist entirely of company staff, or it may be entirely made up of outside expert consultants or, alternatively, by a mix of both staff and outsiders. All three options have pro's and con's depicted in the following overview:

	PRO's	CON's
Internal: The Company Team	<ul style="list-style-type: none"> ▪ Internal capacity building on how to conduct such assessments ▪ Retention of institutional memory ▪ Less resistance from staff to discuss sensitive issues (could be both a pro and a con) ▪ Better access to joint venture partners etc. ▪ Better access to 'sensitive' internal documents ▪ Better understanding how mitigation measures can be integrated into existing management systems 	<ul style="list-style-type: none"> ▪ More resistance from staff to discuss sensitive issues (could be both a pro and a con) ▪ Less international recognition for the assessment process ▪ Subjected to organizational conditions or restraints imposed by country manager ▪ Time pressure to complete an assessment (if operational managers participate and only have limited time to participate)
External: The Consulting Expert	<ul style="list-style-type: none"> ▪ International credibility and recognition of the assessment if 	<ul style="list-style-type: none"> ▪ No internal capacity building and institutional memory

Team	<p>made public</p> <ul style="list-style-type: none"> ▪ Less restrained to speak with outsiders ▪ Better access to NGOs or activist groups (based on existing networks) ▪ Access to experiences (lessons learned) from other companies ▪ No time pressure or other organizational constraints 	<ul style="list-style-type: none"> ▪ Likely less access to sensitive internal documents ▪ Less trust in interviews with company staff ▪ Less understanding how mitigation options can be integrated into existing management systems
Mix of staff and outside experts	<ul style="list-style-type: none"> ▪ Internal capacity building how to conduct such assessments ▪ Retention of institutional memory ▪ Access to experiences (lessons learned) from other companies ▪ Better understanding how mitigation measures can be integrated into existing management systems 	<ul style="list-style-type: none"> ▪ Less international recognition for the assessment process ▪ Time pressure to complete an assessment (if operational managers participate) ▪ Possibly less focus on human rights (if operational managers with a broader responsibility participate) ▪ Subjected to organizational conditions or restraints imposed by country manager

There is no “best” team composition. Rather, different team compositions are likely to work best in certain countries or stages of a project. For example, in cases where management has concerns about an assessment, an internal team or mixed team will face less organizational resistance than an external team would. An assessment conducted by an outside team can provide the company with international recognition and respect for its efforts and play an important role in fending off critics.

Analysis and Reporting

The information gathered needs to be reported to company management during a debriefing at both the end of the desk-top research and especially at the end of a field visit. Step 11: Analyse the observations from research and investigation and draw up a list of actual, potential and perceived risks. Be as specific as possible. In the case of an actual human rights violation, be sure to link this violation to the appropriate article of the Convention in question. When assessing sources of risk report on the degree of likelihood that the risk occurs and the potential consequences of this occurrence to the company (e.g. community objections to a project, bad publicity, legal action).

Step 12: Where the assessment has detected a range of risks, or particularly complex set of risks and opportunities, it may be necessary for the company to conduct a risk analysis workshop. This would gather the relevant internal experts and managers to assess the likelihood and consequences of the risks to the company identified by the assessment. The objective of this exercise allows the company to integrate the analysis of human rights risk into the existing risk

management practices of the company. This kind of collective risk analysis conducted during a risk analysis workshop is needed to locate the findings of the human rights assessor in the often detailed knowledge and awareness of the operational and local context which different managers within the company are operating with. This is so the company can draw on a range of skills and expertise to ensure the human rights risks are mitigated. It also serves to inform managers of how human rights related risk may affect the company and where risk might be found in their own work areas. This analysis is needed also to develop key performance indicators (KPIs) to measure success of these mitigation measures. Mitigation, and the indicators used to monitor mitigation, need to be realistic and achievable by the company (as opposed to something dependent upon, for example, a national government) to gain internal traction and endorsement. Using an inclusive approach involving company staff and managers increases the likelihood that staff will feel ownership of the risks and opportunities identified.

In addition to verbal reporting, the risks should be reported in writing to management as soon as the assessment is completed. The main body of the report might look like this:

- A summary of the risks: this should be a brief description of the risk based on the analysis (company activities + human rights context). This should be organized by categories or ranked by impact, depending on level of evidence.
- An explanation of the recommended action / mitigation, including a recommendation as to further investigation (e.g. whether or not to conduct a field visit, if so when and suggestions about how).
- A list of next steps
- Appended: a one or two page overview or map of the company activities and projects
- Appended: a summary of findings related to the most obvious or severe violations (“red flags”)
- Appended: An overview or list of the Conventions (e.g. ICCPR, ILO Conventions, etc) that the host / home country has signed up to

Implementation

Experience indicates that the implementation of the action or mitigation plan to address human rights risk relies on the urgency of the issues identified as well as on the importance given to human rights risks relative to the other priorities that compete for company management attention.

Each company is different, and even subsidiaries within one company often take distinctly different approaches. Companies which have to date sought to implement human right policies have tended to assign clear responsibilities to a company staff person, either full-time or as part of their job description. The amount of staff time needed to ensure the proper functioning of human rights due diligence will depend on the size of the company and the nature of the company’s potential impact on human rights. As already noted, there are many company

functions which, when carried out properly, also have human rights value (e.g. health and safety, human resources) and there are others which will need to factor in human rights due diligence to their existing procedures (e.g. procurement, plant security). Following up on the various functions take time. Key functions might include, for example:

- Conducting due diligence or guiding human rights due diligence implementation by a company's other operational units
- Developing a human rights monitoring mechanism that keeps track of human rights related indicators in relation to particular activities
- Ensuring that mitigation measures with regard to human rights risk are implemented as well as that the identified opportunities for improving the company's impact on human rights are identified and capitalized on
- Ensuring functional agreement between, and coordination between, the various departments about plans, policies and approaches that affect human rights

In addition, functions might include working to ensure implementation of contracts (with sub-contractors) which promote respect for human rights. This may include powers the company may reserve for itself, for example, to conduct spot-checks on contractors, or to have access to their books. Such clauses have been effective in detecting contractor behavior which violates labour rights.

Stakeholder consultation mechanisms play a central role in human rights risk management. In countries where staff are not able to organize (either because they are prevented by law, government practice, because of the stage of the project, or other reasons), managers should make themselves available to staff as much as possible, for example through internal 'town hall' meetings to discuss working conditions and rights related, issues, as well on a one-to-one basis. Similarly, regular public meetings in the community or via an advisory board with local leaders, monthly meetings with community representatives¹⁶ etc. are all mechanisms that provide people affected by company operations with an opportunity to express concern about human rights related issues. Together with the company, people can help identify ways to ensure that the corporate presence has a positive, rather than negative, impact on local people.¹⁷

Finally, a transparent, accessible, properly resourced and effective grievance mechanism is an invaluable part of a human rights risk management system. Traditionally, grievance mechanisms have been used by companies to address alleged misconduct or harms after they occurred or have done significant damage. Increasingly, companies are finding their grievance mechanisms useful in detecting problems early and identifying mitigations quickly, in effect integrating a remedy mechanism into the human risk management system as a form of prevention. For example, complaints about the behavior of security forces or sub-contractors can

¹⁶ Local leaders or community representatives can of course be both formally appointed, such as elected or appointed officials, as well as social group leaders, such as clan heads, village elders or social movement and/or NGO activists.

¹⁷ See Luc Zandvliet and Mary B. Andersen, *Getting it Rights: Making Corporate-Community Relations Work*, Greenleaf, (2009)

result in communication of expectations to those sub-contractor by the company and the provision of training to change behaviour.

Conclusion

The answer to the question ‘what does it mean for a company to respect human rights in practice’ is easily said: due diligence based on an analysis of the facts of company activities and relationships and the ways that these affect people and their rights. But human rights risk, like all operational risk, is constantly changing. To meet the challenge of a changeable risk environment, due diligence to detect human rights risk should be continual. It requires that those implementing the due diligence are competent in human rights issues and that they apply a sound method.

The approach to human rights risk assessments we have outlined above is a method for use in due diligence. Assessing human rights risk means mapping out the risks of company participation in human rights violations, both directly in its operations and indirectly through its relationships. The approach is based on accepted principles of due diligence and the business responsibility to respect human rights. The overall framework outlined above is not intended to be followed to the letter. It is intended to be adaptable to the size of the company, and the scope of its activities and relationships. We have specifically modeled it on a large company in order to explore the various functions that may be necessary and in order to capture the full range of possible sources for conducting an assessment. But using the basic principles and questions outlined in the first sections, it is possible to adapt the steps, team make-up, reporting and implementation to much smaller firms.

Human rights risk assessments are not mechanical processes. It is very difficult to quantify human rights risk. Checklists or compliance questionnaires, while helpful as a starting point or as a cross-check, cannot capture the quality of the risk and, therefore, the range of potential mitigations. It seems likely that the single most effective way to identify, understand and manage risks are through dialogue processes, such as stakeholder dialogue or the internal company risk workshop, both of which we suggest above. Companies which are familiar with these kinds of consultations and decision-making processes may adapt better to the management of human rights risks. At a minimum, however, the information contained in an assessment should be accessible to company managers, both in-country and at headquarters, so that steps toward preventing or solving the problem can be taken. We encourage companies and other practitioners to adapt and re-work the framework proposed above to meet their own needs.

It should be noted that the adaptability we propose is grounded in solid principles and international human rights law. At a minimum, the approach outlined here applies the full list of human rights provisions, combines these with the companies own activities or relationships, to create a lens through which the company can view its own responsibilities more clearly. In fact, the value of a risk oriented approach is that it allows the company to assess the risks of participation in the full range of internationally proclaimed human rights, while at the same time helping a company – and other stakeholders - understand better the limits of those responsibilities within the universe of rights.

Due diligence can play a key role in helping to identify both the dilemmas companies face in practice as well as ways the ways the company can overcome these and meet its responsibility to respect human rights. Due diligence can help a company do the right thing. It may also help the company identify ways to make concrete contributions to society beyond its core economic impacts. As the law and policy of human rights and business evolves, proper due diligence and good faith human rights risk mitigation is likely to provide the company with crucial elements in a defense against allegations that it is involved in human rights violations. Conducting an assessment is not an ironclad guarantee against involvement in human rights abuse. But an assessment is a necessary basis for taking the practical steps towards managing the risks of harm to people and ensuring that the company respects human rights.

Appendix A Internal Documents to look for

What?	Why?
Site policies	To verify company labor, environmental, community and security commitments
Policies of joint venture and/or partners and/or contractors	To verify their labor, environmental, community and security commitments. Also to look how decision making within partnerships and between partners are structured.
Copy of the standard employment contract	Inclusion or exclusion of provisions is relevant; key entry-point for mitigation. Verify that wage and benefit levels are adequately secured (refer to labor rights and local labor law).
Copy of the standard employment contract of employees contracted by a contractor	Inclusion or exclusion of provisions is relevant; key entry-point for mitigation. Look for important deviants compared to what your standard company contract would look like.
ESIAs or other assessments commission by the company with respect to social or environmental impacts, security arrangements, threat assessments (security), labor rights issues, etc.	Source of information relating to social and economic rights. Assuming that ToRs have been followed, the reports may signal what type of issues/rights were important to the company. These reports also provide insights into what has been recommended by experts in these fields (and can be tested against your own observations).
Incident/Accident records	Important source to verify the cause of a problem, as well as to understand role of security response to the problem.
Relevant documents describing host Government requirements	Important to understand relationship to government in order to analysis HRs risk exposure and in formulating possible mitigation. Look for requirements with regard to labor issues, reporting, use of state security providers, reporting staff information, waste disposal requirements, etc.
Minutes of meetings with unions, (state) security providers, contractors etc	Provides information with regard on human rights related issues that have been discussed and any follow-up or implementation.
A copy of a standard contract with contractors	Provides information as to the type of provisions have been made to ensure human rights are respected down the supply chain.
Special regulatory arrangements, e.g. Production Sharing Agreements, Industrial Zone legislation, etc.	Provides insights in the constraints and opportunities for the company with regard to human rights and may provide insight into the process of negotiation with relevant authorities.

Appendix B Interviews: Whom to talk to and why

Appendix C: Field Study - With Whom to Speak and Why¹⁸

		Whom to meet?	For what reason?
Internal Stakeholders	Capital	Country Management	Explain the assessment, get buy in, identify priority issues. Also identify the importance given to human rights, efforts made to address issues
		Country Risk Analysts	Identification of broader risks to the company and determine which could be portrayed as human rights risks. Suggestions for speaking with internal/external stakeholders
		Human Resource Managers	Working conditions, contract details, labor law related constraints, complaints from staff, relations with unions, labor offices, government interference (hiring/dismissals) etc.
		Contracts/Purchasing Department	Buy in, particular challenges in the contractors market in-country, contracting details, monitoring of contractors/suppliers with regard to human rights issues, government constraints (corruption).
		Business Development Managers	Buy in, challenges in avoiding corrupt practices, government perspectives on the company, assess opportunities to discuss HR with Government officials
		Security Managers	Details of arrangements with security providers Knowledge/awareness/implementation of the Voluntary Principles on Security and Human Rights
		Health and Safety Managers	Safety; Protective gear for workers, health care for workers, environmental concerns/issues (waste, spills, archeology) and mitigations measures, ESIA (land rights, land ownership, indigenous groups), community engagement strategy (consent issues, grievance procedures, NGO criticism)
		Integrity Due Diligence	Experiences with the human rights records of contractors, options to create cooperation between human rights due diligence into anti-corruption due diligence
	Site	Project Managers	Operational challenges, behavior of JV partners and contractors. Suggestions for local stakeholders to speak with. Identification of mitigation measures.
		Health and Safety Coordinators	Operational challenges as well as best practices. Environmental impacts, archeological impacts
		Security Staff	Operational constraints and challenges, details of specific incidents and accidents, mitigation measures and best practices, compare on the ground reality to intended

¹⁸ The list is based on a hypothetical company structure and operating presence. It is meant to be as expansive a list as possible in order to capture the full range of possible sources for the assessment. Practitioners should adapt to their own operating environment.

			policies, introduction to local security providers
		Community Relations officers	Stakeholder engagement approach. Most frequent complaints/grievances. Grievance procedure present? Consultation mechanism present? Does the company work to get prior consent? Land owners, marginal groups, indigenous groups identified and consulted with?
		Human Resource staff	Local challenges, feedback from (contractor) staff, relation with the local labor office. Government interference in labor issues
External Stakeholders	Capital	Contractors (national and international)	Challenges they face as a result of company conditions imposed on them. Difference between this contract and expectations of others they work with.
		Contractor staff (cleaning personnel, gardener)	Working conditions, contract details known? freedom of association, possibility to complain, treatment of migrant labor, living wage? any other issues they would like to bring to the attention of management?
		Other companies operating in the same sector	Challenges they face, mitigation measures taken (human rights program in place?), importance of human rights in their organization, possibilities for collective action (e.g. Vol. Principles), suggestions to approach stakeholders on difficult issues such as the government, advocacy groups etc.
		National Human Rights NGOs, Journalists, local ILO/UNOHCHR representatives, Universities	Main human rights concerns, expectations towards companies, mitigation options, willingness to speak regularly with companies on human rights issues, suggestions for others to speak with (both on capital and site level), differences in approaches between companies, trends in behavior of the governments and companies with regard to human rights. Did any human rights violations occur prior to the arrival of the company to make the area business friendly?
		Unions	General human rights situation for unions in the country (persecutions, union busting?). Labor issues in the country, company specific feedback/observations, options for mitigation
		Labor Office	Expectations towards the companies, record of company (also compared to other companies)
		Police/military (capital level)	Approach/practices of company compared to other companies, best practices in the country, engagement with the company on security issues (protocols, terms of engagement, contracts etc.). Expectations towards the company
	Site	Local Authorities	Quality of the relationship with the company. Local perceptions and expectations on the company. Presence of indigenous groups, minorities, presence of local civil society groups. General plans and ambitions of the local government, pressing issues.
		Police/Military (site)	Quality of relationship with the company. Terms of engagement, awareness of Vol. Principles, changed behavior due to company intervention. Perspective on human rights as a concept.
		Local youth groups	Local perspectives on the company. Perceived fairness in employment practices. Support for youth
		Women groups	Impact of the corporate presence on women/ youth (change in power of women relative to men, impact on the family

		unit, access to water, food, education, health etc.)
	Informal leaders (religious/business, "wise" men/women, elders)	Local perceptions on the companies (positive and negative). Changes in town as a result of the company. (Future) expectations towards the company. Local definition of human rights. Who are the landowners in the area where the company has a presence? presence of minority groups? Has local community been consulted and in what manner? Do people feel they have a say in issues that concern them? Do the official representatives truly represent the population?
	Business owners (local vendors/suppliers, taxi owners, hotel owners)	Support from the company in getting contracts, perception on changes in town as a result of the corporate presence. Perceived fairness in distribution of benefits, suggestions for mitigation options.
	Civil Society groups (Red Cross/Crescent, UN, local NGOs, local newspaper/ radio etc.	Local definition of human rights. Issues in the community, identification of mitigation options, presence of marginalized groups, legitimacy of local authorities, schisms in society, identification of common interests amongst groups, analysis of power structures, behavior of security forces, changes in access to water, land basic amenities as a result of the corporate arrival
	Local labor office	Functioning of labor office, what are hiring/selection/dismissal protocols? Perspective on company practices.
	Local contractors	Challenges/opportunities as a result of company presence. Perceived fairness in allocation of contracts. Options for improvement.
	Local (Contractor) employees	Labor conditions on site, grievance mechanism present? Verify wage levels, minimum age, housing conditions, food, working hours, holidays, treatment of staff, dismissal policies (HiV/AIDS?)

C Documents to look at in country

What?	Why?
Site policies	To verify company labor, environmental, community and security commitments
Policies of partners and contractors	To verify their labor, environmental, community and security commitments. Also to look decision making within partnerships and between partners are structured.
Copy of the standard employment contract	Inclusion or exclusion of provisions is relevant; key entry-point for mitigation. Verify that wage and benefit levels are adequately secured
Copy of the standard employment contract of employees contracted by a contractor	Inclusion or exclusion of provisions is relevant; key entry-point for mitigation. Look for important deviants compared to your own company's standard contract.
Additional ESIA's or external reports related to human rights, labor issues, social or environmental impacts, security arrangements etc.	Source of information relating to social and economic rights. Assuming that ToRs have been followed, the reports signals what type of issues/rights were important to the company. The reports also provides insights into what has been recommended by experts in these field (and can be tested against observations).
Incident/Accident records	Important source to verify the cause of an issue as well as a possible security response to the situation.
Relevant documents describing host Government requirements	Important to understand relationship to government in order to analysis HRs risk exposure and in formulating possible mitigation. Look for requirements with regard to labor issues, reporting, use of state security providers, reporting staff information, waste disposal requirements, etc.
Minutes of meetings with unions, (state) security providers, contractors etc	Provides information with regard on human rights related issues that have been discussed and any follow-up or implementation.
A copy of a standard contract with contractors	Provides information as to the type of provisions have been made to ensure human rights are respected down the supply chain.
Special regulatory arrangements, e.g. Production Sharing Agreements, Industrial Zone legislation, etc.	Provides insights in the constraints and opportunities for the company with regard to human rights and may provide insight into the process of negotiation with relevant authorities.