

Keynote speech by John Morrison,
Institute for Human Rights and Business

Assessing human rights impacts: Where the rubber hits the road

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Clifford Chance LLP, London, UK

I would like to thank the UK Global Compact Network for inviting me to speak with all of you today. Let me begin by congratulating Chris, Stephen and Désirée of the Network for all the hard work involved in organising this event. It is good to see that London is again becoming a dynamic place for discussions on the fast moving business and human rights agenda.

I would also like to thank Rae Lindsay and Clifford Chance for hosting us today. Rae is also a valued Trustee of the Institute for Human Rights and Business. Our organization is now five years old. For those of you who don't know our work, we are a relatively small but global 'think and do tank' seeking to advance the agenda by working in the 'impartial space' between and with governments, business, civil society and trade unions.

We now have an established centre in Myanmar, and regional centres are planned for Kenya and Colombia - as well as emerging programmes in China and Brazil. In addition, our crosscutting thematic work focuses on those business sectors upon which all others rely: information (ICT), workers (recruitment agencies), money (finance) and commodities (energy and mining). Through all of this geographic and thematic work, we have a deep interest in clarifying what is meant by human rights due diligence and improving the assessment of human rights impacts.

It is the "Why, What and How" of assessing impacts that brings us all here today: one of the central challenges that face all practitioners in this field. Before getting into the mix of this, let's take a brief step back to remind ourselves of the context of this important discussion.

First, we should keep in mind that we are all rights-holders - human rights are our birthright. Such rights have been part of the social contract within most societies for several centuries now. In this country we have to go back to the work of Hobbes and Locke over three hundred years ago to

understand what the concept of rights-holders means - essentially that we are not passive vessels or the property of rulers whose unfettered power over us is legitimised by divine right. Instead, our social contract makes clear that we each have inherent dignity, and equal rights that must be respected.

Equally important, we acknowledge that a whole host of actors - from governments to private individuals - can impact the realisation of these rights - for good and bad. It is worth remembering that negative human rights impacts can occur within a wide range of settings: within families or residential institutions, as well as in hospitals or care homes. But we are here today to focus on the impacts of perhaps the most powerful of non-state actors of all: business.

Again there is nothing new about this focus on the human rights impacts of business - let us just take three examples from history. First, the fight to eliminate slavery around the world between 1780 and 1880 - was fundamentally a business and human rights struggle. Second, the 1914 Safety of Lives at Sea Convention, following the sinking of the Titanic, first gave ship captains a universal responsibility - if not a duty - to come to the assistance of other vessels in distress in order to protect the right to life itself. Finally, the work of the International Labour Organization has been bringing business associations to the same table as trade unions and governments to discuss impacts in the workplace now for almost one hundred years. Whilst Eleanor Roosevelt envisaged human rights in all the small places including “the factory, the farm and in the office” we had to wait until June 2011 until we had any international consensus about what this really meant in any normative sense through the unanimous endorsement by the UN Human Rights Council of Guiding Principles on Business and Human Rights.

There are a number of central achievements of the Guiding Principles. Most notable amongst them are:

- The universal political consensus - it is not everyday that all the major international powers and emerging economies agree on anything - let alone a set of human rights norms. This in itself creates political space for business and human rights discussions in many countries, sometimes those with serious human rights concerns;
- The GPs remind us that the central duty remains with states and their duty to protect all human rights in relation to abuses caused by or involving business enterprises - there is much governments can and should do - as ongoing discussions on national action plans on business and human rights remind us.

- We have moved beyond voluntarism only - a direct corporate responsibility to respect all human rights, which whilst not binding in international law, is now an international expectation of all companies, regardless of where they operate. This is not just a voluntary concept and already exists in part in law in most jurisdictions - we have to think no further than health and safety legislation as a clear example of this.
- We now have a strong focus on prevention as well as remedy - like with 'health and safety' we should not wait for bad things to happen but take steps to prevent and minimise risks that may lead to human rights abuses.
- Hence we now talk about human rights due diligence methodology.
- And perhaps most fundamentally, the Guiding Principles have contributed enormously to shifting the impact discussion from being "business centric" to being more "human centric".

So for any business, the Guiding Principles give rise to four critical questions - questions that can be delivered in any "elevator pitch" but take much longer than any elevator trip to answer:

- How much knowledge does my company need to have about its actual and possible human rights impacts? Given the acquisition of knowledge through due diligence takes time, money and resources, companies have to prioritise - but how to decide on issues such as scope, materiality and priority.
- How to act on this knowledge - how should my company prevent the bad things from happening in the first place or to mitigate the impacts as much as possible?
- How transparent should any company be both about its knowledge of risk and impacts as well as its associated preventative strategies and mitigation?
- How can effective remedies for those who still suffer as a result of negative human rights impacts best be ensured? Bad things will still happen to good companies, regardless of how much due diligence is done. No risk can be eliminated completely. In fact, business risk - and to some extent human risk - is an essential component of business.

So then, how much due diligence is enough? I am sure it is a question you all ask yourselves whether you work in government, business or civil society or run a consultancy or law firm selling services to companies. So this leads to the following thoughts:

- Can any business determine the scope and prioritisation of the human rights due diligence it needs to carry out on its own, or does it need to involve stakeholders and rights-holders?

- History perhaps teaches us that thresholds of reasonableness in terms of ‘how much’ cannot be set by business alone. If business does take actions on its own, without involving outside stakeholders, then when push comes to shove - those stakeholders will not defend the threshold, and sometimes competitors will even testify against a company for falling below industry standards, or OECD National Contact Points will issue public statements criticising the business for its actions or inactions.
- These thresholds will clearly have to be set in diverse ways depending on the business sector, geography and the associated human rights risks. Sometimes, such standards of performance can be set through multi-stakeholder initiatives. In other cases, government legislation or economic/financial levers (such as Export Credit Agencies, International Financial Institutions or Public Procurement) will be the more effective way forward. In still other cases, the private sector itself will be able to set clear expectations through a diverse range of business relationships (such as Supply Chain codes, Licensing Agreements, Franchising, M&A processes etc).

The point I’m stressing, in other words, is that how much due diligence is enough is a context specific question. There can be no generic answer across all business sectors. And the reality is that it will take time for the question to be asked and effectively answered in specific contexts. It is right that we focus on the high risk contexts first and that the due diligence bar is set as high as possible in contexts where human rights risk is high. Within the context of Myanmar, for example, we applauded Coca Cola for setting high due diligence standards in terms of the selection of its local Burmese business partners and for reporting on this due diligence under the US Government’s Burma reporting requirements. We at IHRB rarely publicly acclaim, or condemn, a company but sometimes we do when there are wider issues at stake. In terms of Myanmar, Coca-Cola has set a benchmark for others to follow - thanks in part to the US Government’s own requirement.

However, even for high-risk countries such as Myanmar, we still have a long way to go in reaching any consensus on the question of ‘how much human rights due diligence is enough’? We would be concerned if any European company did not engage in the same level of due diligence in their selection of partner as Coke, even without the legal incentive to do so. But there is no guarantee that this will be the case. It shows the complexity of the challenge and that human rights due diligence is subject to a range of competitive forces unless a level playing field is really created - through legislation or other means.

So let's move on to the issue of Quality - what represents good human rights due diligence, including the assessment of impacts? The UNGPs set no real quality control mechanism - i.e. there are no "effectiveness criteria" as there are for Pillar Three on remedies, and so the issue of how we assess quality human rights due diligence in practice has largely been left to research organizations and to the marketplace. Perhaps such "effective criteria" will emerge from the United Nations over time as practices are tested and judged by different actors. Perhaps another authoritative source will serve as the focal point for such developments over the years ahead. But in the meantime, we need to do everything we can to encourage convergence around good practice. This is what makes discussions like today's so important.

The title of this event - "where the rubber hits the road" suggests the organisers rightly wish to ensure this will be a very practical discussion. So I'll seize the opportunity in my remarks to check that the rubber is indeed hitting the right road. To stretch a metaphor, let me suggest a number of key considerations concerning the selection of road surface:

- First, we should be asking - what is the purpose of assessing impacts? The human rights purpose might be (i) the acquisition of knowledge (ii) to enable prevention, risk reduction and mitigation (iii) improving performance through tracking and learning lessons and (iii) to help ensure that remedies are fit for purpose.
- But it is also true that there might be no direct human rights rationale for such assessments. Assessments could help strengthen community relationships broadly speaking, or aid a business in developing greater trust or "social licence". Involving local communities themselves in such assessments could actually increase the likelihood of their consent in circumstances where this is required.
- Second, we must be clear about the types of impacts we talking about: "potential" or "actual" or both? It might be both.
- Assessing and measuring impacts does not necessarily mean a bespoke human rights impact assessment (HRIA) is needed.
- At the same time, in some business sectors the whole terminology of "impact assessment" does not make sense, or is a new idea worthy of examination. For example, the fact that the UK retail sector has for a long time focused almost exclusively on supply chain issues with an audit-heavy approach does not mean that impact assessments are irrelevant. In fact, looking at supply chains from the perspective of impact assessments might be a valuable way of avoiding some of the terrible conditions and loss of life we've seen in countries, such as

Bangladesh, where it is the whole sector that faces systemic and deep-rooted challenges.

- Third, what is a HRIA anyway? We should avoid tautological discussions between the differences between HRIAs and Environmental and Social Impact Assessments. How far apart they are depends a lot on the quality of the Social Impact Assessment - if very good, it will cover off many of the same issues, but perhaps not all of them. For example, very few Social Impact Assessments currently contain the wider context of human rights risk, such as Freedom of Expression issues for community protestors and activists, and issues such as the right to an effective remedy.
- Finally, we must stress that whatever mechanism for assessing impact is chosen, it needs to be 'fit for purpose'. e.g. the traditional "audit led" approach to supply chains is a limited way of measuring impact - audits are by definition a lagging indicator.

These questions of Scope and Quality are fundamental and are not easy to answer. The purpose of IHRB's own "Sector-Wide Impact Assessment" - or SWIA - work is to try and answer this quality question in a few geographic locations, for specific business sectors and in a bottom up way. SWIAs look at impacts of an entire business sector through several [different levels of analysis](#) in order to build a more complete picture of the potential impacts of the sector on society and its enjoyment of human rights. A sectoral view will help stakeholders see the "bigger picture" of potential negative impacts, as well as potential opportunities for positive human rights outcomes, and to make choices based on a broader perspective.

SWIAs differ from project-level impact assessments in a number of ways:

- As the name signifies, a SWIA looks at the impact of a whole sector, which has implications for the scope and [analysis](#) of the assessment.
- Because SWIAs address the impacts of an entire sector, they involve a more in-depth analysis of the relevant policy and legal frameworks, including the implications of these frameworks for businesses operating in the sector.
- SWIAs are intended for a much wider audience than business alone: Government and Parliamentarians, business, local communities, civil society, and workers and trade unions will all benefit from their analysis. Whereas project-level environmental impact assessments (EIA), social impact assessments (SIA) or environmental and social impact assessments (ESIA) are typically carried out by or for a specific project developer, a SWIA will give a broader picture of issues that need to be addressed by any business in a specific sector.

- SWIAs focus in particular on impacts on people. They will include, for example, a focus on land and labour rights and other impacts on communities, workers and consumers.

Let me turn now to focusing for a few minutes on what emerging “good practice” in this area looks like, as well as what I think might be some of the consensus areas on quality and scope moving forward.

In terms of what exists in the public domain on human rights assessments, I’m sure many of you know that there just isn’t an incredible amount out there. This is perhaps for a number of reasons including:

- This is a relatively new area of interest, even if we know there are an increasing number of companies engaged in this endeavour;
- There are good reasons not to publish parts of company level human rights assessments - which can be highly sensitive, likely to offend a host government or even endanger specific rights-holders. However, there are often parts of assessments that can be disclosed, or at least the fact that one has been done and some indication of the methodology used;
- A less excusable but very real limitation on disclosure is the marketplace itself. Different experts, law firms and consultancies have competing methodologies, which they have invested large amounts of time and energy in - therefore there is a proprietorial aspect which exists and has impeded the sharing of methodology for many years now. Lets face it, its true.

So what information is in the public domain? The publicly available knowledge base includes:

- The first private sector HRIA (the concept originally was conceived as a government policy tool) was developed over ten years ago re: BP in West Papua on the Tangguh LNG project. They set up an external independent monitoring and advisory body (TIAP) in 2002, which started covering human rights explicitly in its fourth report in 2006. They renewed it in 2009 to operate for another five years. The annual presentation of findings in this case was chaired by a former US senator. An example of the kind of monitoring of HRIAs is an absolutely critical point, otherwise it sits stale on the shelf.
- NomoGaia is one of the few practitioner organizations publishing their own assessments.
- There are only three HRIAs on the Business and Human Rights Resource Centre website - BP Tangguh; Goldcorp Marlin Mine and Yahoo! We know many more have been done. We at IHRB have had several companies share their own work with us confidentially, but this information is not in the public domain.

- Nestle's HRIA White Paper seeks to set a new standard:
- Kuoni similarly has produced an inventive pilot to assess its impacts regarding the Tourism sectors in Kenya and India.
- Oxfam has developed a community led HRIA tool, based on the Rights & Democracy tool and methodology.
- The latest highly watched project and HRIA is the Tampakan copper/gold mine in the Philippines. They published their HRIA in 2013 with a lot of serious issues at risk. It's a good example of key actors needing to pull together - home government, host governments and major shareholders.
- Finally, we hope that our own work on Sector-Wide Impact Assessments will also help populate this space, with assessments nearly complete for Oil and Gas and Tourism sectors in Myanmar, and with Agriculture and ICT to come, as well as plans for similar processes on Oil and Gas in Kenya; and for Mining, Agriculture and Infrastructure in Colombia.

I'll conclude by highlighting some of the things we would like to see more of in human rights assessments moving forward:

- 1) **Clear intentions of the assessment** - What is its purpose both in commercial terms but also human rights terms? Whose interests will it benefit?
- 2) **Actual or potential impacts** - Does the assessment look at the impacts of an existing activity, does it predict the future impacts of a possible new activity or does it do a mixture of both?
- 3) **Risk to people or risk to company or both** - It is very easy to conflate the two but they are different things. Any human rights assessment must put human risk at the centre of all analysis.
- 4) **Involvement of rights-holders** - Does the assessment clearly separate out the impacted rights-holders from other stakeholders? How are rights-holders consulted during the assessment, how are their views incorporated; are they able to influence the design of the assessment itself?
- 5) **Scope** - What is the nature of the project or business decision the assessment is focused on? All human rights must be considered a priori, but then there is a clear need to prioritise and focus. But how are the decisions about limiting scope arrived at? Are rights-holders and other stakeholders involved in the prioritisation process? Businesses that set their own focus and short-list their perceptions of

the most material human rights in isolation tend to miss very important elements. You might be surprised where your greatest perceived impacts actually lie. Focusing only on the impacts that are easiest to manage or less controversial for the company will not satisfy stakeholders.

- 6) **Avoid labels and silos** - Is water a human rights issue? Is land a human rights issue? Water is both an environmental issue and also a human rights issue - what is different is the approach and the questions raised. Assessment processes that silo issues under specific labels, in the way some reporting standards do, miss the interrelated nature of human rights and also the relationship between human rights and all sustainability and ethical issues.
- 7) **The role of the State** - Assessing the role of government is critical to any human rights assessment as it is the first pillar of the UNGPs. This includes comparing national law to international human rights standards, the effectiveness of applying laws, the effectiveness of the judiciary, and more sensitive issues such as corruption and endemic discrimination. Being honest about the human rights performance of a specific government cannot be dodged but does therefore impose limits on disclosure. Very often a similar analysis of relevant local governments is also essential, as well as specific state agencies or state-owned business partners.
- 8) **Transparency and disclosure** - I have already stated that full disclosure of human rights assessments might not always be a good idea, but as much transparency as is possible must be the default. There are many reasons why there is so little in the public domain at present, but information that is not commercially or human rights sensitive shouldn't be secret and so there is a need for businesses to be specific when not disclosing material. Even if specific impacts or risks cannot be disclosed, the fact that an assessment has taken place can be as can its methodology and associated rights-holders involved. There is far too little disclosure at present for any methodological coherence to develop, which means any meaningful conversation about quality will be difficult to have.
- 9) **Implementation** - Assessment must lead to action which diminishes human rights risks and actual harm.
- 10) **Oversight and review** - Although assessments might be time bound in terms of a specific project or business decision there needs to be clear oversight and follow up. For major projects, independent

oversight mechanisms are a good idea and need to be built into all thinking.

I hope these opening thoughts are helpful in setting the scene for our discussion today. I look forward to any questions as well as to learning about your own perspectives and experiences.
