**Practical guidance and Terms of Reference (ToRs) templates
for enhanced assessment of human rights risks and impacts**

**1. About this practical guidance**

This guidance for fund managers is intended to complement [CDC’s Briefing Note on Human Rights](http://toolkit.cdcgroup.com/e-and-s-briefing-notes/human-rights), by providing additional insights into:

* Clarifying the terminology of human rights due diligence and human rights impact assessments (HRIAs), and describing the key parameters which should inform ToRs for various forms of enhanced assessment of human rights risks and impacts;
* Options and key considerations for structuring the approach to enhanced human rights due diligence;
* Questions to ensure effective integration of a human rights lens into E&S due diligence processes;
* A template for adapting ToRs for different approaches to enhanced assessment of human rights impacts.

**2. Clarifying the terminology: Human rights due diligence, Human Rights Impact Assessments (HRIAs), and key parameters**

**Human rights due diligence** is the process of assessing, addressing, tracking and communicating the negative impacts on people that may be connected to a set of business activities and business relationships. Impacts include both actual impacts on people (those that have occurred) and potential impacts on people (i.e., impacts that might occur, also referred to as human rights risks). Where these actual or potential impacts on people are particularly severe and infringe upon the ability of individuals and groups to enjoy their basic human rights, they rise to the level of human rights impacts (see [CDC Briefing Note on Human Rights](http://toolkit.cdcgroup.com/e-and-s-briefing-notes/human-rights)).

**Human Rights Impact Assessment (HRIA)** is a term that is increasingly used in the community of leading companies and responsible investors taking action on their responsibility to respect human rights in their business activities, and confusion is created when it is mistakenly used interchangeably with the term ‘human rights due diligence’. An HRIA is a stand-alone exercise that can be used to carry out enhanced assessment of human rights risks; it is a specific tool that may be more or less appropriate for different contexts. However, key international frameworks such as the UNGPs, as well as the IFC Performance Standards and the Equator Principles, speak to the expectation that companies undertake human rights due diligence, rather than requiring that a specific tool such as an HRIA be used for risk assessment.[[1]](#footnote-1)

This practical guidance therefore deliberately frames the options and ToR templates for various forms of enhanced assessment of human rights risks and impacts, rather than focusing only on HRIAs.

Where fund managers determine, based on their initial screening, that some form of enhanced assessment of human rights risks and impacts is warranted, the ToRs for that enhanced assessment – regardless of the form that assessment takes – should be aligned with the UN Guiding Principles on Business and Human Rights (UNGPs). ToRs should therefore be informed and guided by the following key parameters:

* The full range of **business activities** and **business relationships** should be considered (for example, the extent to which human rights risks or impacts arise through third parties, such as company supply chains, or other actors when companies operate in locations with inherently higher human rights risk);
* The full range of **potentially affected stakeholders** (individuals and groups) should be included, with particular attention to those groups who may be vulnerable;
* The full range of actual and potential negative impacts on **internationally-recognized human rights** should be assessed;
* Those negative impacts should be **prioritized**, where necessary, on the basis of severity (based on scale, scope and remediability) of harm to people and the likelihood of that harm occurring;
* Steps should be identified that could effectively **prevent or mitigate** those harms, either directly by the business or by building and using its leverage with third party business relationships; and,
* Critically, the process should involve **meaningful consultation** directly with those stakeholders who might be harmed, or their legitimate representatives, to the greatest extent possible.

**3. Options and key considerations for structuring enhanced assessment of human rights impacts**

There are three general options for fund Managers in structuring an enhanced due diligence process to more effectively assess human rights risks and impacts. Below, we identify the options, the factors to consider in determining which option may be most appropriate, and provide examples of how these factors could apply in practice to guide a fund manager’s decision on which option would be most appropriate.

**Options**: The three primary options for structuring an enhanced assessment of human rights risks and impacts are:

1. **Integration of a human rights lens into E&S due diligence**: In many cases, existing E&S due diligence processes can be tailored to meet the parameters of human rights due diligence, as described above, by ensuring that they integrate a human rights lens.
2. **Focused assessment of human rights impacts**: In other cases, it may be necessary to focus on: (i) specific risks or impacts, (ii) specific stakeholder groups that might be adversely affected, (iii) a specific operating context, or (iv) specific business activities or business relationships for a more focused assessment of human rights risks and impacts, conducted either as part of, or in parallel to, an existing E&S due diligence process. This type of focused assessment can ensure better understanding of specific risks and impacts related to the business and bring greater emphasis and attention to those risks to ensure that they are managed effectively;
3. **Broadly**-**scoped assessment of human rights impacts**: In certain cases, it may be appropriate to conduct a more broadly-scoped assessment of human rights impacts (such as an HRIA), including all of the parameters identified in option (b) above, parallel to an existing E&S due diligence process.

**Factors to consider**: In determining an appropriate approach, the [CDC Briefing Note on Human Rights](http://toolkit.cdcgroup.com/e-and-s-briefing-notes/human-rights) identifies a range of factors to consider that could create heightened risk for severe human rights impacts, including factors related to:

* The operating context, where risks can be heightened by the presence of conflict, systemic corruption, weak governance, or widespread social practices that infringe upon certain human rights;
* The business relationships, where risks can be heightened by third-parties connected to the business operations, products or services, including supply chains, security providers, joint venture partners, customers, or government (as in the case of government-led land acquisition processes);
* Impacts to vulnerable groups, such as women, children, ethnic minorities, indigenous peoples, or migrant workers, which may be less able to raise concerns or have more limited recourse to public institutions;
* The nature of specific business activities, which are often accompanied by specific impacts, such as land acquisition and resettlement processes, the presence of public or private security forces, resource-intensive activities in resource-scarce environments (such as water-stressed areas), or activities likely to lead to population influx or significant changes in social dynamics;
* The experience and management systems of the company in managing similar business activities in similar contexts, which can potentially reduce or enhance risk.

**Examples: Applying the factors to guide a fund manager’s decision**:

The table below highlights how the presence of these factors, applied in practice, can guide fund Managers in determining how to structure an appropriate approach to enhanced assessment of human rights risks impacts, depending on the circumstances.

|  |
| --- |
| **Examples: Applying the factors to guide a fund manager’s decision on the most appropriate option** |
| If, for example:* Few of the ‘high-risk factors’ mentioned above are present;
* Company has a policy commitment to respecting human rights; internal processes for conducting effective environmental, social and human rights due diligence; and a good track record of implementing similar projects in similar contexts;
* Fund manager and company are familiar with the operating context, and the operating context has not changed nor is likely to change significantly;
* Those conducting the E&S due diligence have experience and expertise conducting due diligence on social impacts, including labour and employment practices, (as opposed to a primary focus on environmental impacts), and can demonstrate adequate familiarity with international human rights standards; and
* The E&S due diligence process includes robust and meaningful engagement with affected stakeholders.
 | The presence of these factors suggest that:**Integration of human rights lens into E&S due diligence processes** may be appropriate |
| If, for example:* Some (or several) of the ‘high-risk factors’ mentioned above are present;
* A particular vulnerable group, such as indigenous people or migrant workers, is present, and dedicated efforts or expertise are required to ensure that impacts on these groups are properly assessed and understood;
* A particular severe human rights impact is more likely due to the operating context, such as the widespread social acceptance of a particular impact, discrimination against a particular group, or weak regulation or enforcement to protect a particular right;
* A particular set of business relationships raise concerns, because of past track record (for instance, a supplier has a history of labour violations; a security provider has past incidents of excessive use of force; a government customer of a telecommunications company has a history of using technology to conduct targeted surveillance on political dissidents);
* Supply chains where there is recognition of systemic labour rights issues
* The company could contribute to a particular harm through the cumulative effect of many actors undertaking similar activities (i.e., water usage in a water-scarce region);
* Land acquisition or land use in a complex land-tenure context are connected to the company’s activities;
* Security activities are provided by third-parties not under the direct control of the company;
* Unresolved legacy impacts from prior business or government activities in a particular operating context (for example, past land acquisition and resettlement is still contested, or communities have specific concerns related to past environmental impacts on their livelihoods; and
* Specific expertise or focus is required to properly assess a particular type of impact (for example, expertise to assess the human rights impacts of a company’s water usage, as opposed to the environmental impacts).
 | The presence of these factors suggest that**:****Focused assessment of human rights impacts (**to accompany or complement E&S due diligence) may be appropriate |
| If, for example:* Many of the ‘high-risk factors’ mentioned above are present;
* The fund manager or company have limited experience in particular operating context or with a new set of business activities;
* Significant changes to the operating context create new uncertainties for potential impacts on stakeholders;
* Project is likely to face heightened scrutiny from stakeholders, due to substantial concerns from or perceptions of significant harm to stakeholders from a particular set of business activities;
* There is a need to establish a comprehensive human rights baseline against which future impacts can be assessed; and,
* Business activities (or activities of business relationships connected to the business’s operations) take place in fragile or post-conflict contexts.
 | The presence of these factors suggest that:**Broadly-scoped assessment of human rights risks and impacts** (such as an HRIA) may be appropriate |

**4. Ensuring effective integration of a human rights lens in E&S due diligence processes**

Where, the fund manager deems that the appropriate approach is to integrate a human rights lens into E&S due diligence, the ES due diligence ToRs should be informed by the following questions:

|  |
| --- |
| **Questions to inform the framing of ESDD TORs**  |
| **Scope** | Will the E&S due diligence explore potential risks and impacts caused by business relationships? * *(i.e., third parties connected to the business’s operations, products or services, including supply chain actors, joint venture partners, public or private security forces, end-users or customers, and government or regulatory authorities relevant to the business’s activities);*

Will the due diligence use internationally-recognized human rights standards as the benchmark? |
| **Stakeholders** | Will the due diligence process specifically identify vulnerable groups that could suffer disproportionate impacts or might be less able to raise concerns or seek recourse through public institutions? * *(i.e., women, children, ethnic minorities, indigenous peoples, migrant workers, or other groups with special rights under UN conventions);*
 |
| **Severity** | Will the E&S due diligence prioritize impacts on the basis of severity (scale, scope and remediability) of harm to stakeholders, rather than the risk to the business alone? |
| **Leverage** | Will the E&S due diligence identify actions the company can take to address risks and impacts that might be linked to the company’s operations, products or services, but which might be caused by third parties beyond the control of the company? |
| **Stakeholder engagement** | Will the E&S due diligence process engage meaningfully with directly affected stakeholders who might be harmed?* *(i.e., workers of the company and of supply chain partners, neighbouring communities, etc);*
 |
| **Experience and competencies** | Will the E&S due diligence be conducted by internal staff or external consultants with the requisite experience and competencies to effectively identify, assess and address social risks and impacts, including labour and employment practices? |

**5. ToR templates for enhanced assessment of human rights impacts**

Where fund managers determine that some form of enhanced assessment of human rights impacts is necessary, the key considerations presented in the table below can be used to guide the development of the Terms of Reference. The table applies these considerations to two scenarios: (a) focused assessment of human rights risks or impacts, conducted alongside or as part of existing E&S due diligence; and (b) additional broadly-scoped assessment of human rights risks and impacts assessment (such as an HRIA).

Where the fund manager determines that a focused assessment of human rights risks and impacts may be the most appropriate option, in order to better understand specific risks and impacts or bring greater emphasis and attention to those risks and impacts, there are several options for the scope of that focused assessment:

1. A focus on a particular sub-set of human rights risks and impacts;
2. A focus on a particular sub-set of stakeholder groups that might be adversely affected;
3. A focus on a specific operating context (or contexts) within the business’s broader operations or value chain; or,
4. A focus on a particular set of business activities or relationships.

In the table below, ToR components are included for each of these scenarios for a focused assessment of human rights risks and impacts, depending on the particular focus that is appropriate.

|  |
| --- |
| **Considerations for Terms of Reference components for enhanced assessment of human rights impacts** |
|  | **Focused assessment of human rights risks and impacts (part of, or complementary, to E&S due diligence)** | **Broadly-scoped assessment of human rights risks and impacts** |
| **Objectives** | *A focused assessment might have any of the following objectives:*1. *Assess and identify actions to address specific risks or impacts, in alignment with international standards; or,*
2. *Assess the broad range of risks and impacts on a particular sub-group of stakeholders (migrant workers, ethnic minority, indigenous peoples, etc); or*
3. *Assess the particular risks or impacts involved in a certain operating context; or*
4. *Assess the risks or impacts involved with a particular business activity or set of business relationships.*
 | *A broadly-scoped assessment would include all of the specific objectives mentioned in the box to the left:**Assess and identify actions to address the actual and potential negative impacts on individuals or groups, which a business might cause or contribute to or be directly linked to, through its own activities or through its business relationships, in alignment with the expectations of the UNGPs.* |
| **Scope of business activities under review** | *Map the full scope of business activities connected to this company’s operations, products or services, including third-party business relationships:** *which could play a role in this particular impact (for objective 1);*
* *which could have an impact on this particular group of stakeholders (for objective 2);*
* *connected to this particular operating context (for objective 3); or*

*Map the business activities and relationships identified as particularly high-risk (for objective 4).* | *Map the full scope of the business’s activities related to this investment, and the business relationships connected to these business activities, including supply chain partners, third-party contractors (including security providers) joint venture partners, customers, the role of government or other public agencies.* |
| **Scope of stakeholders under review** | *Identify different stakeholders who could suffer the specified impacts (for objective 1),be impacted by operations in the specified context (for objective 3), or be impacted by the specified business activity or business relationships (for objective 4); or,* *Provide further background on the demographics and general conditions in society of the specific stakeholder group (for objective 2);* | *Identify all potentially affected stakeholders who could be harmed by the business’s own activities or those of its business relationships; and,**Identify vulnerable groups, as defined by international standards, who might suffer disproportionate impacts or might be less capable of raising concerns or seeking recourse from public institutions.* |
| **Scope of impacts under review** | *Using internationally-recognized human rights standards:**Provide further background on the specific human rights impact(s), including the legal, social and cultural factors that give rise to this impact in this context, how widespread it is, etc; (for objective 1) or,* *Identify the actual and potential negative impacts on this particular stakeholder group (for objective 2), in the specified operating context (for objective 3), or connected to the specific business activity or business relationships (for objective 4);* | *Using internationally-recognized human rights standards:**Identify all of the actual and potential negative human rights impacts.* |
| **Operating context** | *Assess key factors in the operating context that may make these impacts more likely to occur, including the relevant regulatory context, any current or recent conflict dynamics, socio-economic trends, systemic corruption, social practices that undermine respect for human rights etc.* |
| *Conduct a gap analysis assessing the national legal and regulatory context, and its enforcement against international standards for this particular right (for objective 1) or particular vulnerable group (for objective 2).* | *Conduct a gap analysis assessing the national legal and regulatory context, and its enforcement, against international human rights standards including the rights of vulnerable groups.* |
| **Business relationships** | *Assess the business relationships connected to the company’s activities, in terms of their track records, experience, and strength of management systems for managing relevant impacts, which may make particular impacts more likely to occur.* |
| **Company experience** | *Assess the company’s own experience, track record, and strength of policies and management systems for managing identified impacts;* |
| *Does the company have prior experience managing:** *This particular impact (for objective 1)?*
* *Impacts on this particular group of stakeholders (for objective 2)?*
* *Operations in the specified context (for objective 3)? or,*
* *Similar business activities or business relationships (for objective 4)?*
 | *Does the company have experience operating in similar high-risk contexts in the past?*  |
| **Prioritization** | *Prioritize these impacts, where necessary, in terms of which impacts to address with the greatest urgency, on the basis of severity of harm to stakeholders (using the criteria of scale, scope and remediability, as defined by the UNGPs) and likelihood of the harm occurring.* |
| **Prevention and mitigation** | *Identify steps that the company could take to prevent or reduce the likelihood of the impact occurring, and/or to mitigate the severity of the impact should it occur;**Identify steps that the company could take to use or increase its leverage with third party business relationships to prevent or mitigate impacts that the company has not caused or contributed to through its own actions, but which are nevertheless connected to the company’s operations, products or services through its business relationships.**On occasions to work with other businesses to address systemic sector-wide challenges that generate human rights risks (for example in supply chains, or relating to cumulative impacts on ecosystem services).* |
| **Stakeholder engagement** | *Engage meaningfully, to the greatest extent possible, with potentially affected stakeholders or their legitimate representatives;**Where direct engagement is not possible, engage with credible proxies who have insights into the perspectives of affected stakeholders; and,**Where Free, Prior and Informed Consent (FPIC) is required, consider how the enhanced assessment process relates to that requirement.* |
|  | *Ensure multiple rounds of engagement with potentially affected stakeholders**Engage also with policy level stakeholders including national human rights institutions, international NGOs, and policy-makers, as appropriate.* |
| **Grievance mechanisms** | *Seek evidence of effective site-level grievance mechanisms, using the effectiveness criteria highlighted in the UNGPs (GP 31)[[2]](#footnote-2).**Where effective site-level grievance mechanisms are not present, provide suggestions for the design of effective channels for relevant stakeholders to raise concerns and have them addressed.* |
| **Tools and methodologies** | *Draw on relevant sections of internationally-recognized tools for HRIAs (see corresponding box in next column).* | *Use an internationally-recognized tool for conducting HRIAs, such as those produced by the IFC[[3]](#footnote-3) or the Danish Institute for Human Rights[[4]](#footnote-4).**Consider collabourative assessment approaches particularly where there is a lack of trust between the company and potentially affected stakeholders[[5]](#footnote-5).* |
| **Experience and competencies of consultants**  | *Local or international consultants or teams with:* * *A proven track record in assessing specific human rights dimensions and issues typically associated with the industry sector;*
* *Familiarity with IFC PS*
* *Issue-specific expertise (where enhanced HRDD is scoped around a specific impact);*
* *Experience in the country or regional context;*
* *Relevant language skills;*
* *Ability to engage directly and build trust with relevant stakeholder groups.*
 | *Generally, local and international teams with:** *Extensive and credible experience of assessing human rights risks and issues in complex investments and in higher risk situations;*
* *Expertise in country or regional context;*
* *Relevant language skills;*
* *Expertise in and knowledge of international human rights frameworks and standards;*
* *Ability to engage directly and build trust with stakeholder groups and policy-level stakeholders.*
 |
| **Experience and competencies for fund managers**  | *Experience and ability to:* * *Identify and manage consultants with requisite expertise;*
* *Interpret and integrate results of enhanced HRDD into the investment process and subsequent engagement with the investee so as to ensure management and mitigation of risks;*
* *Engage with client company around the findings of enhanced HRDD;*
* *Monitor implementation of action plans;*
* *Experience and ability to engage at policy level with government, civil society, and other stakeholders around the approach, actions and findings of the enhanced HRDD.*
 |
| **Expectations of disclosure** | *Heightened expectations of public disclosure (in summary form) on the methodology used, the impacts identified and prioritized, and recommendations (as compared with disclosure expectations for typical E&S due diligence).* |

1. [The IFC has developed guidance for conducting HRIAs, available at: http://www.ifc.org/wps/wcm/connect/8ecd35004c0cb230884bc9ec6f601fe4/hriam-guide-092011.pdf?MOD=AJPERES](http://www.ifc.org/wps/wcm/connect/8ecd35004c0cb230884bc9ec6f601fe4/hriam-guide-092011.pdf?MOD=AJPERES) [↑](#footnote-ref-1)
2. http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR\_EN.pdf [↑](#footnote-ref-2)
3. <http://www.ifc.org/wps/wcm/connect/8ecd35004c0cb230884bc9ec6f601fe4/hriam-guide-092011.pdf?MOD=AJPERES> [↑](#footnote-ref-3)
4. <http://www.humanrights.dk/business/tools/human-rights-impact-assessment-guidance-and-toolbox> [↑](#footnote-ref-4)
5. For instance, drawing on the ‘Getting it Right’ tool for community-based human rights impact assessments, developed by Rights & Democracy and applied by Oxfam, <http://policy-practice.oxfamamerica.org/work/private-sector-engagement/community-based-human-rights-impact-assessment-initiative/> [↑](#footnote-ref-5)