

# What Do Human Rights Have to Do With Mergers and Acquisitions?

---

*How Companies Can Identify and Address Human Rights Risks When Structuring M&A Transactions*

By Anna Triponel\*

## Introduction

As a former mergers and acquisitions (M&A) lawyer who supported John Ruggie's development of the [UN Guiding Principles on Business and Human Rights](#) (the Guiding Principles), M&A professionals frequently ask me the following question: **What do human rights have to do with us, and how is this different from what we are doing already?**

Buying new companies and selling to other companies often involves inherent human rights risks – meaning the risk of harm to people. Those risks are steadily on the rise. Businesses are expanding into new markets where legal regimes may not be as protective; increasing populations, inequality and climate change render workers more vulnerable and access to resources more competitive; and social media enables the public to pass judgment on actions that take place thousands of miles away. These developments translate into real costs for companies in the form of legal actions, complaints lodged with National Contact Points set up in Organisation for Economic Co-operation and Development (OECD) countries and investor questioning and divestments. Costs can also include reputational damage from advocacy campaigns, operational delays, management distraction and lost opportunities resulting from conflicts with communities.

***Companies are navigating increasingly unfamiliar waters when it comes to human rights, especially as they rely upon acquisitions to expand into higher risk environments.***

Conversely, experience shows that considering human rights as part of M&A processes increases the likelihood of M&A transactions succeeding in the long term. Paying attention to human rights helps lead to the creation of a market whereby companies are incentivized not only to run an effective business model, but also to put in place an effective human rights risk management system. This is starting to happen, for instance, by

---

\* This article is based on Anna Triponel's work as an Advisor with Shift.

Anna Triponel is a non-practicing solicitor of England and Wales, New York attorney and Paris lawyer. She acted as the principal associate representing US and international clients on mergers and acquisitions, joint ventures, private equity and venture capital transactions at the law firm of Jones Day. She then provided input as a consultant to the mandate of the Special Representative of the UN Secretary-General for Business and Human Rights Professor John Ruggie, that supported the development of the UN Guiding Principles on Business and Human Rights. At Shift, the leading center of expertise on the UN Guiding Principles, Anna works with governments, businesses, lawyers and investors to put the UN Guiding Principles into practice.

junior oil and gas companies placing stronger emphasis on positive relations with communities surrounding their sites, realizing that a strong social license to operate will positively influence their future valuation.

**There is no shortage of examples of M&A transactions that fail, or cost significantly more for a company in the long term, because of a lack of consideration of human rights issues. Prominent examples include:**

- ⇒ Meridian Gold, which acquired Brancote Holdings, the owner of a site in Argentina, for US\$320 million. Although legal due diligence did not uncover any issues, Meridian Gold ended up with five years of litigation rising to the Argentinian Supreme Court and lost its entire investment because the surrounding community opposed the use of the land for an open-pit gold mine. The M&A team could have assisted by flagging that the legal title to the land alone may not be sufficient in light of the local dynamics around mining;
- ⇒ Nokia, which suffered a significant hit to its reputation when news broke that its products and services had assisted the Iranian government's efforts to track, imprison and harm political dissidents during the 2009 Iranian elections. In reality, Nokia had divested the business six months prior to the elections to Iran Telecom. But public opinion was that if a company sells a business that can cause harm, the seller should seek to limit the risk of such harm by incorporating restrictions during the sales transaction, or seeking to sell to another buyer;
- ⇒ US company American Sugar Refining, which acquired Tate & Lyle Sugars for £211 million in 2010. Subsequent to the transaction, Tate & Lyle Sugars was subject to a £10 million lawsuit in the UK High Court for alleged connection to land grabbing in Cambodia. The M&A team could have assisted by flagging risks associated with Tate & Lyle Sugars' suppliers and the fact that legal title to land in Cambodia can mask corrupt practices.

These kinds of inherent human rights risks are leading companies to start to integrate consideration for human rights into their M&A processes. Yet little information is publicly available about how they are seeking to do so. Revising due diligence checklists and crafting template representations and warranties alone will not work. As one senior M&A lawyer I worked with put it, "these changes are meaningless if M&A lawyers don't understand what they are looking for and what

***There is no quick fix for integrating human rights into a company's M&A processes.***

their role is in the process.” Integrating human rights into a company’s due diligence process may require the gathering of further information, but perhaps more importantly, requires a different way of reviewing information that is gathered.

In-house M&A lawyers can play a critical role in helping their companies identify and address risks to people where these risks are not captured when assessing technical legal issues alone. However, the company’s responsibility to respect human rights in such transactions does not and cannot fall on the lawyers’ shoulders alone. Other people on the company’s M&A team, as well as more broadly within the company, will also be critical in assisting the company to avoid involvement in human rights harms in the course of M&A transactions.

***M&A lawyers are but one piece – albeit a large piece – of the puzzle; the company’s responsibility to respect human rights while structuring M&A transactions does not fall on their shoulders alone.***

Through Shift’s [Business Learning Program](#), I have worked with companies that are at the leading edge of efforts to integrate consideration of human rights into their M&A processes. There are some notable differences between a traditional M&A process – one that seeks to identify and address risks to the company – and one that seeks to identify and address risks to people. These differences play out throughout the M&A transaction: when (i) **identifying** the issues to address in the course of due diligence, (ii) **prioritizing** the issues in preparation for contract negotiation and (iii) seeking to **address** these issues.

***By integrating consideration for human rights into corporate M&A processes, M&A teams can play a crucial supporting role for their companies as their business models change through mergers, acquisitions and divestitures.***

Leading companies tend to start by building internal understanding of how human rights relate to the company’s M&A transactions (Section 1). They then map out the company’s M&A processes for identifying risks in the transaction and determine where these processes already adequately capture human rights-related risks, and where they may not (Section 2). Based on this mapping exercise, a company can then decide on a clear allocation of responsibilities within the M&A team for **identifying** human rights risks (Section 3) and strengthen its processes for **addressing** human rights risks. The activities of identifying and addressing human rights risks should take place during the contractual negotiations as well as after the transaction has taken place (Section 4).

This article captures insights from this work to help other companies engaging on a similar path. Although it is intended primarily for companies and their in-house M&A teams, it will also be relevant for law firms that are increasingly seeking to advise clients in this area, as well as other stakeholders interested in advancing business respect for human rights.

## 1. Start with building internal understanding of how human rights relate to the company's M&A transactions

A company may seek to integrate consideration for human rights into its M&A processes for a number of reasons. These can range from a desire to ensure that the transaction does not harm people inadvertently, questions from peer companies and investors, past experience, or the need to publicly demonstrate progress on implementing the Guiding Principles. Whatever the initial reason, strong support and understanding from the M&A team is critical to success.

A range of examples exist in the public domain about costs saved or incurred that the company can seek to draw upon. However, few examples are as powerful as the company's own experience. M&A professionals are commonly privy to a number of compelling examples, but they may not themselves see the connections to human rights or may not share these examples more widely with the M&A team. A process for gathering examples of successes and failures in how human rights have been managed in past M&A transactions is an essential first step. One example could be where an M&A professional was able to tailor follow up questions to the target company where desktop research highlighted that legal title to land was insufficient to protect against human rights risks. Another example might be where building in time to address human rights-related risks before the contract was signed saved the buyer money in the long run. Gathering these kinds of internal examples increases understanding of the value to the company of considering human rights in the course of M&A, creates ownership in the M&A team of this process, and provides lessons to build upon.

*Companies that conduct numerous M&A transactions frequently sit on a treasure trove of relevant examples – but these are frequently not widely known within the M&A team or are not seen as connected to human rights.*

## 2. Map out the company's existing M&A processes for identifying risks involved in the transaction and determine where they already do, and where they may not, adequately capture human rights-related risks

M&A due diligence teams are skilled at identifying legal and business risks, including risks related to the environment, land, tax, employee relations, legal compliance and intellectual property. They typically use legal and regulatory compliance as a baseline. Due to tight confidentiality and timing constraints, they frequently rely upon information provided by the target company and by third parties such as investment banks and local counsel. Although this process may reveal risks that have human rights aspects, traditional M&A due diligence can lead to human rights blind spots.

**Examples of human rights-related blind spots that can occur when conducting due diligence in the course of a potential acquisition are:**

- When assessing a target company's water usage, the environmental specialist compiles

accurate scientific measurements, but misses how this water usage impacts the neighboring community’s access to sufficient water in a drought prone area;

- When assessing a target company’s labor practices, the human resources specialist finds that the target is legally compliant, but misses labor abuses because local labor laws fall below international standards;
- When assessing leaseholds, the real estate specialist finds that the properties are adequate to conduct the business following the acquisition, but misses flaws in the structural stability of the building that could lead to their collapse.

## A. Identifying the nature of the company's connection to the impact

The Guiding Principles help to distinguish a company’s responsibility to take particular actions to prevent or address human rights impacts, depending on how the company is involved with the harm. The company’s responsibility to act is broader where it has caused or contributed to a harm, than where the harm is linked to its operations, products or services by its business relationships.

**Different Modes of Responsibility under the Guiding Principles**

Where a company <b>causes</b> a negative impact on human rights:	The company is expected to mitigate/ prevent the risk of the impact.		The company is expected to remediate the harm if the impact occurs.
Where a company <b>contributes</b> to a negative impact on human rights (e.g., with another company, or by incentivizing harm):	The company is expected to mitigate/ prevent the risk of the impact.	The company is expected to use its leverage with other responsible parties to mitigate / prevent the impact, and increase its leverage as necessary.	The company is expected to contribute to remediating the harm if the impact occurs.
Where a company’s operations, products or services are <b>directly linked</b> to an impact by a business relationship:		The company is expected to use its leverage with other responsible parties to seek to mitigate / prevent the impact, and increase its leverage as necessary.	No responsibility to remedy, but the company may choose to do so.

**B. How do these modes of responsibility translate to the M&A context?**

When one company acquires another, it can inherit human rights issues that the target company has not yet resolved. Even where the acquirer structures the transaction as an asset purchase agreement, carefully leaving the seller's human rights legal liabilities behind, in practice the acquirer can still be perceived as taking on the seller's responsibility for addressing its human rights impacts. This is where the distinction between legal liability and the corporate responsibility to respect human rights under the Guiding Principles comes into play: a company may be able to avoid legal liability and yet still be deemed responsible for a negative human rights impact under the Guiding Principles.

*It is relevant for M&A teams to understand how the UN Guiding Principles' different modes of responsibility for human rights translate to the M&A context and what they are looking for in the course of due diligence.*

Where a company sells a business, it typically passes its responsibility to respect human rights over to the buyer. Any impacts that the company caused or contributed to and which have not been remedied either should be provided for in the agreement, or become the responsibility of the buyer. The seller also should think about how the divested business is going to be used and again, seek to address any human rights risks arising from this in the agreement.

**C. What are M&A teams looking for in practical terms?**

Adding the human rights lens to M&A processes means being equipped to identify potential or actual harm to people that is connected to the target company or, in the case of a divestiture, that is, or may be, connected to the business being divested. In practical terms, what the M&A teams are looking for can be translated as follows:

<b>Acquisitions</b>	<p>The M&amp;A team is looking for ways in which:</p> <ol style="list-style-type: none"> <li>1. The target company may have harmed people in the past, or may be continuing to harm people as it conducts its business; and</li> <li>2. The target company's operations, products or services may be connected through its business relationships to harm to people.</li> </ol>
<b>Divestitures</b>	<p>The M&amp;A team is looking for:</p> <ol style="list-style-type: none"> <li>1. How the divested business may have led to harm to people that the company has not yet remediated, and</li> <li>2. Ways in which the divested business could be connected to adverse human rights impacts, through the buyer and/or its business relationships.</li> </ol>

A mapping of how the company is already looking at these areas will assist in an assessment of where the processes may need to be strengthened to adequately capture the human rights-related risks.

### 3. Based on this mapping exercise, agree on a clear allocation of responsibilities within the M&A team for identifying human rights risks

Companies that are starting to integrate human rights into their M&A processes may initially be inclined to place responsibility for human rights with one individual in the M&A team (e.g., a lawyer, a human rights specialist). However, leading company experience suggests a more nuanced approach that involves collaboration among the whole M&A team. Although allocation of responsibility will depend on the company's internal processes (identified through the mapping exercise described above), emerging practice in the risk identification phase is to strengthen the M&A process in order to:

- i) Equip specific functions with the ability to raise human rights-related issues related to their areas of expertise;
- ii) Equip lawyers with the ability to act as wise counselors by identifying where potential gaps between technical legal risks and human rights risks exist;
- iii) Involve in-house human rights expertise (e.g., human rights, sustainability, corporate social responsibility specialists) in transactions where human rights risks are higher;
- iv) Bring in additional external expertise where human rights risks are particularly high or new to the company.

To elaborate on the potential roles these different actors can play:

- **Specific functions:** Each function can identify risks to people in their due diligence. For example, environmental specialists can identify risks to people resulting from environmental damage, property specialists can identify risks to people resulting from the real estate's structure and human resources specialists can identify risks to workers. Leading companies are seeking to build their M&A professionals' capacity to play a role in identifying human rights risks in the course of their due diligence;
- **M&A lawyers:** Increasingly, companies are asking their M&A lawyers to take a holistic view of legal and human rights risks. After all, human rights are defined in international law, and national laws increasingly require business to respect human rights, as regulatory initiatives in France and Switzerland show. This coincides with a movement of lawyers increasingly acting as wise counselors and trusted advisors, in addition to providing technical legal expertise;

- **In-house expertise:** Some companies have tasked a human rights, sustainability or corporate social responsibility specialist to support the M&A team in identifying human rights risks. In this case, the process should be structured at the outset to facilitate this function, for instance by providing this specialist access to the data room and the ability to formulate follow-up questions for the target company;
- **External expertise:** Where transactions are at a higher risk of being connected to human rights harms, some companies may bring in specific external expertise. To protect the confidentiality of the transaction, the external expertise need not be privy to the specifics of the transaction or can commit to a non-disclosure agreement. For example, the buyer of a mining company operating in areas where indigenous people are living may wish to bring in an independent expert on free, prior and informed consent. The buyer of a food company that supplies seafood products from Thailand may wish to bring in additional expertise on bonded labor. The buyer of an information and communications technology business operating in a restrictive environment may wish to bring in additional local knowledge on censorship and privacy violations. The buyer of a company that relies heavily on land may wish to solicit expert views on the validity of the titles to land from the local communities' perspective.

Once responsibility is allocated, the company can work to provide the guidance and tools necessary to assist relevant M&A team members to find and assess the relevant information. Companies can do so through workshops, guidance notes and regular team trainings. Human rights is commonly seen as quite foreign to M&A. Human rights due diligence on the one hand involves ongoing and open engagement with potentially impacted stakeholders, while M&A transactions are typically subject to strict confidentiality and timing constraints. Even within one company, the knowledge of the transaction can be highly secretive and restricted to senior management and the relevant team members conducting the M&A. Therefore, it is critical to assist the M&A team in navigating these, at times, competing tensions.

***Companies need to equip their M&A teams to navigate confidentiality and timing considerations in a way that does not constrain their assessment of human rights risks.***

This should involve assisting the M&A professionals in:

- Identifying the human rights implications of information received;
- Assessing what additional information is needed from the target company to evaluate human rights risks, including the (i) types of questions that are relevant to integrate into the due diligence checklist (related to the company's approach to human rights risk management and what its **salient**, or leading, human rights risks are), and (ii) follow up questions that are relevant to ask;
- Understanding when they may need additional information, and where they can go to get it. This can include (i) desktop resources, (ii) existing information in the company that is not typically relied upon,

such as country or business partner assessments and experience gained from lawyers on prior similar transactions, and (iii) seeking additional information from external sources on a no-names basis;

- Understanding how to prioritize the risks found, based on those risks that are the most severe to people.

#### **4. Strengthen the company's M&A process for addressing human rights risks, both during the contractual negotiations as well as after the transaction has taken place**

Once M&A team members are empowered and equipped to identify risks to people in the course of their due diligence, they need to know what to do with the issues identified. There are some notable differences between a traditional M&A process that seeks to address the risks to the company from the transaction, and one that seeks to avoid and/or mitigate risks to people whose rights may be impacted by the operations of the target or divested business.

##### ***A. Prioritization of issues to address***

First, in an M&A process, the prioritization of issues to address during the negotiations (the “deal breakers”) is typically based on financial value. Bringing a human rights lens to bear adds an additional layer: the areas that have emerged during due diligence as those where people are, or could be, most severely harmed, would also need to be addressed by the company.

This is not to say that the M&A team must address immediately all of the areas that are important from a human rights perspective. For example, a finding that the seller's security guards have harmed community members may best be addressed during the negotiations in order to ensure that the seller provides or sets aside the funds for remedy. A finding that the target company's buildings are unsafe and at risk of collapsing may best be addressed after the M&A transaction closes, by relocating the workers to a safer site. In this example, the costs of doing so – breaking the lease, moving the workers, renting a new worksite, etc. – would still be relevant for the negotiations since these costs should be factored into the purchase price. Consideration of human rights might therefore mean a change in how issues are currently prioritized for contractual negotiations, and underscores the importance of passing information on to others in the company to address post-transaction.

##### ***B. Addressing the issues identified***

Secondly, when seeking to address issues uncovered during due diligence, a typical process will involve the M&A lawyers in seeking to allocate risks away from the company they are working to protect. Adding the human rights lens by contrast requires some attention to the root cause of the issue. For instance, where workers of the seller were harmed because they were not provided protective equipment, the buyer could seek an adjustment in the purchase price to provide remedy to those harmed, as opposed to using this money to fight possible workers' litigation.

As described above, the Guiding Principles distinguish the actions a company should take depending on how it is involved with an adverse human rights impact. For instance, if the M&A team of a buyer company finds that the target company is responsible for ongoing human rights harm, this will trigger a different action by the buyer than if the M&A team finds that the company has been responsible for adverse human rights impacts in the past.

In practical terms, what the M&A teams are looking to address can be translated as follows:

***The M&A team's response to the issues identified will depend on (i) the degree of severity of the impact to people and (ii) how the company could be involved in the harm following the transaction.***

<b>Acquisitions</b>	<p>The M&amp;A team considers how to:</p> <ol style="list-style-type: none"> <li>1. Address past harm at the time of negotiations (e.g., requesting the target company to provide remedy or ensuring that the buyer can provide remedy); and</li> <li>2. Address ongoing/ future harm, either during the contractual negotiations or following the acquisition.</li> </ol>
<b>Divestitures</b>	<p>The M&amp;A team considers how to:</p> <ol style="list-style-type: none"> <li>1. Address harm that the divested business has caused or contributed to and that has not yet been remediated (e.g., by ensuring remedy is provided before the sale or ensuring the buyer takes on the responsibility subsequent to the transaction); and</li> <li>2. Build leverage (i.e., influence) during the negotiations to minimize the risk of the company's divested business being used by the buyer in a way that harms people.</li> </ol>

## 5. Conclusion

M&A lawyers are trained to find solutions to risks and typically play an important role assisting the company in this process. By following a thought process similar to the one described in this viewpoint, companies will be better equipped to avoid involvement in human rights harm as their business models change through mergers, acquisitions and divestitures.

But M&A teams are not alone in this task. The company more broadly has a responsibility to consider how its business strategy may play a role in increasing its human rights risk profile, and take appropriate action to minimize these risks on an ongoing basis. Seeking to ensure that adverse human rights impacts are prevented as the company conducts its day-to-day business will in turn minimize the likelihood that divestitures will unveil past human rights issues. Furthermore, a company that addresses its human rights risks on an ongoing basis is likely to command a higher price than one that does not.

Companies that have sought to integrate consideration for human rights into their M&A processes are now building on this experience by assessing how their other lawyers can play a role in helping the company meet its responsibility to respect human rights. Lawyers in the company who negotiate contracts that are critical to the company's business, such as procurement contracts, sales contracts, joint venture contracts and state investment contracts, are equally important in helping the company build and exercise its leverage with its business partners to together advance sustainable and respectful business.