



EVALUATING THE HUMAN RIGHTS IMPACT OF INVESTMENT PROJECTS

BACKGROUND, BEST PRACTICES, AND OPPORTUNITIES

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ACRONYMS

Civil Society Organization	CSO
Environmental Impact Assessment	EIA
Extractive Industry Transparency Initiative	EITI
Eco Management and Audit System	EMAS
International Federation for Human Rights	FIDH
Farm Labor Organizing Committee	FLOC
Global Reporting Initiative	GRI
Human Rights Impact Assessment	HRIA
Human Rights Impact Assessment and Management Guide	HRIAM
International Business Leaders Forum	IBLF
Information and Communications Technology	ICT
International Finance Corporation	IFC
International Initiative for Integrated Reporting	IIRC
International Labor Organization	ILO
International Organization for Standardization	ISO
Mine Safety and Health Administration	MSHA
National Contact Point	NCP
Organization for Economic Cooperation and Development	OECD
Sustainability Accounting Standards Board	SASB
Strategic Environmental Assessment	SEA
Securities and Exchange Commission	SEC
Social Impact Assessment	SIA
Principles for Responsible Investment	UN PRI

INTRODUCTION

This report aims to identify best practices in Human Rights Impact Assessments (hereinafter, HRIA) and incorporate these findings into the development of an HRIA tool for communities affected by investment projects. Communities could use this HRIA tool before, during and upon completion of an investment project. In addition, the community-led HRIA approach can help businesses improve their own human rights due diligence procedures. By reviewing the normative foundations of human rights impact assessments, current best practices and opportunities for further development, this report aims to contribute to the efforts of communities, companies, governments and other stakeholders to ensure respect for human rights in the context of investment projects.

Communities affected by corporate activities have developed a range of approaches to address human rights violations caused by investment projects. Within legal strategies, cases have been brought before national and international courts relying on agrarian law, injunctions for human rights violations, or indigenous rights and the right to free, prior and informed consent (FPIC). In parallel, political strategies include lobbying governments (local, national and foreign), or influencing public opinion through media advocacy. Using grassroots mobilization, marches, protests, roadblocks, strikes, and occupying buildings, communities seek to physically halt projects while also attracting public attention to the issues.

Although these strategies have produced some results, they have been insufficient in preventing the harm caused to affected populations. Cases of severe environmental damage, threats to community leaders, activists disappeared or killed, and communities displaced, continue to occur against a backdrop of a lack of political will or inability of governments to protect vulnerable populations from these threats. To a large extent, the state is captured by a corporate elite, resulting in an unfavorable context for human rights whereby economic interests prevail over social and human rights objectives in the formation and application of public policy and regulatory frameworks. The tight relationship between government and business leads to cases where, for example, mining companies operate with very few regulatory checks, with the authorization and support of government, and with little to no concern for the social, environmental and human rights impacts of their activities.

In addition, these strategies are applied reactively, that is, once the investment project has already begun or is in very advanced stages. It is much more difficult to suspend or regulate an investment project at this late point because of the amount of resources already invested. In addition, a reactive defense strategy may not see fruits in time to prevent damage to human rights.

The Project on Organizing, Development, Education, and Research (hereinafter PODER[®]) proposes an HRIA tool that would complement existing community-led strategies of prevention, negotiation and defense when confronted with the entry of an investment project.

Based on the premise that economic interests often prevail over social interests, human rights goals and even laws or court rulings, it is fundamental that affected communities adopt strategies that can affect business incentives. PODER has identified three key areas that a business-conscious, community-led HRIA tool would integrate: First, how business enterprises operate, with a view to understanding the incentives for investing in a specific project through a comprehension of the concept of risk, how risk is measured and how it impacts investment decisions. Second, it is essential that communities be equipped to evaluate and determine, independently, what the impact of an investment project is likely to be on their human rights. The human rights legal framework stipulates a series of obligations for states and businesses; it is critical that communities know what their human rights are and how to make the most use of existing protection mechanisms. Finally, it is crucial that communities be organized. Experience has demonstrated that communities that are articulate and cohesive are much better equipped to protect themselves and demand that their rights be respected.

PODER proposes a tool that would help communities analyze and understand company logic as well as human rights impact, while also contributing to community organizing. Although other tools exist to assess human rights impact, none of these adequately combine the three aforementioned elements. The majority of tools and guides are designed for use by businesses within a traditional due diligence or corporate social responsibility framework. The HRIA tools that are designed for use by communities do not normally contain an in-depth assessment of business logic and the economic drivers of investment projects. Nonetheless, existing HRIA tools have made important methodological developments and have shed light on some best practices. Thus one of the main objectives of this paper is to review the advances of

existing HRIA tools in detail in order to build upon their design and lessons learned from their application.

In the first chapter, we review some preliminary concepts in order to understand the relationship between business and human rights, including basic definitions and a brief history of the evolution of the business and human rights framework. We explore the most recently proposed solutions at an international level, including the United Nations, as well as sector-specific initiatives. Considering that the headquarters of many large transnational companies are located in the United States of America and Europe, we place special emphasis on the binding legislation in these jurisdictions. We note that the human rights obligations of business have increased in recent years. In the first chapter, we also introduce the concept of risk and its relevance for human rights due diligence and business decision-making processes.

The second chapter deals with the ways in which businesses currently assess and report information on risk and human rights impacts associated with their operations. There is a growing trend to include human rights issues in financial and non-financial reports produced by companies. Some regulations also exist requiring businesses to divulge their actual and potential impact on human rights. These reports can serve as a general source of information about a company's human rights performance and can encourage companies to pay more attention to their human rights impacts as well as to make this information available to the public, including affected populations.

The third chapter defines an HRIA, as well as the actors involved and its primary applications. We also compare the HRIA to other types of impact assessments, such as environmental impact assessments, in order to elucidate the particularities of the HRIA as an impact assessment tool. This chapter also focuses on how to conduct the human rights impact analysis, detailing the key characteristics, methodologies, and stages of an HRIA. Finally, we analyze existing HRIA tools and review some illustrative examples of HRIA implementations.

In the fourth and final chapter, we examine examples of best practices from three different angles. First, we compare two existing HRIA tools: the first for businesses and the second for affected communities. We then explore best practices that correspond to each of the essential stages of an HRIA. Finally, we review some concrete cases in which HRIAs have been implemented in order to identify challenges and lessons learned that might serve as a guide for future assessments.

1. BUSINESS AND HUMAN RIGHTS: INTERNATIONAL INITIATIVES

Over the past forty years, concern about the repercussions that business can have on human rights has grown. Since the 1970s, civil society has put increasing pressure on companies to respect international human rights standards in response to grave human rights violations caused by business activities. There is a wealth of examples of such violations, including the poisonous gas leak caused by Union Carbide in 1984, which killed thousands in India, the use of child labor in production lines of popular clothing and shoe brands, pollution, complicity in human rights abuses by companies in the mineral, oil, gas and other extractive industries, and acts of violence perpetrated by state security forces.¹

In response to this situation, a series of initiatives related to the impact that companies have on human rights have emerged. For example, the United Nations created the Global Compact, the Principles for Responsible Investment, and the Guiding Principles for Business and Human Rights. This UN framework, which is designed to “protect, respect and remedy,” places a responsibility on businesses to respect human rights.

There have also been a number of initiatives outside the UN to develop international as well as industry-specific standards for business and human rights. ISO 26000, the Organization for Economic Cooperation and Development (OECD) Guidelines for Multinational Enterprises, and the OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas, are among the most encompassing of existing international standards. Notable sector-specific initiatives include the Extractive Industries Transparency Initiative and the Global Network Initiative.

In this chapter, we will look at these initiatives with a view to understanding the advances made in business and human rights in recent years, emphasizing how they delimit the responsibility of businesses to respect human rights by carrying out human rights due diligence.

1. For these and many more examples, visit “Business & Human Rights Resource Centre,” www.business-humanrights.org/GettingStartedPortal/Intro.

1.1 UNITED NATIONS

1.1.1 EARLY ATTEMPTS AT CREATING INTERNATIONAL NORMS FOR BUSINESS AND HUMAN RIGHTS

The discussion on the creation of international norms to regulate business conduct has a long history within the United Nations. During this period, there have been alternating positions, namely between those advocating for a hard, legally binding regulatory framework, and those that proposed voluntary initiatives that companies could join in a spirit of collaboration.

In 1972, during the UN's third conference on Trade and Development, the first recommendations were made to develop codes of conduct for transnational companies.² That same year, the UN Economic and Social Council (ECOSOC) requested that the Secretary General form a Panel of Eminent Persons charged with analyzing the effects of transnational companies on development and international relations.⁵

In response to the proposal presented by the Panel of Eminent Persons in 1974, ECOSOC created an intergovernmental body, the Commission on Transnational Corporations, and its research institute, the UN Centre on Transnational Corporations (UNCTC).⁴ The latter began working on a code of conduct project in 1977, which aimed to create binding regulations on transnational companies in host states, including requiring greater transparency in their structures and activities.⁵

The negotiations on a code of conduct, however, received strong opposition by some transnational corporations. These companies, both independently and through industry associations, such as the International Chamber of

2. Jens Martens and Judith Richter, "Corporate Influence on the Business and Human Rights Agenda of the United Nations," 2014, 6, www.misereor.org/fileadmin/redaktion/Corporate_Influence_on_the_Business_and_Human_Rights_Agenda.pdf. Hereinafter: Martens and Richter, "Corporate Influence on the Business and Human Rights Agenda of the United Nations."
3. *Supra* note 2: Martens and Richter, "Corporate Influence on the Business and Human Rights Agenda of the United Nations." See also: ECOSOC Resolution 1721 (LIII), July 2, 1972.
4. ECOSOC Resolution 1908, year 1974 (E/5570) y ECOSOC Resolution 1913, year 1975 (E/5570/Add. 1)
5. *Supra* note 2: Martens and Richter, "Corporate Influence on the Business and Human Rights Agenda of the United Nations."

Commerce (ICC), used their influence and a myriad of strategies at their disposal to impede the regulation of their operations.⁶ Some governments also expressed their opposition. For example, the United States sent a *démarche* request to its embassies in 1991 requesting that they lobby against the Code of Conduct. The following year, the negotiations collapsed with the announcement by the President of the UN General Assembly that it had not been possible to reach a consensus; the UNCTC and the Commission on Transnational Corporations were shut down in 1992.⁷ From this point forward, the UN adopted a new approach towards business: attempts to regulate were abandoned and instead efforts were directed at voluntary initiatives in cooperation with the private sector.

Another important early initiative was the UN “Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights” (hereinafter, Norms).⁸ The Norms project was developed by a working group within the UN Sub-commission on the Promotion and Protection of Human Rights, a consultative entity of the Commission on Human Rights at the time. Following four years of debate, the Sub-commission approved the Norms in August of 2003, including specific obligations for states. They establish that “[w]ithin their respective spheres of activity and influence, transnational corporations and other business enterprises have the obligation to promote, secure the fulfillment of, respect, ensure respect of and protect human rights recognized in international as well as national law, including the rights and interests of indigenous peoples and other vulnerable groups.”⁹ However, the Commission on Human Rights did not end up approving the Norms. Rather, it declared that the latter had no legal authority in a resolution published in 2004.¹⁰ The following year, the Commission on Human Rights requested that the Secretary General designate a Special Representative on the issue of business and human rights. Professor John Ruggie was to take on this role.

6. *Ibid.*

7. *Ibid.*, 8.

8. United Nations, Economic and Social Council, Commission on Human Rights. UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003), accessed August 5, 2014, www1.umn.edu/humanrts/business/norms-Aug2003.html

9. *Ibid.*

10. “United Nations Sub-Commission Norms on Business & Human Rights: Explanatory Materials,” accessed August 5, 2014, <http://business-humanrights.org/en/united-nations-sub-commission-norms-on-business-human-rights-explanatory-materials>; *Supra* note 2: Martens and Richter, “Corporate Influence on the Business and Human Rights Agenda of the United Nations,” 10.

Although neither the Code of Conduct nor the UN Norms were adopted, they are worth mentioning because they underpinned future discussions on the obligations of business with respect to human rights. More precisely, the debate around the Norms underscores the strong opposition from companies, the ICC, and some governments, towards the creation of a hard regulatory framework for corporate activities and how the voluntary initiatives approach started to gain ground.

1.1.2 THE GLOBAL COMPACT

In 1999, former UN Secretary General Kofi Annan launched the Global Compact at the World Economic Forum. Companies that voluntarily chose to form part of this framework “committed to aligning their operations and strategies with ten universally accepted principles in the areas of human rights, labor, environment and anti-corruption.”¹¹ The Global Compact currently has more than 12,000 participants in over 145 countries, making it the largest voluntary corporate responsibility initiative worldwide.¹²

Its ten principles are derived from the Universal Declaration of Human Rights, the International Labor Organization’s (ILO) Declaration on Fundamental Principles and Rights at Work, the Rio Declaration on Environment and Development, and the UN Convention against Corruption.¹³ The first two principles state that companies must “support and respect the protection of internationally proclaimed human rights” and “make sure that they are not complicit in human rights abuses.”¹⁴ The Global Compact does not, however, provide clarity on how these responsibilities should be fulfilled, nor does it contain effective protection mechanisms for those affected.

In 2010, the Joint Inspection Unit (JIU), the UN’s independent, external oversight body, evaluated the risk that Global Compact companies might be benefiting from the brand without in fact respecting its fundamental principles and values. The evaluation found that Global Compact membership had managed to

11. “The Global Compact,” accessed November 18, 2013, www.unglobalcompact.org/AboutTheGC/index.html

12. “Overview of the UN Global Compact,” accessed November 28, 2013, www.unglobalcompact.org/AboutTheGC/index.html. Hereinafter: “Overview of the UN Global Compact.”

13. “UN Global Compact, the Ten Principles,” accessed November 28, 2013, www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/index.html.

14. “The UN Global Compact’s Ten Principles,” accessed March 18, 2014. www.unglobalcompact.org/abouttheGc/TheTenprinciples/index.html.

expand considerably in the private sector, however in the absence of a specific mandate, its focus and impact were unclear.¹⁵ Furthermore, due to the lack of criteria for admission and no effective monitoring system, the participants' implementation of the principles had attracted criticism, which in turn could damage the reputation of the UN.¹⁶ In light of the results of the evaluation, the JIU recommended that member states participate in articulating a clear mandate and redefining the role of the Global Compact Office.

The Global Compact therefore has served more as a part of companies' public relations strategies than as an effective platform for improving corporate respect for human rights. While the Global Compact does provide certain guidelines, incentives for compliance are weak.

1.1.3 PRINCIPLES FOR RESPONSIBLE INVESTMENT

The UN Principles for Responsible Investment (UN PRI) were created following an invitation by former UN Secretary-General Kofi Annan to bring together leaders from the international investment community. They began outlining a series of global principles to improve responsible investment practices.¹⁷ The UN PRI were drafted by institutional investors under the supervision of the UN Environmental Program Finance Initiative and the Global Compact – both UN bodies – and were formally launched on the New York Stock Exchange in April 2006.¹⁸

The UN PRI include criteria on environmental, social and corporate governance (ESG) issues and aim to provide a structural framework to obtain greater long-term returns on investments and increase the number of sustainable markets.¹⁹ Currently, the UN PRI has 1265 signatories, who jointly manage more than USD 45 trillion in assets.²⁰

15. Papa Louis Fall and Mohamed Mounir Zahran, *United Nations Corporate Partnerships: The Role and Functioning of the Global Compact*, Geneva: United Nations, 2010, iii. odpowiedzialnybiznes.pl/public/files/Role_and_functioning_of_the_Global_Compact_JIU_2010.pdf.

16. *Ibid.*

17. "Principles for Responsible Investment: History," accessed December 3, 2013, www.unpri.org/about-pri/about-pri/history.

18. *Ibid.*

19. "Principles for Responsible Investment: Principles for Responsible Investment Hit US\$ 8 Trillion Mark on First Year Anniversary," accessed December 3, 2013, www.unpri.org/press/principles-for-responsible-investment-hit-8-trillion-mark-on-first-year-anniversary.

20. "Principles for Responsible Investment: PRI Fact Sheet," accessed August 28, 2014, www.unpri.org/news/pri-fact-sheet.

The UN-PRI are aspirational and voluntary. The six principles are:

- > Incorporate ESG issues into investment analysis and decision making processes.
- > Become active owners and incorporate ESG issues into ownership policies and practices.
- > Seek appropriate disclosure on ESG issues by the entities in which they invest.
- > Promote acceptance and implementation of the Principles within the investment industry.
- > Work together to enhance effectiveness in implementing the Principles.
- > Report on activities and progress on implementing the Principles.²¹

The UN PRI are not legally binding, and do not contain mechanisms to sanction signatories who fail to comply with them. Those whose human rights are violated by signatories cannot rely on these principles to seek protection or remedy. The Principles do, however, highlight the growing importance which regulators and financial actors place on ESG issues as part of their active promotion and adoption of responsible investment practices.

1.1.4 GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS

The UN Guiding Principles on Business and Human Rights (hereinafter, Guiding Principles) aim to improve regulations and practice in relation to business enterprises and human rights in order to obtain tangible results for affected persons and communities, as well as to contribute to socially sustainable globalization.²² In this respect, the Guiding Principles seek to contribute to a harmonious relationship between business operations and the protection of the human rights of persons and communities who are affected by these operations.

Between 2005 and 2011, Professor John Ruggie developed the Guiding Principles during his mandate as Special Representative to the UN Secretary General on the issue of Human Rights and Transnational Corporations and other Business Enterprises. In June 2011, the UN Human Rights Council unanimously endorsed the Guiding Principles.²³

21. *Ibid.*

22. John Ruggie, *Report of the Special Representative of the Secretary General on the issue of human rights and transnational corporations and other business enterprises*, John Ruggie: *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect, Remedy" Framework*, U.N. Doc. A/HRC/17/31. March 21, 2011. Hereinafter: Ruggie, March 2011.

23. "Shift Project: UN Guiding Principles on Business and Human Rights," accessed December 2, 2013, www.shiftproject.org/page/un-guiding-principles-business-and-human-rights. Hereinafter: "Shift Project."

The Guiding Principles are based on the three pillars of the UN framework to “protect, respect, and remedy” which Professor Ruggie proposed at the UN Human Rights Council in 2008.²⁴ The three fundamental principles on which the framework is based are:

- I. The State duty to protect against human rights abuses by third parties, including business enterprises, through appropriate policies, regulation, and adjudication.
- II. The corporate responsibility to act with due diligence to avoid infringing on the rights of other parties and to address adverse impacts with which they are involved.
- III. The need to improve victims’ access to effective remedies, both judicial and non-judicial.²⁵

Upon introducing the Guiding Principles to the Human Rights Council, Professor Ruggie explains that:

Each of these principles constitutes an essential element of the inter-related dynamic system of preventative and remedial measures: the duty of the State to protect, because it lies at the very core of the international human rights regime, the corporate responsibility to respect human rights because it is the basic expectation society has of business in relation to human rights; and the access to remedy because even the most concerted efforts cannot prevent all abuse.²⁶

The Guiding Principles provide greater detail and guidance for governments, business enterprises, communities and other stakeholders regarding the implications and scope of this three-pillar “protect, respect, and remedy” framework.²⁷ These Guiding Principles apply to all states and business enterprises, regardless of size, sector, operational context, ownership or structure.

According to Principle 1: “States must protect against human rights abuses within their territory and/or jurisdiction by third parties, including business enterprises. This requires taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication.”²⁹

24. John Ruggie, *Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises*, John Ruggie: *protect, respect, remedy - A Framework for Business and Human Rights*, U.N. Doc. A/HRC/8/5. April 2008. Hereinafter: Ruggie, April 2008.

25. *Supra* note 22: Ruggie, March 2011, 4.

26. *Ibid.*

27. *Supra* note 23: “Shift Project.”

28. *Supra* note 22: Ruggie, March 2011, Guiding Principle 14.

29. *Ibid.*, Guiding Principle 1.

Business enterprises should have the following policies and processes in place to show that they respect human rights, detailed in Principle 15:

- a) A policy commitment to meet their responsibility to respect human rights;
- b) A human rights due-diligence process to identify, prevent, mitigate and account for how they address their impacts on human rights;
- c) Processes to enable the remediation of any adverse human rights impacts they cause or to which they contribute.³⁰

With regard to the process of human rights due diligence, Principle 17 defines the parameters as follows:

In order to identify, prevent, mitigate and account for how they address their adverse human rights impacts, business enterprises should carry out human rights due diligence. The process should include assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed. Human rights due diligence:

- a) **Should cover adverse human rights impacts that the business enterprise may cause or contribute to through its own activities**, or which may be directly linked to its operations, products or services by its business relationships.
- b) **Will vary in complexity** with the size of the business enterprise, the risk of severe human rights impacts, and the nature and context of its operations.
- c) **Should be ongoing**, recognizing that the human rights risks may change over time as the business enterprise's operations and operating context evolve.³¹

An HRIA is therefore an essential component of human rights due diligence. Such an assessment should include adverse impacts on human rights either caused directly by business enterprises or to which they contributed. The Principles also clearly highlight that due diligence must be carried out on an ongoing basis and should be adjusted as necessary according to the context and human rights abuses detected.

Additionally, Principles 18 – 21 define the essential components of human rights due diligence, the most important being:

30. *Ibid.*, Guiding Principle 15. Emphasis added.

31. *Ibid.*, Guiding Principle 17. Emphasis added.

- > In order to gauge human rights risks, business enterprises should identify and assess any actual or potential adverse human rights impacts with which they may be involved either through their own activities or as a result of their business relationships. This process should: (a) Draw on internal and/or independent external human rights expertise; (b) Involve meaningful consultation with potentially affected groups and other relevant stakeholders, as appropriate to the size of the business enterprise and the nature and context of the operation.³²
- > In order to prevent and mitigate adverse human rights impacts, business enterprises should integrate the findings from their impact assessments across relevant internal functions and processes, and take appropriate action.³³
- > In order to verify whether adverse human rights impacts are being addressed, business enterprises should track the effectiveness of their response. Tracking should: (a) Be based on appropriate qualitative and quantitative indicators; (b) Draw on feedback from both internal and external sources, including affected stakeholders.³⁴
- > In order to account for how they address their human rights impacts, business enterprises should be prepared to communicate this externally, particularly when concerns are raised by or on behalf of affected stakeholders.³⁵

With respect to the aforementioned Principles, the following points merit further comment. First, business enterprises are obligated to identify and assess both the actual and potential adverse consequences on human rights. In order to assess the potential effects, it would be prudent to carry out an assessment before operations commence with a view to determining the potentially unfavorable consequences in time to pursue an alternative course of action if necessary.

This obligation applies not only to an enterprise's own activities, but also to those with whom it does business. Consequently, it is important that the company evaluate the impact throughout its value chain, including clients and suppliers. In addition, those who may be affected by the activities should be consulted as part of the assessment in order to ensure an effective human rights due diligence process. According to Principle 19, business enterprises should integrate the results of the impact assessment into internal functions and processes and take appropriate action.

Principle 20 again makes reference to the participation of affected parties in an ongoing process to determine whether the business enterprise is

32. *Ibid.*, Guiding Principle 18. Emphasis added.

33. *Ibid.*, Guiding Principle 19.

34. *Ibid.*, Guiding Principle 20.

35. *Ibid.*, Guiding Principle 21.

taking the necessary measures to prevent adverse consequences. This participation is particularly relevant for the legitimacy of the impact assessment process.

Finally, it is important that the companies publish the results of the assessment, as well as the measures they plan on taking, thereby ensuring that all stakeholders have access to the information and the means to participate actively.

The Guiding Principles are at the center of the international discussion on business and human rights. They may be seen as a step forward because they bring clarity to the role and responsibility that states and business enterprises should play in the protection and respect of human rights. It is also a positive step that those affected by business operations are recognized as rights-holders and that the responsibility that businesses have for the impact of their actions on human rights is made explicit. The guidance for businesses on how to carry out human rights due diligence to prevent violations and correct negative practices is also an important contribution of the Guiding Principles.

It remains to be seen whether the Guiding Principles will help improve corporate practices with respect to human rights. The norms they establish are not binding, business enterprises are not legally obligated to carry out human rights due diligence, and the generality of the Guiding Principles leaves room for a range of different interpretations regarding the scope of their application and methodology.

Although the Guiding Principles may be considered an important instrument, as they stand, they are not sufficient for guaranteeing the human rights of persons affected by investment projects, nor do they provide mechanisms for redress in case of violations. It is both a challenge and an opportunity for civil society and other stakeholders to advance these Principles and use them effectively for the promotion and defense of human rights. In our view, the Guiding Principles represent a minimum standard, a point of departure or a point of reference that civil society and communities can incorporate into their strategies to protect human rights from harmful business practices. It remains to be seen whether the Guiding Principles can be harnessed in such a way that they strengthen the role of civil society as long-term corporate accountability guarantors.

1.2 INTERNATIONAL STANDARDS

1.2.1 OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES

The Organization for Economic Cooperation and Development also has a series of guidelines for companies on compliance with social responsibility and human rights norms.

The OECD was founded in 1961 and currently has 34 member countries, the majority of which are industrialized countries. The Organization holds forums in which these governments work together, tasked with improving economic development on a global scale.³⁶ The OECD Guidelines for Multinational Enterprises (hereinafter, Guidelines) were first adopted in 1976 as part of the Declaration on International Investment and Multinational Enterprises.³⁷ The signatories of the Guidelines include the 34 member states, as well as eight additional countries and the European Commission. They were developed to serve as a counterweight to the protection given to the rights of investors.^{38, 39}

The Guidelines have been revised on four occasions. The foreword in the most recent version, dated May 2011, states that:

The OECD Guidelines for Multinational Enterprises are recommendations addressed by governments to multinational enterprises operating in or from adhering countries. They provide non-binding principles and standards for responsible business conduct in a global context consistent with applicable laws and internationally recognized standards. The Guidelines are the only multilaterally agreed and comprehensive code of responsible business conduct that governments have committed to promoting.⁴⁰

36. OECD. "About the OECD," accessed March 19, 2014, www.oecd.org/centrodemexico/laocde.

37. OECD. "Declaration and Decisions on International Investment and Multinational Enterprises," accessed December 3, 2013, www.oecd.org/daf/inv/mne/oecddeclarationanddecisions.htm.

38. These countries include: Argentina, Brazil, Egypt, Israel, Latvia, Lithuania, Peru and Romania.

39. Véronique Van Der Plancke et al., "Corporate Accountability for Human Rights Abuses: A Guide for Victims and NGOs on Recourse Mechanisms" (FIDH, July 2010), 349. Hereinafter: Van Der Plancke et al., "Corporate Accountability for Human Rights Abuses."

40. OCDE (2013) *OECD Guidelines for Multinational Enterprises (Revision 2011)* (OECD Publishing, n.d.), www.oecd.org/daf/inv/mne/48004323.pdf. Hereinafter: OECD Guidelines for Multinational Enterprises (Revision 2011).

The Guidelines contain a series of voluntary, non-binding recommendations for business enterprises, though with a commitment by governments to promote their application. Thus the Guidelines can be seen as an accepted standard for responsible business practice, but with no direct obligation of compliance for companies.

The Guidelines are implemented through National Contact Points (hereinafter, NCPs). The NCPs are entities or organs that are created by adhering governments, tasked with promoting and implementing the Guidelines as well as supporting businesses and stakeholders to promote their implementation. The NCPs also serve as a platform for mediation and conciliation when disputes arise.

Due to the many changes that took place in the panorama for international business since 2000, it was deemed necessary to update the Guidelines. In parallel, civil society was growing increasingly critical of the role of the NCPs, resulting in discussions in 2009 that paved the way for the latest revision of the Guidelines.⁴¹

The significance of the 2011 revision of the OECD Guidelines is that it added a new chapter on human rights. This chapter was drafted based on the UN framework on Business and Human Rights to “protect, respect, and remedy.”⁴² Furthermore, a “new and comprehensive approach to due diligence and responsible supply chain management” was included.⁴³ This means that the Guidelines could now be applied not only to direct investors, but also across a company’s value chain, including business partners and all public or private entities linked to its operations.^{44, 45}

Chapter III of the Guidelines recommends that businesses divulge precise information on specific aspects of their activities, including structure,

41. Katarzyna Kryczka, Sarah Beckers, and Tineke Lambooy, “The Importance of Due Diligence Practices for the Future of Business Practices in Fragile States” (University of Oslo Faculty of Law, June 13, 2012), 126. Hereinafter: Kryczka, Beckers, and Lambooy, “The Importance of Due Diligence Practices.”

42. *Supra* note 40: *OECD Guidelines for Multinational Enterprises (Revision 2011)*.

43. *Ibid.*

44. *Supra* note 41: Kryczka, Beckers, and Lambooy, “The Importance of Due Diligence Practices.”

45. *Supra* note 40: *OECD Guidelines for Multinational Enterprises (Revision 2011)*, 27.

financial situation and results, shareholders, and corporate governance codes. Moreover, the Guidelines suggest that enterprises disclose information on their transactions with related parties and foreseeable risk factors.⁴⁶ Businesses are also encouraged to disseminate information on declarations, principles, regulations, policies, and other codes of conduct to which the company adheres, how they are implemented and the level of compliance, as well as information on internal audits, risk management and compliance systems, and information on the relationship with workers and stakeholders.⁴⁷

Chapter III also highlights the importance of transparency with respect to a company's operations:

Clear and complete information on enterprises is important to a variety of users ranging from shareholders and the financial community to other constituencies such as workers, local communities, special interest groups, governments and society at large. To improve public understanding of enterprises and their interaction with society and the environment, enterprises should be transparent in their operations and responsive to the public's increasingly sophisticated demands for information.⁴⁸

Chapter IV of the Guidelines states that business enterprises should respect human rights, prevent human rights violations, mitigate adverse impacts, and carry out human rights due diligence. Enterprises are encouraged to:

- > Respect human rights, which means they should **avoid infringing on the human rights of others and should address adverse human rights impacts** with which they are involved.
- > Within the context of their own activities, **avoid causing or contributing to adverse human rights impacts** and address such impacts when they occur.
- > **Seek ways to prevent or mitigate adverse human rights impacts** that are directly linked to their business operations, products or services by a business relationship, even if they do not contribute to those impacts.
- > **Have a policy commitment** to respect human rights.
- > **Carry out human rights due diligence** as appropriate to their size, the nature and context of operations and the severity of the risks of adverse human rights impacts.
- > Provide for or co-operate through **legitimate processes in the remediation of adverse human rights impacts** where they identify that they have caused or contributed to these impacts.⁴⁹

46. *Ibid.*, 30.

47. *Ibid.*, 31.

48. *Ibid.*

49. *Ibid.*, 35. Emphasis added.

Comment no. 45 of the Guidelines provides greater insight into the subject of due diligence. It indicates that due diligence should include an assessment of the actual and potential impact on human rights, the results of which should guide the implementation of corresponding measures. The final component of the process is follow-up and dissemination of information on the measures adopted by the company to deal with the human rights risks and impacts of its operations.⁵⁰

It is also suggested that human rights due diligence be integrated into a company's risk management system, focusing not only on the risks for the company itself, but also for rightsholders. Due diligence should be an on-going process, given that the risks to human rights may change over time.⁵¹

The incorporation of a chapter on human rights in the Guidelines is a positive step forward. The contents of the chapter are in line with the UN Framework to "protect, respect and remedy" and clearly state that enterprises must respect human rights, regardless of where they operate. Businesses are also instructed to avoid causing or contributing to human rights violations, and therefore should carry out due diligences processes.

However, there are shortcomings in the Guidelines, such as the lack of clear regulations and precise orientation for businesses on how to carry out an effective HRIA. The Guidelines do not elaborate on consulting with affected parties, nor on free, prior and informed consent, in particular with indigenous populations.⁵² Furthermore, there is no standardized model for NCPs; as a result, their structures differ from one state to another, and so too does their effectiveness. The NCPs have come under constant criticism, accused of favoring business or lacking the mandate to conduct investigations. Even in cases where the NCP determines that violations have occurred, there are no mechanisms to require redress.⁵³

50. *Ibid.*, 38.

51. *Ibid.*

52. *Supra* note 39: Van Der Plancke et al., "Corporate Accountability for Human Rights Abuses," 355.

53. *Ibid.*, 385-386.

1.2.2 OECD DUE DILIGENCE GUIDANCE FOR RESPONSIBLE SUPPLY CHAINS

The OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas (hereinafter, OECD Guide) is tasked with cultivating transparent mineral supply chains, as well as promoting sustainable corporate engagement in the mining sector. The goal is that the extraction and trade of minerals cease to be a source of conflict, insecurity and human rights abuses, enabling countries to benefit from their mineral resources.⁵⁴

The OECD Guide is designed for companies involved in the mineral supply chain that provide or use tin, tantalum, tungsten, gold or their derivatives found in conflict or high-risk zones.⁵⁵ A series of recommendations exist to encourage these companies to respect human rights and to avoid contributing to conflict as a result of mineral sourcing practices, including in the selection of suppliers.⁵⁶

The OECD Guide defines the term “supply chain” as the system of all activities, organizations, actors, technology, information, resources and services involved in moving the mineral from the extraction site downstream to its incorporation in the final product for end consumers.⁵⁷ Conflict-affected and high-risk areas are identified by the presence of armed conflict (domestic or international), widespread violence or other risks of harm to people. The OECD Guide defines a high-risk area as zones of political instability or repression, institutional weakness, insecurity, collapse of civil infrastructure and widespread violence. Such areas are often characterized by widespread human rights abuses and violations of national or international law.⁵⁸

The OECD Guide understands due diligence to be a risk-analysis process. Due diligence involves the steps that a company should take to identify and deal with actual or potential risks in order to prevent or mitigate the adverse impacts related to mineral sourcing.⁵⁹ Furthermore, it defines due diligence

54. *OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas: Second Edition* (OECD Publishing, November 2012), 3, dx.doi.org/10.1787/9789264185050-en.

55. *Ibid.*, 15.

56. *Ibid.*, 3.

57. *Ibid.*, 14.

58. *Ibid.*, 13.

59. *Ibid.*

as an on-going, proactive and reactive process through which companies can ensure that they respect human rights and do not contribute to conflict. Due diligence can also help companies ensure they observe international law, including UN resolutions, and comply with domestic laws, including those governing illicit trade in minerals.⁶⁰

The OECD Guide's due diligence procedure consists of measures designed to establish control systems in the supply chain, communicate important information for consumers, governments and institutions that regulate the mineral trade, as well as assess the situation of conflict in the mines, along transport routes, and where mineral trade takes place. It also encourages that information be disseminated about the due diligence process.

The OECD Guide synthesizes the due diligence process in five steps:

1. *Establish strong company management systems.*
2. *Identify and assess risk in the supply chain.*
3. *Design and implement a strategy to respond to identified risks.*
4. *Carry out independent third-party audit of supply chain due diligence at identified points in the supply chain.*
5. *Report on supply chain due diligence.*⁶¹

The OECD Guide was developed for a specific group of companies, namely, those operating in or receiving minerals from conflict zones. This is significant because the extraction and trade of precious minerals has led to the exacerbation of human rights abuses throughout the world. The OECD Guide is of such relevance that it has been endorsed by the UN Security Council.⁶²

In summary, the OECD Guide provides guidance on due diligence principles for supply chains from a risk perspective. The aim is that the due diligence procedure as outlined in the five-step framework be incorporated into company management systems. Although the OECD Guide makes a significant contribution to the norms around human rights due diligence, implementation remains voluntary and non-binding.

60. *Ibid.*

61. *Ibid.*, Annex I.

62. "OECD: Promoting Responsibly Sourced Minerals: What Can Donors Do?," accessed March 19, 2014, www.oecd.org/countries/rwanda/promotingresponsiblysourcedmineralswhatcandonorsdo.htm.

1.2.3 ISO 26000: SOCIAL RESPONSIBILITY

The International Organization for Standardization (ISO), composed of a network of national standards bodies, is the world's largest developer of voluntary international standards.⁶³ Since its creation, the ISO has published some 19,500 international standards covering different aspects of industry and technology.

ISO 26000 was published in November 2010. It seeks to standardize the definition of social responsibility by providing “guidance on the underlying principles of social responsibility, recognizing social responsibility and engaging stakeholders, the core subjects and issues pertaining to social responsibility... and on ways to integrate socially responsible behavior into the organization.”⁶⁴

ISO 26000 is designed for a range of organizations, regardless of activities, size, or location, within both the public and private sector, as well as civil society organizations (CSOs).⁶⁵ Because the instrument is designed for different types of actors across a broad spectrum, ISO 26000 intentionally uses the term “social responsibility” and not “corporate social responsibility.”

The standard defines due diligence as a comprehensive, proactive process to identify the actual and potential adverse social, environmental and economic impacts of an organization's decisions and activities over the entire life cycle of a project or activity with the aim of avoiding and mitigating negative impacts.⁶⁶ Seven core subjects are included that serve as a practical guide on how the principles of social responsibility should be implemented in a holistic manner.⁶⁷ These are: organizational governance, human rights, labor practices, the environment, fair operating practices, consumer issues and community involvement and development.⁶⁸ With regard to human rights, ISO 26000 recommends that organizations

63. ISO. “ISO - About,” accessed March 19, 2014, www.iso.org/iso/home/about.htm.

64. “ISO 26000:2010 - Guidance on Social Responsibility,” accessed December 6, 2013, www.iso.org/obp/ui/#iso:std:iso:26000:ed-1:v1:en Hereinafter: “ISO 26000 - Guidance on Social Responsibility.”

65. *Ibid.*

66. *Supra* note 41: Kryczka, Beckers, and Lambooy, “The Importance of Due Diligence Practices,” 127.

67. “Discovering ISO 26000.” (International Organization for Standardization, 2010), 4. www.iso.org/iso/discovering_iso_26000.pdf. Hereinafter: “Discovering ISO 26000.”

68. *Supra* note 64: “ISO 26000 - Guidance on Social Responsibility.”

implement due diligence, monitor and mitigate risks, avoid complicity, and support conflict resolution mechanisms.⁶⁹

An important contribution of ISO 26000 is that it reinforces the idea that non-state actors can play a role in human rights abuses, and as such assigns to business enterprises corresponding responsibilities.⁷⁰ Furthermore, by recommending human rights due diligence as a measure for organizations to implement as part of the responsibility to respect human rights, ISO 26000 is consistent with the indications of the UN Guiding Principles on Business and Human Rights.

With respect to high-risk situations for human rights, ISO 26000 recommends that organizations take additional measures to ensure respect for human rights. The standard also signals that actors should take care to avoid complicity in human rights violations, should have mechanisms in place to remedy violations, and should pay particular attention to vulnerable groups. There is also a section of ISO 26000 exclusively dedicated to the subject of community participation.⁷¹

It is worth noting that as the ISO 26000 is not obligatory, it does not have a complaints mechanism in case of non-compliance. As a result, the practical value added of ISO 26000 is difficult to ascertain. Although it provides certain guidance on how to adopt and measure social responsibility, there is little material available with which to assess if or how the standard has been integrated into corporate activities, and to what degree of effectiveness.

1.3 SECTOR-BASED INITIATIVES

In addition to the UN framework (section 1.1) and other international initiatives in Business and Human Rights (section 1.2), the international

69. “*Knowing and Showing*”: *Using U.S. Securities Laws to Compel Human Rights Disclosure*, International Corporate Accountability Roundtable, 2013, 23. accountabilityroundtable.org/wp-content/uploads/2013/10/ICAR-Knowing-and-Showing-Report4.pdf. Hereinafter: ICAR, *Knowing and Showing*. The International Corporate Accountability Roundtable is a “coalition of human rights, environmental, labor, and development organizations that creates, promotes and defends legal frameworks to ensure corporations respect human rights in their global operations.” Further information available at: <http://accountabilityroundtable.org/about/mission>.

70. *Supra* note 39: Van Der Plancke et al., “Corporate Accountability for Human Rights Abuses,” 509.

71. *Ibid.*

community has also developed sector-specific standards. For example, the Extractive Industries Transparency Initiative, as its name suggests, seeks to improve standards around transparency in the extractive industry, a sector with a long history of human rights violations, particularly in countries rich in natural resources but with serious governance gaps. Another illustrative example of an industry-specific body of corporate responsibility standards is the Global Network Initiative, developed by the Information and Communications Technology sector.

1.3.1 EXTRACTIVE INDUSTRIES TRANSPARENCY INITIATIVE

The Extractive Industries Transparency Initiative (hereinafter, EITI), launched in the United Kingdom in 2002, is a coalition of governments, companies and CSOs that promote transparency in extractive sector revenues at the local level.^{72, 73}

The EITI aims to make transparent the revenue that governments receive from the exploitation of natural resources such as oil, gas, metals and minerals. Governments should disclose the revenue they receive from extractive companies operating in their jurisdiction, and extractive companies should reveal the payments they make to governments.⁷⁴ The ultimate goal is that civil society have greater access to information about financial flows derived from natural resources.

Countries that implement the EITI Standard are required to publish an EITI Report in which the revenue that comes from the extraction of natural resources is disclosed to the public. The procedure is as follows: the company reveals the payments it made to governments (taxes, royalties, etc.), while separately, the government declares the payments that it received from companies. This information is subsequently analyzed by an independent third party that compares both versions and identifies inconsistencies. However, the transactions reported by both parties are not subjected to an audit.⁷⁵ Supervision of the EITI Reports is undertaken by a national group

72. *Supra* note 41: Kryczka, Beckers, and Lambooy, “The Importance of Due Diligence Practices,” 129.

73. “EITI: FAQs,” accessed December 7, 2013, eiti.org/faqs.

74. *Ibid.*

75. “EITI: Seeing Results from Natural Resources (reports),” accessed December 7, 2013, eiti.org/countries/reports. Hereinafter: “EITI: Seeing Results from Natural Resources.”

of various stakeholders, including governmental entities and civil society representatives.⁷⁶ According to the EITI webpage, there are 27 “Compliant Countries” that have implemented the EITI Standard. There are an additional 17 “Candidate Countries,” and, to date, 35 countries have drafted EITI Reports.⁷⁷

In summary, the EITI Standard provides a mechanism for contributing to extractive sector transparency by requiring that companies and governments report on public-private financial flows derived from the extraction of natural resources. Although the EITI has been promoted at an international level, its effectiveness in practice could be hindered by the absence of mechanisms for assessing compliance. Moreover, as Human Rights Watch puts, transparency alone is not enough to guarantee accountability.⁷⁸ Real improvements in corporate and government accountability require that basic human rights guarantees be in place, rendering it possible to demand compliance and sanction non-compliance. Transparency in payments between the public and private sector is indeed a positive step forward, but in many parts of the world, much remains to be done before civil society is in a position to act as corporate accountability guarantor in the extractive sector.

1.3.2 INFORMATION AND COMMUNICATIONS TECHNOLOGY: THE GLOBAL NETWORK INITIATIVE

The Global Network Initiative (GNI) came about following an initiative by a diverse group of stakeholders including companies, CSOs, investors and academics, with the ultimate goal of protecting and promoting freedom of expression and privacy in the Information and Communications Technology sector (ICT).⁷⁹ The GNI requires that participating companies implement the Principles on the Freedom of Expression and Privacy in order to protect human rights on a global scale.⁸⁰

76. *Supra* note 41: Kryczka, Beckers, and Lambooy, “The Importance of Due Diligence Practices,” 130.

77. *Supra* note 75: “EITI: Seeing Results from Natural Resources.”

78. *A New Accountability Agenda, Human Rights and the Extractive Industries Transparency Initiative*, Human Rights Watch, May 21, 2013. The full EITI debate is available at: eiti.org/blog/open-letter-new-hrw-report-jonas-moberg-writes-human-rights-watch

79. “Global Network Initiative,” accessed on December 7, 2013, www.globalnetworkinitiative.org/international/Espanol.php. Hereinafter: “Global Network Initiative.”

80. *Supra* note 41: Kryczka, Beckers, and Lambooy, “The Importance of Due Diligence Practices,” 24.

The GNI relies on three fundamental documents that outline the objectives of the initiative and the essential commitments required of participants. These documents include: the Principles of Freedom of Expression and Privacy (hereinafter, the Principles), the Implementation Guidelines, and the Governance, Accountability and Learning Framework.⁸¹

The Principles are based on recognized international human rights norms and standards, including the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.⁸² The Principles underscore the obligation of governments to respect, protect, promote and comply with human rights norms, as well as the responsibility of ICT companies to respect and protect their clients' right to freedom of expression and privacy.⁸³

A framework was established to orient ICT companies, and a governance structure was developed to oversee the implementation of the Principles.⁸⁴ Participating companies are assessed on their implementation of the Principles two years after they sign up to the initiative and on an annual basis thereafter.⁸⁵ Each participating company must present an annual report detailing their experiences in implementing the Principles, including challenges and reactions from government. Independent evaluators subsequently analyze the information provided and complement it with additional data that they themselves obtain from the company.⁸⁶

The Principles instruct participating companies' Management or Executive Boards to incorporate the impact of their operations on freedom of expression and privacy in their business analysis. As a consequence of this impact

81. *Supra* note 79: "Global Network Initiative."

82. *Principles on Freedom of Expression and Privacy* (Global Network Initiative, n.d.), www.globalnetworkinitiative.org/sites/default/files/GNI_-_Principles_1_.pdf. Certain regional instruments also deal with the issue of freedom of expression and privacy such as the European Convention on Human Rights, the American Convention on Human Rights, and the African Charter on Human and Peoples' Rights.

83. *Ibid.*

84. *Ibid.*

85. *Implementation Guidelines for the Principles on the Freedom of Expression and Privacy* (Global Network Initiative, n.d.), https://globalnetworkinitiative.org/sites/default/files/GNI_-_Implementation_Guidelines_1_.pdf. Hereinafter: *Implementation Guidelines for the Principles on the Freedom of Expression and Privacy*.

86. *Governance, Accountability and Learning Framework* (Global Network Initiative, n.d.), globalnetworkinitiative.org/sites/default/files/GNI_-_Governance_Accountability_Learning.pdf. Hereinafter: *Governance, Accountability and Learning Framework*.

assessment, circumstances in which freedom of expression and privacy could be at risk are identified and ideally mitigated.⁸⁷

Companies are requested to follow the Principles and the Implementation Guidelines whenever they have operational control and to make best efforts to ensure that business associates, investors, suppliers, distributors, and other parties do the same.⁸⁸

Finally, the GNI creates a multi-stakeholder organization tasked with training companies and other interested parties within the ICT industry to respect and protect freedom of expression and privacy on a global scale through individual and collective actions.⁸⁹

It is worth noting that this initiative makes reference to the responsibility of both governments and companies to protect human rights, in line with the first pillar of the UN Framework to “protect, respect and remedy.” Moreover, in the Implementation Guidelines, the GNI explicitly calls for the incorporation of human rights impact assessments into companies’ due diligence procedures.⁹⁰ However, this is also a voluntary and non-binding framework, and does not offer mechanisms to protect affected persons or remedy violations.

In this chapter we analyzed a range of initiatives that have been developed at the international level to promote corporate respect for human rights. There have been significant advances: the UN Guiding Principles stand out for defining the responsibilities of government and business in protecting and respecting human rights and providing remedy for violations, and in particular for laying out the corporate responsibility to carry out human rights due diligence. However, it is worrying that all of the initiatives described in this chapter are designed to merely orient companies towards responsible business practices, without generating real incentives for compliance.

In the following chapter, we will examine what companies are doing and could be doing to evaluate and manage their human rights impact.

87. *Supra* note 85: Implementation Guidelines for the Principles on the Freedom of Expression and Privacy.

88. *Ibid.*

89. *Supra* note 86: *Governance, Accountability and Learning Framework*.

90. *Supra* note 85: *Implementation Guidelines for the Principles on the Freedom of Expression and Privacy*. 2

We will look at a range of perspectives which consider that the impact on human rights by corporate activities is an issue that should be measured and disclosed in company reports, with the objective of making this impact known to rightsholders, such as employees and affected communities, as well as to other relevant stakeholders, including shareholders, investors, managers, employers, regulators, lenders, and the general public.

2. REPORTING ON HUMAN RIGHTS RISKS AND IMPACTS

2.1 WHY MEASURE AND REPORT ON HUMAN RIGHTS IMPACTS?

In this chapter, we analyze the benefits for different stakeholders from businesses evaluating their human rights impacts and publishing this information both in financial and non-financial reports. The business reasoning for human rights reporting is that respecting human rights can have consequences for the bottom line, creating economic incentives for exercising greater corporate responsibility. From a public interest perspective, an informed civil society can use the information from human rights impact reporting to strengthen their strategies for demanding corporate accountability.

According to the International Corporate Accountability Roundtable in their report *“Knowing and Showing”: Using U.S. Securities Laws to Compel Human Rights Disclosure*, there is growing evidence to support that corporate performance with respect to human rights has a significant impact on the valuation of a company over an extended period. Moreover, it is important that investors are aware of how a business enterprise foresees, mitigates and manages risk and impact, including risks to human rights, in order to decide whether or not to invest in a company. In this respect, the actual or potential human right impact is crucial for investors’ decision-making.^{91, 92} The report highlights the following examples of direct costs that human rights issues can imply for company performance:

91. *Supra* note 69: *Knowing and Showing*, 25.

92. *Ibid.*

- > Additional costs which the business enterprise may incur in order to comply with laws and regulations related to human rights norms,
- > If a company is responsible for human rights abuses, there may be costs related to the mitigation of the impact, litigation, remediation, or other conflict resolution mechanisms.
- > There may be increased costs assigned to public relations to mitigate reputational impacts.⁹³

A company's reputation may be seriously affected if the company is linked to human rights abuses. This in turn may affect the company's business relations with rightsholders and other stakeholders, both internally (employees, shareholders) and externally (suppliers, customers and the public in general).

The indirect costs for a company that are associated with human rights impacts are somewhat more difficult to determine, however they may also prove to be significant. Such costs may arise as a result of the company's reputation being tarnished, changes in consumer behavior, or changes that affect the prices of materials in the supply chain. If this actual or potential impact is linked to human rights issues, this may constitute a material risk, which, in certain jurisdictions, must, by law, be disclosed to investors, companies, regulators and the general public.⁹⁴ The concept of "materiality" is key in this regard, and will be explained in greater detail in section 2.3.

2.2 CORPORATE GOVERNANCE AND TRANSPARENCY

The term "corporate governance" refers to the manner in which corporations are managed and controlled. The governance structure determines the distribution of rights and responsibilities among different participants within the corporation, such as the board of directors, managers, shareholders, creditors, auditors, regulators, and other stakeholders, as well as the regulations and procedures for making decisions on corporate affairs.

In common law countries (such as the United States, Canada, the United Kingdom, and Australia), corporate governance tends to be oriented towards external investors, mainly shareholders. In these countries, senior management is usually controlled by a rewards and punishment system

93. *Ibid.*

94. *Ibid.*

based on the market.⁹⁵ The objective of a company is to create and maximize shareholder value by striving to produce the greatest returns possible on capital invested in the company.

In civil law countries, corporate governance tends to encompass stakeholders more broadly. A company's main stakeholders may include investors, employees, clients, and suppliers. Additionally, these stakeholders may include the community, government and trade associations.⁹⁶

According to the OECD Principles of Corporate Governance, "the corporate governance framework should recognize the rights of stakeholders established by law or through mutual agreements and encourage active cooperation between corporations and stakeholders in creating wealth, jobs, and the sustainability of financially sound enterprises."⁹⁷ In this manner, the interests and opinions of all stakeholders should be taken into account in company decision-making.

A key element of corporate governance is to guarantee "that timely and accurate disclosure is made on all material matters regarding the corporation, including the financial situation, performance, ownership, and governance of the company."⁹⁸ Traditionally, a company's administration only disclosed financial information. However, in recent years, information regarding the actual or potential impact on human rights has gained relevance. This is reflected in two distinct trends.

With regard to the first trend (which we will discuss in more depth in section 2.3), certain information on human rights has been attributed such importance that it has become necessary to include it in financial reports. The United States has implemented some important advances in this field by introducing legislation such as the Dodd Frank Wall Street Law Reform and Consumer Protection Act of 2010, the California Transparency in Supply Chains Act of 2010, and the Department of State - Burma Responsible Investment Reporting Requirements.

95. Roberto García-Castro et al., "A Cross-National Study of Corporate Governance and Employment Contracts," *SSRN Scholarly Paper* (Rochester, NY: Social Science Research Network), March 20, 2014, <http://papers.ssrn.com/abstract=1140817>.

96. *Ibid.*

97. *OECD Principles of Corporate Governance* (OECD Publishing, 2004), www.oecd.org/daf/ca/corporategovernanceprinciples/31557724.pdf

98. *Ibid.*

The second facet (which we will analyze in section 2.4) refers to the inclusion of human rights issues in sustainability reports, which companies are producing with greater frequency and detail. A sustainability report presents information on a company's economic, environmental, social, and governance (ESG) performance.⁹⁹ Within the "social" category, there is a subcategory on human rights, which can cover issues such as discrimination, freedom of association and collective bargaining, child labor, forced labor, indigenous peoples' rights and the human rights performance of suppliers.

2.3 HUMAN RIGHTS IN FINANCIAL REPORTS: A CASE STUDY OF THE US

As mentioned above, the United States has made significant advances in the dissemination of human rights issues in financial reports. Furthermore, its stock exchanges are of enormous relevance: Many transnational companies that undertake major operations and have a considerable impact on a global scale are traded in the U.S. Thus we will examine in detail the legal framework in the United States governing the dissemination of financial information in general, as well as specific to the disclosure of information on human rights, at both the federal and state levels.

2.3.1 BACKGROUND: FINANCIAL TRANSPARENCY IN THE UNITED STATES

The legal framework for the United States securities market is based on transparency.¹⁰⁰ The underlying rationale is that investors should be aware of certain basic information on potential investments in order to make informed investment decisions.¹⁰¹ Transparency has become one of the principal mechanisms to protect the interests of investors and the general public. With the objective of protecting investors, maintaining just, orderly and efficient markets and facilitating capital formation, Section 4 of the Securities Exchange Act of 1934 created the US Securities and Exchange Commission (SEC).¹⁰²

99. "Global Reporting Initiative: Sustainability Reporting," accessed February 13, 2014, www.globalreporting.org/information/sustainability-reporting/Pages/default.aspx

100. *Supra* note 69: ICAR, *Knowing and Showing*, 8.

101. SEC. "How the SEC Protects Investors, Maintains Market Integrity, and Facilitates Capital Formation," accessed December 9, 2013, www.sec.gov/about/whatwedo.shtml#laws.

102. *Ibid.*

Both the Securities Act of 1933 and the Securities Exchange Act of 1934 were designed to restore investor confidence in capital markets following the Wall Street Crash of 1929 by providing both investors and markets with reliable information and clear regulations on transactions. The purpose of both laws derived from the following basic principles:

- > Companies publicly offering securities for investment dollars must tell the public the truth about their businesses, the securities they are selling, and the risks involved in investing.
- > People who sell and trade securities – brokers, dealers, and exchanges – must treat investors fairly and honestly, putting investors’ interests first.¹⁰³

The debates surrounding the Securities Act of 1933 and the Securities Exchange Act of 1934 illustrate that the objective of financial transparency is to influence how companies do business and thereby contribute to corporate social responsibility.¹⁰⁴ The components of effective securities reporting can be synthesized into two steps:

- > Identifying and collecting the type of information required for disclosure under securities regulations and
- > Filtering that information by determining what is “material” for disclosure to the SEC, investors, and shareholders.¹⁰⁵

Under US securities law, issuers should publicly disclose information to the SEC in established regular intervals and associated with extraordinary events.¹⁰⁶

Materiality is one of the fundamental principles of financial reporting in the U.S. It refers to information that is important to disclose in order to truly reflect the financial situation and operational performance of a corporation.¹⁰⁷ According to the Supreme Court of the United States, information is material if it presents “a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the ‘total mix’ of information made available.”¹⁰⁸ The criteria set

103. *Ibid.*

104. Cynthia A. Williams, “The Securities and Exchange Commission and Corporate Social Transparency,” *SSRN Scholarly Paper* (Rochester, NY: Social Science Research Network), accessed March 20, 2014, papers.ssrn.com/abstract=169456.

105. *Supra* note 69: ICAR, *Knowing and Showing*, 8.

106. *Ibid*; See *Securities Act of 1933 [as amended through P.L. 112-106, approved April 5, 2012]*, §§12-15, www.sec.gov/about/laws/sa33.pdf.

107. “The Definition of Materiality. Sustainability Accounting Standards Board,” accessed August 29, 2014, www.sasb.org/materiality/important.

108. *TSC Industries* 426 U.S. (1976) 438, 449.

out by the Supreme Court have replaced the logic of total disclosure of information with a stricter, “caveat emptor” logic, which means “let the buyer beware.”¹⁰⁹ The Supreme Court ruling was based on the premise that investor decision-making would best be served by the concise disclosure of pertinent information.¹¹⁰

To determine whether a fact is material requires conducting an evaluation of the consequences that a reasonable shareholder would foresee based on given set of facts, and the importance of these consequences for the shareholder.¹¹¹ In 1999, the SEC published the Staff Accounting Bulletin, № 99 (SAB 99), which provides additional information to guide companies in determining the materiality of information. Similar to the Supreme Court definition, SAB 99 states that an issue is material if there is a substantial probability that a reasonable person would consider it important. Furthermore, it adds that in determining materiality, managers and auditors should consider not only quantitative factors, but also, qualitative factors (including court rulings, academic doctrine and SEC regulations).¹¹²

Since 2000, a series of financial scandals have shaken the financial system, negatively affecting investor confidence. One of the most notorious cases was that of Enron, in which a series of accounting irregularities, coupled with financial deregulation, were particularly detrimental to investors. In response, a number of laws were passed that modified the regulatory framework for the financial sector.

Among the most relevant of these reforms was the Sarbanes-Oxley Act of 2002.¹¹³ The Act introduced major changes to the regulation of financial practice and corporate governance.¹¹⁴ Since coming into force, the senior management of public companies are required to individually certify the accuracy of financial information. Sanctions were also increased in cases of fraudulent activities. These changes also augmented the independence of external auditors and the supervisory function of Boards of Directors.¹¹⁵

109. *Supra* note 69: ICAR, *Knowing and Showing*, 14. Citing SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180, 186 (1963) (cited in Basic, Inc., 485 U.S. at 234).

110. *Ibid.*, citing TSC Industries, Inc. v. Northway, Inc., 426 U.S. 438, 448-49 (1976).

111. *Ibid.*, citing TSC Industries, Inc., 426 U.S. 450; *see also*: Basic, Inc., 485 U.S. (1988) 236.

112. “SEC Staff Accounting Bulletin № 99 - Materiality, 64,” accessed March 28, 2014, www.sec.gov/interps/account/sab99.htm.

113. *Supra* note 69: ICAR, *Knowing and Showing*, 8.

114. “The Sarbanes-Oxley Act of 2002,” accessed February 13, 2014, www.soxlaw.com/index.htm.

115. *Ibid.*

In parallel, certain information on human rights has acquired enormous importance in recent years, to the extent that it in some cases, it is considered material and as such, obligatory to disclose in financial reports. As a result, the United States has passed laws compelling greater corporate transparency related to human rights.

Examples of these regulatory developments include: The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, the Department of State - Burma Responsible Investment Reporting Requirements, and the California Transparency in Supply Chains Act of 2010.

2.3.2 THE DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT

In 2009, the global economic recession severely affected the world's greatest economies, including that of the United States. On 11 July 2010, in response to this crisis, President Barack Obama endorsed the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010. The scope of this reform extended throughout the financial services industry with a view to restoring confidence in financial markets.¹¹⁶

The Dodd-Frank Reform applies to companies that trade on a US stock exchange, and although it mainly reforms the financial regulatory system, it also institutes new requirements for transparency.¹¹⁷ Among these, the Reform requires that financial reports include information related to security in mines, payments made by extractive companies to governments, and due diligences processes in the supply chain by companies that supply minerals from the conflict-affected Great Lakes Region in Africa.^{118, 119, 120}

Article 1502 of the Dodd-Frank Reform refers to the exploitation and trade of conflict minerals from the Democratic Republic of Congo (DRC) and adjoining countries. Mining activities in this part of the world are particularly

116. "CNMV - International Bulletin," accessed December 10, 2013, www.boletininternacionalcnmv.es/ficha.php?menu_id=3&jera_id=54&cont_id=90.

117. Supra note 41: Kryczka, Beckers, y Lambooy, "The Importance of Due Diligence Practices." 128.

118. *Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010*, §1503; 17 C.F.R. §§229.104, 239, 249 (2013), accessed December 10, 2013, www.sec.gov/about/laws/wallstreetreform-cpa.pdf. Hereinafter: Dodd-Frank 2010.

119. *Ibid.*, §1504; 17 U.S.C. §78m(q) (2013).

120. *Ibid.*, §1502; 15 U.S.C. §78m(p) (2013).

concerning because they may be linked to financing conflicts characterized by extreme levels of violence, including sexual and gender-based violence, and contributed to causing a humanitarian emergency.¹²¹

Companies that are legally bound by Article 1502 of the Dodd-Frank Reform include those that file reports before the SEC as well as those that require conflict minerals as inputs for the manufacture or proper functioning of their products. If these companies use conflict minerals, they must determine their geographical origin and publish annually whether these minerals originated in the DRC or an adjoining country.¹²²

Conflict minerals include cassiterite, coltan, tungsten, gold, or their derivatives, in addition to any other mineral or derivative that the Secretary of State determines has been used to finance the conflict in the DRC or adjoining countries.¹²³

If a company uses conflict minerals from the DRC or one of its adjoining countries, and these minerals are necessary for the functionality of their products, the company must carry out due diligence in the chain-of-custody to determine whether the purchase of these minerals may have financed armed groups either directly or indirectly.¹²⁴

In such cases, companies are required to include a section in their reports before the SEC and on their websites detailing the due diligence process undertaken to determine both the mineral source and the chain-of-custody:

These reports should include:

- > A description of the measures adopted to undertake due diligence on the source and chain-of-custody of these minerals. The conflict minerals report, which includes the measures adopted for due diligence, should be audited by an independent third party from the private sector.
- > A description of the products that are manufactured or contracted to be manufactured that have not been found to be “DRC Conflict Free.” Products, which carry the label “DRC Conflict Free” are those which do not contain minerals linked directly or indirectly to having financed or benefitted armed groups in the DRC and adjoining countries.

121. *Ibid.*, §1502 (a).

122. *Ibid.*, §1502 (b); 15 U.S.C. §78m(p) (2013).

123. *Ibid.*, §1502 (e).

124. *Supra* note 69: ICAR, *Knowing and Showing*, 18.

- > The private sector entity that conducted the independent audit.
- > The facilities used to process the conflict minerals.
- > The country of origin of the conflict minerals.
- > The efforts made to identify the mine or the location of origin to the greatest possible level of accuracy.¹²⁵

It is important to note that the Dodd-Frank Reform only requires disclosure; it does not prohibit the use of conflict minerals.¹²⁶

Section 1503 of the Dodd-Frank Reform refers to the disclosure of information on the security and safety of mines, applicable to issuers that operate coal or other mines either directly or through a subsidiary.¹²⁷ This section is based on the Mine Safety and Health Act of 1977 and expands on the information regarding security in mines that should be publicly disclosed.¹²⁸ Reports must contain information on any warnings received from the Mine Safety Health Association (MSHA), the number of security and health breaches, as well as orders and citations under the Mine Safety Act. Reports should also include the dollar value of proposed assessments from the MSHA under the Mine Safety Act and the total number of mine-related fatalities during the period of evaluation. The issuer is required to report on each mine it operates.¹²⁹

Finally, Section 1504 requires extractive companies that are involved in the commercial development of oil, natural gas or minerals, to reveal all payments made to the United States Federal Government or foreign governments. Payments made by subsidiaries or any other entity under the control of the extractive enterprise should also be disclosed.¹³⁰ The term “commercial development” refers to the exploration, extraction, processing, exportation as well as other significant actions related to oil, natural gas or minerals, or the acquisition of a license to undertake these activities.¹³¹ The term “payment” refers to taxes, royalties, fees (including license fees), production entitlements, bonuses and other material benefits that the SEC determines to be part of the

125. *Supra* note 118: Dodd-Frank 2010. §1502 (b); 15 U.S.C. §78m(p) (2013).

126. *Supra* note 41: Kryczka, Beckers, and Lambooy, “The Importance of Due Diligence Practices,” 129.

127. *Supra* note 118: Dodd-Frank 2010. §1502.

128. *Supra* note 69: ICAR, *Knowing and Showing*, 18.; Securities & Exchange Commission, Mine Safety Disclosure, Securities Act Release No 9,164, Exchange Act Release No 63,548, 75 Fed. Reg. 245, 80,374 (proposed on December 22, 2010); Mine Safety Disclosure, 17 C.F.R. §§229.104, 239, 249; Federal Mine Safety and Health Act (1977); 30 U.S.C. §801 et seq. (2012).

129. “SEC Adopts Dodd-Frank Mine Safety Disclosure Requirements,” accessed March 20, 2014, www.sec.gov/news/press/2011/2011-273.htm.

130. *Supra* note 118: §1504(q)(2)(A); 15 U.S.C. §78m(q) (2013)

131. *Ibid.* §1504(q)(1)(A).

commonly recognized revenue stream for the commercial development of oil, natural gas or minerals, in line with the EITI Standard.¹⁵²

The requirements for the disclosure of information as stipulated by the Dodd-Frank Reform provide a clear example of how issues that may affect human rights become material, and as such, must be reported to investors and the public. If, as a result of this disclosure requirement, companies avoid using conflict minerals or improve labor conditions for miners, then it is possible to consider that the Reform has generated a useful mechanism for achieving corporate accountability for human rights violations. The fact, however, that the Dodd-Frank Reform does not prohibit companies from contributing to human rights violations by sourcing conflict minerals, but merely establishes administrative obligations, may send companies the wrong message. It is up to rightsholders and other stakeholders, including shareholders and the general public, to 1) hold issuers to the highest standard of due diligence reporting, and 2) use the information reported to hold complicit corporations accountable for contributing to human rights abuses linked to conflict minerals.

2.3.3 BURMA RESPONSIBLE INVESTMENT REPORTING REQUIREMENTS

According to the Department of State Burma Responsible Investment Reporting Requirements (hereinafter, Burma Reporting Requirements), US persons or enterprises that invests more than USD 500,000 in Burma must comply with a series of requirements on the disclosure of information.¹⁵³ The persons or companies are obligated to present a public report within 180 days from the moment in which they exceeded the investment threshold of USD 500,000 and subsequently present annual reports every first of July. The objective of these reports is to publish the policies and procedures adopted in relation to human rights due diligence, in the fight against corruption and the promotion of community participation. In this respect, the following should be included:

152. *Ibid.* §1504(q)(1)(C)(ii).

153. U.S. Department of State. *Responsible Investment in Burma Reporting Requirements*, OMB No 1405-0209. www.humanrights.gov/wp-content/uploads/2013/05/Responsible-Investment-Reporting-Requirements-Final.pdf.

- > Due diligence policies and procedures that address the operational impact on human rights, labor rights, and/or the environment (including those related to impact assessments and risk).
- > Policies and procedures that address anti-corruption.
- > Policies and procedures related to the participation of communities and stakeholders.
- > Policies and procedures related to grievances mechanisms for employees and local communities (including whether such processes provide access to remedies) and how employees and communities were made aware of these mechanisms.
- > Global policies on corporate social responsibility, including those that address human rights, sustainability, workers rights, anti-corruption and/or environmental rights.¹⁵⁴

Obligations also exist regarding the disclosure of information on the purchase, use, or lease of land or other real property, either directly or through a subsidiary, which is worth over USD 500,000, or larger than 30 hectares. These obligations also extend to rights linked to or associated with the land or real property. The company is required to publish a summary of the policies and procedures that were used to determine the characteristics of the real property, as well as the grievance process and financial agreements reached to compensate the residents or occupants.¹⁵⁵

Finally, a section on transparency requires the disclosure of payments in excess of USD 10,000 made to the Burmese government or any other sub-national or administrative governmental entity or non-state actor that has or claims to have authority over investments in Burma. Each payment must be referenced separately by receiving entity and type of payment, including, but not limited to royalties, taxes, profit-sharing arrangements and fees.¹⁵⁶

The Burma Reporting Requirements are another example of the growing importance placed on evaluating and reporting on companies' respect for human rights. They also illustrate the increasing importance of integrating stakeholder and community participation into due diligence procedures, as well as the provision of grievance mechanisms for employees and local communities. Nonetheless, as with most standards in the field, requirements for companies do not go beyond reporting on policies and procedures. There is little guidance on exactly how to put in place effective policies and procedures, nor how to implement them. In short, it is obligatory to publish due diligence

134. *Ibid.*

135. *Ibid.*

136. *Ibid.*

procedures without establishing any clear criteria on how to carry it out. This means that it is the company itself that defines the nature and extent of its due diligence procedures. As a result, the reports presented by various companies (from a range of sectors including oil & gas, real estate, financial services and the food industry) vary considerably in quality and scope.

2.3.4 CALIFORNIA TRANSPARENCY IN SUPPLY CHAINS ACT 2010

There are also initiatives at the state level that seek to address the human rights impact of business. In fact, according to US law, it is precisely the states that are responsible for legislating on corporate governance and corporate responsibility.¹³⁷ Certain states have used this responsibility to pass relevant legislation, while others are still considering whether and how to move. As an example of the former, the state of California passed the California Transparency in Supply Chains Act in 2010.¹³⁸

The California Transparency Act states that manufacturers and retailers who do business in the State of California must disclose on their websites their efforts to eradicate slavery and human trafficking from their supply chains. This requirement is applicable to manufacturers and retail sellers whose annual worldwide gross receipts are in excess of USD 100,000,000.¹³⁹ As a minimum requirement, information must be disclosed on the manner in which the company:

- > Engages in verification of product supply chains to evaluate and address risks of human trafficking and slavery. The disclosure shall specify if the verification was not conducted by a third party.
- > Conducts audits of suppliers to evaluate supplier compliance with company standards for trafficking and slavery in supply chains. The disclosure shall specify if the verification was not an independent, unannounced audit.
- > Requires direct suppliers to certify that materials incorporated into the product comply with the laws regarding slavery and human trafficking of the country or countries in which they are doing business.
- > Maintains internal accountability standards and procedures for employees or contractors failing to meet company standards regarding slavery and trafficking.

137. *Supra* note 69: ICAR, *Knowing and Showing*, 20.

138. *California Transparency in Supply Chains Act*, S.B. № 657 (2010). www.state.gov/documents/organization/164934.pdf. Hereinafter: California Transparency in Supply Chains Act.

139. *Ibid.*

- > Provides company employees and management, who have direct responsibility for supply chain management, training on human trafficking and slavery, particularly with respect to mitigating risks within the supply chains of products.¹⁴⁰

Without a doubt, human trafficking and slavery are highly unacceptable and this is therefore a positive initiative because it requires companies to ensure that such practices do not take place in their product supply chains. However, other grave human rights violations are not addressed. It is necessary that companies carry out due diligence to assess their impact on all human rights, both those affected by their direct operations and across their supply chain, to comply with the obligation to respect human rights.

2.3.5 STATE-LEVEL CONFLICT MINERALS LEGISLATION

At the state-level, legislation requiring companies to report on human rights due diligence is also gaining ground. The State of California went a step further than the Dodd-Frank Reform by including a provision sanctioning companies that fail to comply, prohibiting them from being contracted by the state.

In 2011, California became the first state to adopt a law on conflict minerals, applicable to companies that fail to disclose information on their supply chain in accordance with the requirements of the Dodd Frank Reform.¹⁴¹ This law, which came in to force on January 1, 2012, prohibits California government agencies from outsourcing provision of goods and services to companies that have not complied with their obligations to disclose information on the supply chain of conflict minerals sourced in the DRC.¹⁴² The state of Maryland passed a similar law in 2012, and at the time of writing, there was also an initiative to introduce conflict mineral legislation in Massachusetts.¹⁴³

140. *Ibid.*

141. *Supra* note 69: ICAR, *Knowing and Showing*, 20; Corrine Hauth. “Gov. Brown Signs California’s Conflict Minerals Bill,” *Enough Project* (blog), October 14, 2011, accessed December 11, 2013, www.enoughproject.org/blogs/gov-brown-signs-ca-conflict-minerals-bill.

142. *Supra* note 138: California Transparency in Supply Chains Act.

143. *Supra* note 69: ICAR, *Knowing and Showing*, 20; *Maryland H.B. 425, Procurement – Required Disclosure – Conflict Minerals Originated in the Democratic Republic of the Congo*, May 2, 2012, accessed December 11, 2013, www.srz.com/files/upload/Conflict_Minerals_Resource_Center/Text_of_Maryland_House_Bill_425_on_Conflict_Minerals.pdf; *Massachusetts Bill H.2898 - An Act Relative to Congo Conflict Minerals*, accessed December 11, 2013, malegislature.gov/Bills/188/House/H2898.

2.4 HUMAN RIGHTS IN NON-FINANCIAL REPORTS

Companies have also begun to assess and disclose human rights issues in other ways, such as in sustainability reports, where these issues are gaining more relevance.

Companies use sustainability reports to detail three fundamental aspects of their activities: environmental, social, and corporate governance (ESG). In other words, a sustainability report should contain information on the company's positive and negative impact on the environment, society, and the economy.¹⁴⁴ Human rights issues form part of the "social" category and cover "the extent to which processes have been implemented, incidents of human rights violations, and changes in stakeholders' ability to enjoy and exercise their human rights."¹⁴⁵

The origin of sustainability reporting dates from the 1980s, when the first environmental impact reports were drafted. At that time, very few companies produced these types of reports. The tendency to present non-financial reports, such as sustainability or corporate social responsibility reports, is relatively new, and has grown significantly in recent years. At present, many companies produce annual sustainability reports and various standards and procedures have been developed.¹⁴⁶ For example, of the Global 250, 95% publish reports on sustainability.¹⁴⁷ Furthermore, the number of S&P companies that published sustainability reports increased from 19% in 2010 to 53% in 2011.¹⁴⁸

The most widely used methodology for sustainability reports is based on the Global Reporting Initiative (GRI). The GRI framework was developed

144. *G4 Sustainability Reporting Guidelines* (Global Reporting Initiative, 2013) www.globalreporting.org/resource/library/GRIG4-Part1-Reporting-Principles-and-Standard-Disclosures.pdf

145. *Ibid.* 4.

146. Rosie Bristow, "Guardian Sustainable Business: Sustainability Reporting," *The Guardian*, April 10, 2011, sec. Guardian Sustainable Business, www.theguardian.com/sustainable-business/online-panel-discussion-sustainability-reporting.

147. *Value of Sustainability Reporting* (Ernst & Young and Boston College Center for Corporate Citizenship, May 2013), [www.ey.com/Publication/vwLUAssets/EY_-_Value_of_sustainability_reporting/\\$FILE/EY-Value-of-Sustainability-Reporting.pdf](http://www.ey.com/Publication/vwLUAssets/EY_-_Value_of_sustainability_reporting/$FILE/EY-Value-of-Sustainability-Reporting.pdf). Hereinafter: *Value of Sustainability Reporting*.

148. "Five Global Trends Leading a Growing Corporate Interest in ESG Issues," accessed February 20, 2014, www.csrwire.com/blog/posts/959-five-global-trends-leading-a-growing-corporate-interest-in-esg-issues?utm_medium=Twitter&utm_campaign=CSR+and+sustainability+news.

through a global consultation process involving various stakeholders, such as corporations, governments, CSOs, consultants, accounting organizations, industry associations, credit rating agencies, universities and research institutes.¹⁴⁹ The framework was designed in line with other sustainability standards, such as the OECD Guidelines for Multinational Enterprises, ISO 26000, and the Global Compact.¹⁵⁰

The business logic behind sustainability reporting is that companies stand to benefit by improving their reputation, obtaining a “license to operate,” satisfying workers’ expectations, gaining greater access to capital, and improving risk assessments by relating financial risk to performance along ESG criteria.¹⁵¹

The GRI framework and the trend towards greater sustainability reporting has been subject to criticism, most often for the high-cost that such reporting generates for companies, as well as for the difficulty in measuring some of the data required in these reports.¹⁵² However, according to recent research, producing sustainability reports not only leads to intangible benefits such as loyalty of employees and a better reputation, but also in economic performance. A study published in 2012 found that shareholders’ interventions on issues related to corporate social responsibility led to an increase in the value of shares by 4.4% annually.¹⁵³ Conversely, if a company does not uphold corporate social responsibility standards, the value of shares may be negatively affected. Additionally, stakeholders whose human rights are affected by a company’s activities can apply awareness of these market mechanisms to their corporate accountability strategies.

Large consultancy firms such as Deloitte and Ernst and Young have found that human rights issues, together with other ESG factors, are important to investors and therefore, companies should research, assess, and disclose the risks to, and impact on, corporate performance. Deloitte highlights the following “ESG events” that could negatively impact business:

149. “About GRI,” accessed February 14, 2014, www.globalreporting.org/information/FAQs/Pages/About-GRI.aspx.

150. *Supra* note 147: *Value of Sustainability Reporting*.

151. *Ibid.*

152. Ralph Thurm, “Reforming Sustainability Reporting: For and Against,” *The Guardian*, March 11, 2013, sec. Guardian Sustainable Business, www.theguardian.com/sustainable-business/reforming-sustainability-reporting-pros-cons.

153. *Supra* note 147: *Value of Sustainability Reporting*; see also: Elroy Dimson, Oguzhan Karakas, y Xi Li, “Active Ownership,” *SSRN Scholarly Paper* (Rochester, NY: Social Science Research Network, June 4, 2013), papers.ssrn.com/abstract=2154724.

- > corporate criminal activity,
- > violation of labor and environmental laws
- > human rights issues,
- > boycotts and divestitures
- > public protests on labor issues and consumer issues, product recalls.¹⁵⁴

In other words, non-financial information on the risks to and impact on human rights might be material for investors.

As a consequence of the increasing evidence that ESG factors, including human rights, can affect the business performance of a company, financial and sustainability reporting are on the rise. The tendency is moving towards developing comprehensive annual reports that include both financial and non-financial information.¹⁵⁵ In this regard, the International Initiative for Integrated Reporting (IIRC) proposes disclosing standard financial information together with ESG information with a view to providing a holistic assessment of a company's operating context.¹⁵⁶

A number of new initiatives in sustainability reporting are sprouting at the time of writing of this report. Among these, the Sustainability Accounting Standards Board (SASB) is worth mention. SASB involves the creation and dissemination of norms for companies trading on US stock exchanges to require disclosure of material information on sustainability for the benefit of investors as well as the general public.¹⁵⁷ It aims to advance the quality and utility of sustainability reporting by developing specific standards derived from the particular materiality issues associated with a given industry. The SASB has classified companies into 10 sectors covering 89 different industries. The initiative offers a map of material risk factors ("SASB Materiality Map") and guides companies towards referencing specific industry standards in their reports to the SEC, classifying sustainability issues as either "impacts" or "opportunities for innovation."¹⁵⁸

154. "Using ESG Disclosures as a Risk Management Tool," October 22, 2013, deloitte.wsj.com/riskandcompliance/2013/10/22/using-esg-disclosures-as-a-risk-management-tool.

155. *Supra* note 147: *Value of Sustainability Reporting*.

156. "Looking Ahead: The Importance of Materiality," accessed January 20, 2014, www.csrwire.com/blog/posts/1183-looking-ahead-the-importance-of-materiality.

157. "Sustainability Accounting Standards Board: Vision and Mission," accessed February 15, 2014, www.sasb.org/sasb/vision-mission.

158. *Supra* note 147: *Value of Sustainability Reporting*, 22; SASB. "Welcome to the Sustainability Accounting Standards Board." www.sasb.org. Access the SASB Materiality Map at www.sasb.org/materiality/sasb-materiality-map.

In another initiative to advance company reporting on human rights impact, Shift and Mazars, together with the Business and Human Rights Resource Centre, are working on the Human Rights Reporting and Assurance Frameworks Initiative (RAFI).¹⁵⁹ The RAFI is being developed through a consultative process with various stakeholders that aims to offer a clear framework for quality human rights reporting based on the UN Guiding Principles.¹⁶⁰

The evident tendency towards publishing sustainability reports is quickly becoming a best practice that many companies worldwide are adopting. The challenge remains, however, in ensuring that the results obtained from sustainability assessments are objective, that is, are published even when they are critical of company practices or reveal risk in the operating context. There is the ever-present risk that companies will exploit sustainability reporting as a public relations tool. In order to guarantee objectivity and authenticity, one proposal on the table is external auditing. In fact, the position in favor of integrating financial and sustainability reporting is gaining ground in part because it would imply a third party audit of the integrated report.

2.5 EUROPEAN UNION: GUIDELINES ON THE PUBLICATION OF NON-FINANCIAL INFORMATION

The European Union has also taken strides towards ensuring greater corporate transparency on social and environmental issues. On April 15, 2014, the European Parliament published guidelines on the “disclosure of non-financial and diversity information by certain large companies and groups.”¹⁶¹ The directive will enter into force once adopted by the EU Council and published in the Official Journal of the European Union. These guidelines would oblige large European companies (approximately 6000 qualify) to

159. “Business and Human Rights Reporting and Assurance Frameworks Initiative (‘RAFI’).” Business & Human Rights Resource Centre,” accessed August 25, 2014, business-humanrights.org/en/business-and-human-rights-reporting-and-assurance-frameworks-initiative-%E2%80%9Crafi%E2%80%9D-0; “Human Rights Reporting and Assurance Frameworks Initiative - RAFI,” accessed August 25, 2014, www.shiftproject.org/project/human-rights-reporting-and-assurance-frameworks-initiative-rafi.

160. *Ibid.*

161. Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL amending Council Directives 78/660/EEC and 83/349/EEC as regards disclosure of non-financial and diversity information by certain large companies and groups. eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52013PC0207.

publish information in their annual reports regarding their policies, risks and outcomes related to human rights, environmental, social and labor issues, as well as anticorruption and bribery.^{162, 163, 164}

In order to meet the requirements, companies may refer to legislation and existing national and international frameworks for guidance. These frameworks include: the Global Reporting Initiative, the United Nations Global Compact, the OECD Guidelines for Multinational Enterprises, ISO 26000, the ILO Tripartite Declaration on Principles concerning Multinational Companies and Social Policy, the United Nations Guiding Principles on Business and Human Rights, and the Eco Management and Audit Scheme (EMAS).¹⁶⁵

The requirements apply to public companies with more than 500 employees, as well as to some private companies, such as banks and insurance companies. Subsidiaries may be exempt from reporting if the information is already included in the reports filed by the parent company.¹⁶⁶ It is estimated that the directive will be adopted by the EU Council during the summer of 2014 and will subsequently be incorporated in the national regulatory framework of each member state.¹⁶⁷

In this chapter, we analyzed how the disclosure of corporate information related to human rights has been gaining ground in recent years. This tendency is the result of two factors. First, there is a growing body of regulation that requires the disclosure of this information, as illustrated by the examples of the United States and European Union. Second, there is a growing recognition that information on human rights impacts is not only important for the general public, but could be of material concern to

162. Fourth Directive 78/660/CEE from the Council, July 25, 1978, accessed December 16, 2013, eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31978L0660:ES:NOT.

163. Seventh Directive 85/349/CEE of the Council, June 13, 1983, accessed December 16, 2013, eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31983L0349:es:NOT.

164. "European Commission: Non-Financial Reporting," accessed December 13, 2013, ec.europa.eu/internal_market/accounting/non-financial_reporting.

165. "European Commission: EMAS," accessed December 16, 2013, ec.europa.eu/environment/emas/index_en.htm.

166. *Commission Staff Working Document Impact Assessment*, accessed December 16, 2013, eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52013SC0127:EN:NOT.

167. "Europe Press Release: Improving Corporate Governance. Europe's Largest Companies Will Have to Be More Transparent about How They Operate," accessed June 9, 2014, europa.eu/rapid/press-release_STATEMENT-14-124_en.htm.

investors. In addition, some studies have shown that there are economic benefits for companies that assess and publish the impact of their operations on human rights.

Although sustainability reports may be seen as a step in the right direction, experience has shown that they are far from sufficient to guarantee respect for the human rights of communities affected by investment projects. Displacement, killings, disappearances, pollution, child labor, forced labor and other violations continue to be linked to irresponsible business activities. In order to ascertain whether companies respect human rights or not, or whether they will do so in the future, it is necessary to conduct a human rights impact assessment that would expose both actual and potential impacts associated with a specific investment project. The HRIA should complement other channels available to affected populations, that is, it should not attempt to substitute host- and home-country governments' obligation to provide access to justice and protect human rights.

In the following chapter, we will look at how a Human Rights Impact Assessment can contribute to the prevention, mitigation and reparation of human rights violations in the context of investment projects.

3. HUMAN RIGHTS IMPACT ASSESSMENTS

3.1 DEFINITION AND APPLICATIONS

A Human Rights Impact Assessment (HRIA) identifies, measures, and/or prevents the actual or potential impacts on human rights brought about by a specific investment project or business activity, or resulting from policies, laws, or government programs.¹⁶⁸ In order to reach its goal, an HRIA measures the discrepancy between the commitments made by the state (human rights in theory) and the real possibility for individuals, groups and communities

168. "Human Rights Impact Resource Centre: Overview," accessed November 19, 2013, www.humanrightsimpact.org/hria-guide/overview. Hereinafter: "Human Rights Impact Resource Centre: Overview"; see also: *Human Rights Impact Assessments: A Review of the Literature, Differences with Other Forms of Assessments and Relevance for Development* (Commissioned by the Nordic Trust Fund and the World Bank, February 2013), v. Hereinafter: *Human Rights Impact Assessments: A Review of the Literature, Differences with Other Forms of Assessments and Relevance for Development*, and "NomoGaia's Human Rights Impact Assessment Tools," NomoGaia, accessed January 14, 2014, nomogaia.org/tools.

to realize these rights (human rights in practice).¹⁶⁹ An HRIA may be used to evaluate activities of which the specific aim is to improve a human rights situation, as well as activities that may have a positive or negative human rights impact without this being part of their objective.¹⁷⁰

A myriad of actors, including, CSOs, companies, governments, and affected communities can use an HRIA.¹⁷¹ For example, local CSOs may use the results of an HRIA to monitor the government's compliance with its human rights obligations, propose policy reforms or demand accountability; international CSOs can use HRIAs to advocate for human rights and accountability at an international level.¹⁷²

There are many reasons why companies could benefit from conducting an HRIA. These include: maintaining a good reputation for both the corporation and its products, obtaining a social license to operate, identifying risks, attracting investment, contributing to sustainable development, and above all, avoiding, mitigating, or compensating adverse effects on human rights.¹⁷³

Governments can also use an HRIA to assess their strategies and public policies to ensure that they respect human rights. An HRIA can guide governments in taking measures that ensure that policies do not violate human rights or cause other adverse impacts.

Above all, rightsholders likely to be affected by a law, policy, program or investment project can conduct an HRIA. The HRIA can help affected communities make an informed decision as to whether or not they support the activity, investment project, policy or program that is the subject of the evaluation, and identify how exactly their rights could be affected. The HRIA facilitates this decision making by increasing knowledge of human rights as well as of accountability or protection mechanisms in both national and international frameworks. While the ultimate goal of an HRIA is to prevent

169. Human Rights Impact Resource Centre. *Introduction to Human Rights Impact Assessment*, www.humanrightsimpact.org/fileadmin/hria_resources/Introduction_to_Human_Rights_Impact_Assessment.pdf. Hereinafter: *Introduction to Human Rights Impact Assessment*.

170. *Supra* note 168: *Human Rights Impact Assessments: A Review of the Literature, Differences with Other Forms of Assessments and Relevance for Development*.

171. *Supra* note 169: *Introduction to Human Rights Impact Assessment*.

172. *Ibid.*

173. "Human Rights Impact Resource Centre: HRIA in Business," accessed December 17, 2013, www.humanrightsimpact.org/themes/business-centre.

negative impacts on human rights and increase positive ones, the process itself could serve to build capacity in affected communities, putting them in a stronger position to negotiate the terms of the project or articulate their opposition.

3.2 TYPES OF IMPACT ASSESSMENTS

Human Rights Impact Assessments are a relatively new concept and still in their formative phase of development. Other types of impact assessment, however, have a much longer history. To a certain extent, the Environmental Impact Assessment provides some of the methodological bases for the HRIA. Thus, we will first review this type of impact assessment in some detail. We will also briefly mention other assessment tools in order to identify and differentiate them from the HRIA.

The Environmental Impact Assessment (EIA) is the oldest impact assessment tool, dating back to the 1960s. It grew out of an increasing concern for the impact of human activities on public health and the environment.¹⁷⁴ The International Association for Impact Assessment (IAIA) defines an EIA as the “process of identifying, predicting, evaluating and mitigating the bio-physical, social and other relevant effects of development proposals prior to major decisions being taken and commitments made.”¹⁷⁵ An EIA aims to provide useful information for decision-making processes, promote transparency and participation, and identify monitoring procedures and methods. By fulfilling these objectives, the EIA hopes to contribute to a safer and more sustainable environment.¹⁷⁶

The EIA has two essential characteristics. First, it is a technical analysis tool that provides information to stakeholders and decision-makers on the impact of certain activities, such as policies, projects and programs, or of events such as natural disaster, war or conflict. Second, an EIA may be a legal requirement in order to obtain authorization for certain projects or activities.¹⁷⁷ In the latter sense, the EIA has been incorporated into legislation

174. IAIA. “What is Impact Assessment?,” accessed December 18, 2013, www.iaia.org/publicdocuments/special-publications/What%20is%20IA_web.pdf

175. *Ibid.*

176. *Ibid.*

177. *Ibid.*

in over 100 countries, delimiting specific obligations for decision-makers and applying a well-established methodology to assess impact.¹⁷⁸

While an EIA places emphasis on specific projects such as roadways, hydroelectric dams, or mines, a Strategic Environmental Assessment (SEA) has a broader focus, examining laws, policies and procedures.¹⁷⁹ The SEA aims to create awareness within strategic decision-making institutions. It is a preventative instrument and therefore is applied at the early stages of decision-making processes and advocates for dialogue between a range of public and private actors with a view to improving the quality of public policies, plans and programs.¹⁸⁰

Other forms of assessing impact worth mentioning in order to differentiate them from the HRIA include the Social Impact Assessment (SIA) and the Health Impact Assessment (HIA).

According to the IAIA definition, an SIA encompasses “the processes of analyzing, monitoring and managing the intended and unintended social consequences, both positive and negative, of planned interventions (policies, programs, plans, projects) and any social change processes invoked by those interventions. Its primary purpose is to bring about a more sustainable and equitable biophysical and human environment.”¹⁸¹ An SIA contributes to the premise that social, economic and biophysical impacts are interrelated, and as a result take into account the manner in which persons and communities interact with their surroundings.¹⁸²

The World Health Organization defines a Health Impact Assessment (HIA) as a “combination of procedures, methods and tools by which a policy, programme or project may be judged as to its potential effects on the health of a population and the distribution of those effects within the population.”¹⁸³

178. J. Harrison, “Human Rights Measurement: Reflections on the Current Practice and Future Potential of Human Rights Impact Assessment,” *Journal of Human Rights Practice* 3, no. 2 (May 26, 2011): 164, doi:10.1093/jhuman/hur011. Hereinafter: Harrison, “Human Rights Measurement.”

179. Hussein Abaza et al., *Environmental Impact Assessment and Strategic Environmental Assessment: Towards an Integrated Approach* (Geneva: UNEP, 2004).

180. “Qué Es La EAE. Evaluación Ambiental Estratégica,” accessed August 27, 2014, www.mma.gob.cl/ea/1315/w3-propertyvalue-15960.html.

181. IAIA. “Impact Assessment Wiki: Social Impact Assessment,” accessed December 19, 2013, www.iaia.org/iaia/wiki/sia.ashx#Definition_13.

182. *Ibid.*, 7.

183. World Health Organization. “Health Impact Assessment,” accessed December 19, 2013, www.who.int/hia/about/defin/en/.

Considering these objectives, this assessment may form a small part a HRIA, because the right to health is a human right; however, the scope of a HRIA is broader and encompasses all rights.

An HRIA incorporates some of the elements of the aforementioned impact assessments. For example, both the HRIA and the EIA rely on technical analysis to provide information to stakeholders and decision makers on the impact of certain activities. That said, the HRIA relies on a unique methodology and has characteristics that set it apart from these other types of assessments, as we will see in the following section.

3.3 ESSENTIAL ELEMENTS OF AN HRIA

A review of existing literature on human rights impact assessments permits us to make a preliminary articulation of the essential features of an HRIA. One of the most useful sources for this review was the report *Human Rights Impact Assessments: A Review of the Literature, Differences with Other Forms of Assessments and Relevance for Development* (commissioned by the Nordic Trust Fund and the World Bank in February, 2013). The study analyzes existing literature on HRIA tools with a view to identifying what experts on the subject agree to be its essential elements.¹⁸⁴ What follows is neither an exhaustive nor definitive list of the essential elements of an HRIA. Rather, it should be viewed as an introduction to the elements that are most frequently referenced in the relevant literature and on which there appears to be broad consensus.

3.3.1 THE HUMAN RIGHTS FRAMEWORK

The first essential element of an HRIA is that it is based on the human rights normative framework. Many experts consider this feature to be fundamental in differentiating an HRIA from other types of assessments.¹⁸⁵ The objective of an HRIA is to determine whether the project being assessed is in line with international human rights norms. An HRIA can be useful both for rightsholders to demand that their rights be respected, and for duty bearers, by

184. *Supra* note 168: *Human Rights Impact Assessments: A Review of the Literature, Differences with Other Forms of Assessments and Relevance for Development*, 11.

185. *Ibid.*

providing greater clarity on how to be in compliance with their human rights obligations.¹⁸⁶ In addition to relying on human rights norms as the basis for an HRIA, the implementation process should comply with and respect human rights standards at each stage.¹⁸⁷ In other words, it is vital, as with any type of assessment, that the implementation of the HRIA not contribute to or directly cause human rights violations.¹⁸⁸ In order for an HRIA to be implemented effectively, it is important that the assessment team be composed of persons with profound knowledge and experience in human rights.

It is precisely the obligatory nature of the normative human rights framework that strengthens and gives legitimacy to the recommendations made by an HRIA. Cases of noncompliance, whether by a government that fails to protect human rights or companies that do not respect them, may give rise legal action, which in turn could represent material risk to investors.¹⁸⁹

3.3.2 PARTICIPATION

The second essential element of an HRIA tool is the requirement of effective participation of rightsholders. Participation is essential not only for the quality of the HRIA, but also so that all stakeholders consider its results legitimate.¹⁹⁰ In addition to the HRIA process itself, the HRIA should evaluate whether the investment project under assessment contemplates effective participation mechanisms.

Various experts agree that inclusion of rightsholders in the assessment is crucial to ensure the incorporation of all relevant information on potential human rights impacts. Direct participation of affected communities can also have the additional benefit of building capacity for human rights defense and promotion among community members.¹⁹¹ Professor James Harrison from the

186. *Ibid.*, 12.

187. *Ibid.*, 12.

188. Interview with Kendyl Salcito, Executive Director of Nomogaia, on July 23, 2014.

189. *Ibid.*, 12. Citing Gay, R. 2008 in “Mainstreaming wellbeing: An impact assessment for the right to health,” *Australian Journal of Human Rights*, 13(2): 33–63.

190. *Ibid.*, xi.

191. *Ibid.*, 13. Citing Gay, R. 2008 in “Mainstreaming wellbeing: An impact assessment for the right to health,” *Australian Journal of Human Rights*, 13(2): 33–63. *See also*: Gabrielle Watson, Irit Tamir, and Brianna Kemp, “Human Rights Impact Assessment in Practice: Oxfam’s Application of a Community-Based Approach,” *Impact Assessment and Project Appraisal* 31, no. 2 (June 2013): 118–27.

University of Warwick's Law School and Co-Director of the Centre for Human Rights in Practice, states that: "the centrality of the consultative process is one of the key ways in which HRIAs can be differentiated from standard economic impact assessments which tend to focus on aggregate impacts and often pay insufficient attention to the impacts on vulnerable groups."¹⁹²

The right to consultation of indigenous peoples has received special attention in the international human rights framework due the particular relationship that indigenous peoples have with the land and environment. The right to consultation and to free, prior and informed consent is articulated in the UN Declaration on the Rights of Indigenous Peoples as well as ILO Convention 169 on Indigenous and Tribal Peoples.

"Free" consent means the absence of coercion, manipulation, threats, corruption, fear of reprisals, or inequality during the dialogue and decision-making processes. "Prior" means that the process of dialogue and reaching agreements takes place before to the adoption of potentially harmful measures, allowing the community the time needed to determine their level of consent and respecting their traditions and customs. Finally, that consent be "informed" implies that communities have access to all relative information, which should be provided in an objective, clear and culturally appropriate manner.¹⁹³

The Inter-American Court of Human Rights declared the following with regard to free, prior and informed consultation for indigenous peoples:

The Court has established that in order to ensure the effective participation of the members of an indigenous community or people in development or investment plans within their territory, the State has the obligation to consult the said community in an active and informed manner, in accordance with its customs and traditions, within the framework of continuing communication between the parties. Furthermore, the consultations must be undertaken in good faith, using culturally-appropriate procedures and must be aimed at reaching an agreement. In addition, the people or community must be consulted in accordance with their own traditions, during the early stages of the development or investment plan, and not only when it is necessary to obtain the community's approval, if appropriate. The State must also ensure that the members of the people or

192. *Ibid.* 13. Citing Harrison, J., 2011 in "Human Rights Measurement: Reflections on the Current Practice and Future Potential of Human Rights Impact Assessment."

193. Amnesty International. "Governments must stop imposing development projects on indigenous peoples' territory" (Amnesty International, August 2010), www.amnesty.org/en/library/asset/AMR01/005/2012/en/a7684e73-096f-4a63-8f9b-7211d8314a77/amr010052012pt.html.

the community are aware of the potential benefits and risks so they can decide whether to accept the proposed development or investment plan. Finally, the consultation must take into account the traditional decision-making practices of the people or community. Failure to comply with this obligation, or engaging in consultations without observing their essential characteristics, entails the State's international responsibility.¹⁹⁴

Consultation processes and free, prior and informed consent play a fundamental role in indigenous rights issues. While the Inter-American Court has contributed significantly to the jurisprudence on this subject, these advances too often do not result in the criteria set out by the court being respected in practice.

Stakeholder participation is, without doubt, a very important characteristic of an HRIA. However, fulfilling this criterion is by no means an easy feat. Some obstacles to realizing genuine stakeholder participation include: time constraints, logistical difficulties in convening the consultation, superficial or one-time only consultations, risk of exclusion of marginalized groups, lack of clarity about the consultation processes and their objectives, and shortcomings in transmitting the conclusions and recommendations from the consultations to stakeholders for feedback and verification.¹⁹⁵

One of the priorities of current efforts around HRIAs should be to identify and develop best practices for ensuring effective rightsholder participation. Without adequate participation of all stakeholders in an open and informative dialogue, an HRIA would be incomplete and its results would lack legitimacy.

3.3.3 EQUALITY AND NON-DISCRIMINATION

As mentioned above, an HRIA should not only evaluate a project in reference to the normative human rights framework; the HRIA itself must ensure that those rights be respected in the course of the evaluation process. In this regard, the principle of equality is another essential element of an HRIA. Although other types of assessments, such as SIA or HIA, also rely on the

194. Inter-American Court of Human Rights. *Kichwa Indigenous People of Sarayaku vs. Ecuador. Merits and Reparations*. Judgment 27 June 2012. Series C No 245, 54, http://corteidh.or.cr/docs/casos/articulos/seriec_245_ing.pdf

195. *Ibid.*, 13; see also: ODI (Overseas Development Institute). 2005. "Civil society participation in the PRSP: the role of evidence and the impact on policy choices."

principle of equality, in the HRIA tool, the principle of equality implies analyzing whether the activity that is being assessed will discriminate directly against a specific group, or, by affecting certain persons or groups differently from others, provoke or contribute to discriminatory practices.¹⁹⁶

Development or investment projects often lead to consequences that are discriminatory; consequently, an HRIA should assess both direct and indirect forms of discrimination.¹⁹⁷ As Article 2.2 of the International Covenant on Economic, Social and Cultural Rights states, both direct and indirect or differential treatment constitute discrimination.¹⁹⁸

The distinction between direct and indirect discrimination may be explained in the following manner:

- a) Direct discrimination occurs when an individual is treated less favorably than another person in a similar situation for a reason related to a prohibited ground; e.g., where membership of a trade union, or employment in educational or cultural institutions is based on the political opinions of applicants or employees. Direct discrimination also includes detrimental acts or omissions on the basis of prohibited grounds where there is no comparable similar situation (e.g. the case of a woman who is pregnant).
- b) Indirect discrimination refers to laws, policies or practices which appear neutral at face value, but have a disproportionate impact on the exercise of Covenant rights as distinguished by prohibited grounds of discrimination. For instance, requiring a birth registration certificate for school enrolment may discriminate against ethnic minorities or non-nationals who do not possess, or have been denied, such certificates.¹⁹⁹

An HRIA must pay particular attention to the diverse forms of discrimination that exist, considering that certain individuals and/or groups may become victims of discrimination as a result of a project. As Harrison pointed out, relying on the human rights framework helps evaluators to highlight negative impacts on the rights of vulnerable groups. This feature is not an integral part of other assessments.^{200, 201}

196. *Supra* note 168: *Human Rights Impact Assessments: A Review of the Literature, Differences with Other Forms of Assessments and Relevance for Development*, 14.

197. *Ibid.*

198. International Covenant on Economic, Social and Cultural Rights. Accessed January 10, 2014, www.un-documents.net/icescr.htm

199. Committee on Economic, Social and Cultural Rights, *General Observation No 20: Non-discrimination in Economic, Social and Cultural Rights*, E/C.12/GC/20, 2 July 2009.

200. *Supra* note 168: *Human Rights Impact Assessments: A Review of the Literature, Differences with Other Forms of Assessments and Relevance for Development*, 15.

201. *Supra* note 178: Harrison, "Human Rights Measurement."

3.3.4 TRANSPARENCY AND ACCESS TO INFORMATION

Transparency in an HRIA has two dimensions. First, the HRIA should evaluate the quality of transparency with respect to the investment or development project, that is, how accessible detailed information about the project is to the public. It is paramount that all this information be made available in a timely fashion and in a language that is understood by all stakeholders. Second, the HRIA process should itself be transparent, including the assessment framework, the methodology used and the results obtained, in order to assess the situation in an accurate, independent, and legitimate manner.²⁰² However, in some cases the publication of certain information may be detrimental to certain stakeholders, for example, by placing community members or the assessment team at risk. In this regard, when deciding on the publication of information, it is important to remember that the implementation process itself should not contribute to the violation of human rights.²⁰³

3.3.5 ACCOUNTABILITY

One of the main contributions of an HRIA tool is its focus on accountability. The international human rights normative framework, which forms the basis of an HRIA, contains a series of obligations for states on respecting, protecting, and realizing human rights, as well as a series of obligations for companies to respect these rights. If these human rights are not respected, those who are affected can seek remedy and demand accountability. An HRIA produces solid arguments and evidence on human rights impact and assigns responsibility. Affected communities could thus use an HRIA to target demands for accountability at those most directly responsible.

An HRIA examines whether the investment project provides adequate grievance mechanisms in the event that human rights violations occur. It promotes accountability insofar as it determines what the state's human rights obligations are and the mechanisms available to demand that these rights be respected in the context of the investment project.

202. *Ibid.*, xi.

203. Interview with Kendyl Salcito, July 23, 2014.

An effective grievance mechanism should be proportionate, culturally appropriate, accessible, transparent, accountable, and offer protection.²⁰⁴ A mechanism may be considered proportionate if it is “scaled to the size of the activity, and the risks and impacts associated with the company’s operations” and has “adequate resources and manpower [...] deployed to equip the mechanism’s scale and size.”²⁰⁵ In other words, a grievance mechanism should respond to a company’s specific situation and to the actual or potential impacts associated with its operations, and also adjust as necessary, in line with contextual changes.

To ensure that a HRIA is culturally appropriate, it “should complement the local community’s way of handling concerns” and “it should be designed in collaboration with key affected stakeholders, and/or a trusted local representative who has the acceptance of the local community to advance their opinions.”²⁰⁶ This is another key moment during which the community should participate, permitting adequate time periods for such participation and guaranteeing respect for their traditions and customs.

In order to be accessible, a “grievance mechanism should be physically, linguistically and freely accessible to all stakeholders” and “where illiteracy is prevalent or location is a hindrance, appropriate measures should be put in place to ensure these problems are overcome. For example, encourage oral testimonies in areas of high illiteracy.”²⁰⁷ Finally, the grievance mechanism should offer protection, therefore “the company should institute measures that safeguard stakeholders from retribution, and ensure that engagement in the grievance mechanism does not impede access to other remedies, such as legal action.”²⁰⁸ A grievance mechanism provided by the company should not function as a substitute for other channels of redress, nor should it generate risks for those who use it.

An HRIA tool’s focus on accountability distinguishes it from other types of impact assessments. The point of departure for an HRIA is the states’ human

204. Désirée Abrahams, *Guide to Human Rights Impact Assessment and Management* (HRIAM). (International Business Leaders Forum and the International Finance Corporation). 43. Hereinafter: Abrahams, HRIAM. www.ifc.org/wps/wcm/connect/8ecd35004c0cb230884bc9ec6f601fe4/hriam-guide-092011.pdf?MOD=AJPERES

205. *Ibid.*, 43.

206. *Ibid.*

207. *Ibid.*

208. *Ibid.*

rights commitments and obligations, and any violation of these rights has legal and ethical consequences. If human rights are not respected, those who are affected can access grievance mechanisms, or, in their absence, seek justice and accountability through more informal avenues. In this way, an HRIA is instrumental not only in determining if human rights were or could be violated, but also in demanding that they be protected or remedied. In order to ensure accountability, HRIA recommendations should be clear, objective, targeted and enforceable. If they are not, they will not contribute to the respect of human rights, nor will they be instrumental in providing an effective remedy in case of violation.²⁰⁹

3.3.6 INTERSECTORAL APPROACH

It is widely recognized that human rights are indivisible, interrelated and interdependent. This includes all rights: civil, political, economic, social, cultural, individual and collective. The protection of one right therefore facilitates the protection of other rights and similarly, the deprivation of one right will negatively affect the enjoyment of other rights.²¹⁰

For example, an assessment of the impact on the right to health should also assess other rights that are closely linked to this right, such as the right to food, water, and an adequate standard of living.²¹¹ As well as looking at specific impacts, an HRIA should also assess the accumulated impact of an investment project, considering that it may be precisely this combination of different impacts that may lead to additional human rights violations or a variation in the intensity or extent of such violations.²¹²

In summary, there are six of essential elements of an effective HRIA:

- > It is based on the human rights normative framework,
- > It includes effective participation processes involving all stakeholders, especially rightsholders and marginalized groups,

209. Comments provided by Kendyl Salcito, July 23, 2014.

210. Office of the High Commissioner for Human Rights “What are Human Rights?” accessed March 21, 2014, www.ohchr.org/SP/Issues/Pages/WhatareHumanRights.aspx.

211. *Supra* note 168: *Human Rights Impact Assessments: A Review of the Literature, Differences with Other Forms of Assessments and Relevance for Development*, xi., 19. Citing Walker, S. 2009. “The Future of Human Rights Impact Assessments of Trade Agreements,” *School of Human Rights Research Series*, vol. 35.

212. This point has been underscored by various different experts contacted, including Damiano de Felice, Caroline Brodeur and Sarah Zoen.

- > It must apply the principle of equality and non-discrimination, both in its procedures and in the evaluation of the project,
- > The HRIA must evaluate transparency in the investment project and must itself be a transparent process,
- > Accountability is at the heart of analysis and recommendations,
- > It follows an intersectoral approach, alert to the interrelatedness of rights and accumulated impact of the project.

3.4 HRIA APPLICATIONS

In recent years, HRIAs have been used with growing frequency across different thematic areas. The most common applications have been with respect to development programs, public health, the rights of the child, multinational enterprises, international trade, public policy, and the financial sector.

3.4.1 DEVELOPMENT PROGRAMS

One of the first examples of HRIA in practice was in the assessment of development policies and programs. Some CSOs received funding specifically to carry out such assessments.²¹³ The Norwegian Agency for Development Cooperation produced an oft-cited guide for inter-government cooperation programs as well as civil society and private sector initiatives with the objective of providing users with a practical tool for improving the human rights performance of development programs.²¹⁴

3.4.2 HUMAN RIGHTS AND HEALTH

An HRIA may also be used in assessing human rights and health issues. The organization Aim for Human Rights has spearheaded advances in this area,

213. *Supra* note 178: Harrison, “Human Rights Measurement,” 168. Examples of HRIAs of development programs may be found in: Landman, T. and M. Abraham. 2004. *Evaluation of Nine Non-Governmental Human Rights Organisations*. The Hague: Netherlands Ministry of Foreign Affairs: Policy and Operations Evaluation Department. www.humanrightsimpact.org, or in Biekart, K., B. Thoresen, and F. Ochaeta. 2004. *Evaluation of the Dutch “Governance and Human Rights Programme,”* The Hague: Netherlands Ministry of Foreign Affairs: Policy and Operations Evaluation Department. www.humanrightsimpact.org.

214. *Handbook in Human Rights Assessment - State Obligations Awareness & Empowerment*, Norwegian Agency for Development Cooperation. February 2001. www.norad.no/en/tools-and-publications/publications/publication?key=109343.

developing the Health Rights of Women Assessment Instrument. Various authors agree that this methodology is the most commonly used in this field.²¹⁵ Other CSOs and UN entities, such as the UN Special Rapporteur on the Right to Health, have advocated in support of impact assessments of the right to health and developed guides in this regard.²¹⁶

3.4.3 CHILD RIGHTS

HRIAs have also been used to assess impacts on the rights of the child. The Child Rights Impact Assessment is an HRIA based on the United Nations Convention on the Rights of the Child.²¹⁷ The UN Committee on the Rights of the Child has stressed the relevance of this type of impact assessment, and both state and non-state actors have developed various types of methodologies for this type of HRIA.²¹⁸ There are a number of cases in which an HRIA focused on the rights of the child has been implemented: In one example, UNICEF, together with other CSOs, applied this instrument to measure the impact on children's rights in Bosnia-Herzegovina in the context of rising electricity prices.²¹⁹

UNICEF collaborated with the Danish Institute to design a manual to guide companies on the integration of child rights in their impact assessments.²²⁰ The manual contains a series of criteria, developed by UNICEF, the Global

215. *Health Rights of Women Assessment Instrument*, Aim for Human Rights. 2010. www.humanrightsimpact.org/fileadmin/hria_resources/HeRWAI_Training/HeRWAI_engels_2010.pdf; Supra note 178: Harrison, "Human Rights Measurement," 168.

216. Supra note 178: Harrison, "Human Rights Measurement," 168; see also: People's Health Movement, 2006. "The Assessment of the Right to Health and Health Care at the Country Level: A People's Health Movement Guide." www.phmovement.org, and Hunt, P. y G. MacNaughton. "Impact Assessments, Poverty and Human Rights: A Case Study Using the Right to the Highest Attainable Standard of Health." *Health and Human Rights Working Paper Series* No 6. 2006. World Health Organization and UNESCO. www.who.int.

217. Supra note 178: Harrison, "Human Rights Measurement."

218. See also: United Nations Committee on the Rights of the Child. 2010. *Consideration of Reports Submitted by States Parties under Article 44 of the Convention. Concluding Observations*. Belgium. June 18. CRC/C/BEL/ CO/3-4. www.ohchr.org.

219. Supra note 178: Harrison, "Human Rights Measurement"; see also: UNICEF. 2007. *Child Rights Impact Assessment of Potential Electricity Price Rises in Bosnia and Herzegovina*. www.unicef.org. Other such cases include: Scottish Commissioner for Children and Young People (SCCYP). 2006. *Vetting and Barring Arrangements in the Protection of Vulnerable Groups Bill: A Full Impact Assessment*. sccyp.net. y en Mason, N. and K. Hanna. 2009. *Undertaking Child Impact Assessments in Aotearoa New Zealand Local Authorities: Evidence, Practice, Ideas*. New Zealand: Office of the Children's Commissioner and UNICEF. www.unicef.org.nz.

220. *Children's Rights in Impact Assessments*, UNICEF, in collaboration with the Danish Institute, December 2013.

Compact, and Save the Children, which are in line with the Children’s Rights and Business Principles. They consist of a series of actions that businesses should take to prevent and remedy adverse impacts on children’s rights.²²¹

3.4.4 TRADE AGREEMENTS

In recent years, there has been a growing interest in HRIAs to assess trade agreements.²²² The first HRIA on trade agreements was conducted in 2006 by the National Human Rights Commission of Thailand to assess the free trade agreement signed between Thailand and the United States.²²³ Food First Information and Action Network have led HRIAs on the impact on the right to food of the liberalization of certain agricultural products in Ghana, Honduras, Indonesia, Uganda and Zambia.²²⁴ The Free Trade Agreement between the United States, Central America and the Dominican Republic has also been the subject of an HRIA focused on the impact on intellectual property rights.²²⁵

3.4.5 BUSINESS AND HUMAN RIGHTS

One of the areas of most relevance for an HRIA is business. Although environmental and social impact assessments have been conducted for investment projects, such as mega-projects in the extractive industry, the practice of implementing an HRIA for investment projects is quite recent. According to Harrison, HRIAs for multinationals originated with an assessment commissioned by British Petroleum (BP) for the Tangguh LNG natural gas project in Indonesia. The results of the assessment were published in April 2002.²²⁶

221. “Children’s Rights and Business Principles,” accessed June 18, 2014, www.unglobalcompact.org/issues/human_rights/childrens_principles.html.

222. *Supra* note 178: Harrison, “Human Rights Measurement,” 169; see also: Harrison, J. y A. Goller. 2008. “Trade and Human Rights: What Does ‘Impact Assessment’ Have to Offer?,” *Human Rights Law Review* 8(4): 587–615.

223. *Supra* note 178: Harrison, “Human Rights Measurement,” 169.

224. *Ibid.*; see also: www.fian.org

225. *Supra* note 178: Harrison, “Human Rights Measurement,” 169; see also: Walker, S. 2011. “The United States–Dominican Republic–Central American Free Trade Agreement and Access to Medicines in Costa Rica: A Human Rights Impact Assessment.” *Journal of Human Rights Practice* 5(2): 188–213.

226. *Supra* note 178: Harrison, “Human Rights Measurement”; Smith, G. A. and B. Freeman. 2002. Human Rights Assessment of the Proposed Tangguh LNG Project: Summary of Recommendations and Conclusions. www.bp.com.

Although a variety of HRIA tools and methodologies have been developed, carrying out an HRIA is the exception rather than the rule.²²⁷ As we saw in section 1.1.3, the UN framework to “protect, respect, and remedy” is widely recognized as the point of departure for business and human rights.²²⁸ According to this framework, companies have a responsibility to respect human rights. This responsibility includes carrying out due diligence. According to Ruggie, HRIAs are an essential element in due diligence processes.²²⁹

The table below summarized the tools that have been developed to aid in the implementation of HRIAs within the Business and Human Rights Framework:

HRIA: PRINCIPLE TOOLS AND METHODOLOGIES

TOOLS	DEVELOPED BY	DESCRIPTION
Business Guide for Conflict Impact Assessment and Risk Management	UN Global Compact	Contains a short methodology for HRIAs as part of a more general framework for assessing the impact of conflicts and risk management. Its objective is to support businesses in the development of strategies that reduce negative effects and maximize positive consequences of investing in conflict zones. ²³⁰
Children’s Rights in Impact Assessments: A guide for integrating children’s rights into impact assessments and taking action for children.	UNICEF and the Danish Institute for Human Rights	This tool provides a guide for companies to assess their policies and processes related to their responsibility to respect and promote children’s rights. ²³¹
Conflict-Sensitive Business Practice: Guidance for Extractive Industries	International Alert	This tool is designed to assess the impact of companies in the extractive sector that operate in conflict regions. As well as including human rights, it also covers issues surrounding corruption, transparency, and social investment policies. ²³²

227. James Harrison and Mary-Ann Stephenson, *Human Rights Impact Assessment: Review of Practice and Guidance for Future Assessments*. Scottish Human Rights Commission. June 1, 2010. Hereinafter: Harrison and Stephenson, *Human Rights Impact Assessment: Review of Practice*.

228. *Ibid.*

229. *Ibid.*, 30.

230. “Global Compact Business Guide for Conflict Impact Assessment and Risk Management,” accessed January 14, 2014, www.unglobalcompact.org/docs/issues_doc/Peace_and_Business/BusinessGuide.pdf.

231. “Children’s Rights in Impact Assessments,” UNICEF, accessed January 14, 2014, www.unicef.org/csr/156.htm.

232. Jessie Banfield, *Conflict-Sensitive Business Practice Guidance for Extractive Industries* (London: International Alert, 2005), www.international-alert.org/resources/publications/csbp-extractive-industries-en.

TOOLS	DEVELOPED BY	DESCRIPTION
Guide to Human Rights Impact Assessment and Management	International Business Leaders Forum and the International Finance Corporation, in association with the UN Global Compact. ²³³	This is designed to serve as a practical tool that permits companies to identify, understand and assess the actual or potential impacts on human rights for each stage of a development project. It aims to link the human rights assessment with existing management processes. ²³⁴
Human Rights Compliance Assessment	Business and Human Rights Program at the Danish Institute for Human Rights. ²³⁵	A self-assessment tool designed to detect possible human rights violations against employees, local communities and other stakeholders caused by a company's activities. ²³⁶
Human Rights Impact Assessment toolkit	NomoGaia	The objective is to assess projects in developing countries that may have a positive or negative impact on human rights. ²³⁷ Nomogaia offers two tools on its website: The Impact Assessment Toolkit, and a tool to guide companies in developing internal human rights policies. ²³⁸
Conducting an Effective Human Rights Impact Assessment: Guidelines	Business for Social Responsibility (BSR)	The BSR tool is a guide for businesses to “identify, prioritize and address human rights risks and opportunities.” It proposes four distinct HRIA methodologies focusing separately on risks derived from corporate, site, country or product-specific characteristics. ²³⁹
Getting It Right	Rights & Democracy ²⁴⁰	The Getting it Right tool aims to guide communities affected by foreign investment projects, or CSOs accompanying them, in implementing a comprehensive, community-driven HRIA. ²⁴¹

233. *Supra* note 204: Abrahams, HRIAM.

234. “IFC: Guide to Human Rights Impact Assessment and Management (HRIAM),” accessed January 14, 2014, www.ifc.org/wps/wcm/connect/Topics_Ext_Content/IFC_External_Corporate_Site/Guide+to+Human+Rights+Impact+Assessment+and+Management#.

235. “Danish Institute: Human Rights Compliance Assessment,” accessed January 14, 2014, hrca2.humanrightsbusiness.org/. Hereinafter: “Danish Institute: HRCA.”

236. *Human Rights Compliance Assessment: Quick Check*. Danish Institute for Human Rights. 2006. www.humanrightsbusiness.org/files/HRCA/hrca_quick_check_spanish.pdf. Hereinafter: *HRCA: Quick Check*.

237. “NomoGaia’s Human Rights Impact Assessment Tools,” NomoGaia, accessed January 14, 2014, nomogaia.org/tools/. Hereinafter: NomoGaia.

238. *Supra* note 227: Harrison and Stephenson, *Human Rights Impact Assessment: Review of Practice*.

239. Faris Natour and Jessica Davis Pluess, *Conducting an Effective Human Rights Impact Assessment. Guidelines, Steps, and Examples*, BSR, March 2013.

240. “Rights and Democracy: Getting it Right. Human Rights Impact Assessment Guide,” accessed January 14, 2014, hria.equalit.ie/es.

3.4.6 FINANCIAL SECTOR

Another important area for HRIAs is the financial sector. Banks, in the same way as other companies, may be responsible for human rights abuses by financing projects that cause or contribute to human rights violations.²⁴² Existing literature and various examples point towards the links between banks and companies found responsible for human rights abuses.²⁴³ For example, HSBC, a Public Eye Awards finalist in 2014, was accused of having contributed, through its financial support, to land grabbing and other grave human rights violations, such as forced displacement.²⁴⁴

In this respect, a series of important initiatives have been developed to orient financial institutions in carrying out human rights due diligence. The International Finance Corporation (IFC), the arm of the World Bank Group dedicated to private sector investment, includes the Performance Standards on Environmental and Social Sustainability in its Sustainability Framework. These Performance Standards aim to guide IFC financial clients in identifying, avoiding, mitigating and managing risks and environmental and social impacts.²⁴⁵

Separately, the Equator Principles, which at the time of writing, had been adopted by 80 financial institutions (Equator Principle Financial Institutions - EPFIs), use the IFC Performance Standards as their foundation and contain a series of guidelines for EPFI clients. These clients, upon

241. *Supra* note 227: Harrison and Stephenson, *Human Rights Impact Assessment: Review of Practice*.

242. Damiano De Felice, "Banks and Human Rights: The Thun Group and the UN Guiding Principles on Business and Human Rights," *SSRN Scholarly Paper*, 2014, accessed August 26, 2014, papers.ssrn.com/sol3/papers.cfm?abstract_id=2477126. Hereinafter: De Felice, "Banks and Human Rights."

243. *Ibid.*, 21. See also: Global Witness, *Undue Diligence: How Banks Do Business with Corrupt Regimes*, 2009; Facing Finance, *Dirty Profits II: Report on Companies and Financial Institutions Benefiting from Violations of Human Rights*, December 2013; ICAN and IKV Pax Christi, *Don't Bank on the Bomb: A Global Report on the Financing of Nuclear Weapons Producers*, 2013; Oxfam Australia, *Banking on Shaky Ground: Australia's Big Four Banks and Land Grabs*, April 2014; Horacio Verbitsky and Juan Pablo Bohoslavsky, *Cuentas Pendientes: Los Cómplices Económicos de La Dictadura* (21th Century Editors, 2013).

244. "The Public Eye Awards Case HSBC," Public Eye Awards, accessed August 13, 2014, publiceye.ch/es/case/hsbc.

245. IFC International Finance Corporation, *Performance Standards on Environmental and Social Sustainability*, January 1, 2012.

seeking financial advice and support for development projects from EPFIs can use the Standards to determine, assess, and manage the social and environmental risks associated with a particular project.²⁴⁶ By signing the Equator Principles, financial institutions reiterate their “responsibility to respect human rights by undertaking due diligence.” Furthermore, the second principle establishes that in certain high-risk situations, “it may be appropriate for the client to complement its Assessment Documentation, with specific human rights due diligence.”²⁴⁷

In October 2013, a group of banks entitled the Thun Group (Barclays, BBVA, Credit Suisse, ING Bank, RBS Group, UBS, UniCredit), published a Discussion Paper interpreting the Guiding Principles for financial activities: “UN Guiding Principles on Business and Human Rights, Discussion Paper for Banks on Implications of Principles 16-21.”^{248, 249} The Discussion Paper recognized that the Guiding Principles apply to all bank operations, including the asset management and private banking, and not just to project finance. Furthermore, the Discussion Paper contributes substantially to the development of a comprehensive guide for banks on how to put the Guiding Principles into practice within their policies and governance frameworks and clarifies the meaning of due diligence as applied to different financial activities.²⁵⁰

A principle shortcoming of the paper is its limited focus on only Guiding Principles 16 – 21, leaving out important obligations found in other Principles. Principle 22, for instance, establishes that if companies provoke or contribute to adverse human rights impacts, they should provide or contribute to providing remedy. Similarly, Principle 29 refers to the obligation of companies to establish or participate in effective grievance

246. “About the Equator Principles,” accessed August 13, 2014, www.equator-principles.com/index.php/about-ep; De Felice, “Banks and Human Rights,” 4.

247. “Equator Principles III,” accessed August 13, 2014, www.equator-principles.com/index.php/ep5/ep5.

248. The Thun Group of Banks is not an entity but rather an informal group of banking representatives that came together to discuss the Guiding Principles and how they apply to banks. They took their name from the city in Switzerland where they held their meetings in 2011 and 2012.

249. *UN Guiding Principles on Business and Human Rights Discussion Paper for Banks on Implications of Principles 16–21*, accessed August 13, 2014, business-humanrights.org/sites/default/files/media/documents/thun-group-discussion-paper-final-2-oct-2013.pdf.

250. “BankTrack Welcomes Thun Group Paper on Banks and Human Rights,” accessed August 13, 2014, us6.campaign-archive1.com/?u=ca4ff3016df790ab4c04c0ddd&id=c9c662623d&e=8b99bb8f5a; De Felice, “Banks and Human Rights.”

mechanisms.²⁵¹ The Discussion Paper’s non-participatory drafting process – civil society groups were not consulted – has also been subject to criticism.²⁵²

3.4.7 OTHER APPLICATIONS

There are other ways in which HRIAs may be used, in addition to the aforementioned categories. For instance, Aim for Human Rights has developed a tool to assess policies and laws related to human trafficking and another on domestic violence.²⁵³ The European Commission has used a comprehensive impact assessment tool to examine policy and legislative proposals. This tool refers specifically to the need to assess the impact of policies on human rights recognized in the EU Charter of Fundamental Rights.²⁵⁴ There are also some cases in which public officials have conducted HRIAs to assess specific policies or practices. As told by Harrison, the United Kingdom has developed a series of impact assessments that can be considered HRIAs in that they focus specifically on impacts on human rights and equality. This practice stems from the obligation in UK law that public authorities prevent discrimination and promote equality.²⁵⁵

To summarize, an HRIA can be applied across a range of themes, including:

- > Development programs,
- > Health and Human Rights,
- > Child rights,
- > Trade agreements,
- > Business and Human Rights
- > Finance
- > Public Policy

To delve deeper into how HRIAs work in practice, in the next section, we identify and describe the basic steps in a generic HRIA methodology.

251 *Ibid.*; De Felice, “Banks and Human Rights”; Ruggie, *Report of the Special Representative of the Secretary General on the issue of Human Rights and Transnational Corporations, and other Business Enterprises*, John Ruggie: *Guiding Principles on Business and Human Rights: Implementing the UN “Protect, Respect and Remedy” Framework*, U.N. Doc. A/HRC/17/51.

252. *See* De Felice, “Banks and Human Rights,” 20.

253. *Supra* note 178: Harrison, “Human Rights Measurement,” 170; *see also*: Aim for Human Rights. 2010a. *The Right Guide: A Tool to Assess the Human Rights Impact of Anti-Trafficking Laws and Policies*. www.humanrightsimpact.org.

254. *Ibid.* *See*: European Commission. 2009. *Impact Assessment Guidelines*. SEC (2009): 92. ec.europa.eu.

255. *Supra* note 178: Harrison, “Human Rights Measurement,” 170.

3.5 HRIA: ESSENTIAL STEPS

Although there are many different methodologies available to guide the implementation of an HRIA, there is a general consensus, both in academia and in practice, on what may be considered to be the essential steps in any HRIA process.²⁵⁶ Upon analyzing existing practice related to HRIAs, as well as other impact assessments, Harrison identified eight methodological steps that all HRIAs should include.²⁵⁷ Drawing from Harrison’s analysis, the table below summarizes the essential methodological stages of an HRIA.²⁵⁸

ESSENTIAL METHODOLOGICAL STEPS OF AN HRIA

STAGE	DESCRIPTION
Screening	A preliminary evaluation of the investment or development project (or any other activity to be assessed: policies, laws, programs, projects or interventions) is carried out to determine whether it is appropriate or necessary to conduct an HRIA.
Scoping	Define basic characteristics for the project, including the context and the information to be gathered.
Evidence Gathering	Use various sources and tools to gather all the necessary information to carry out the assessment.
Consultation	Steps must be taken to guarantee that all relevant actors, particularly those who will be affected by project, have the opportunity to express themselves and that their views are taken into account during the development and in delivering the results of an HRIA.
Analysis	Drawing from the information gathered, analyze potential or actual impacts of the project on human rights.
Conclusions and Recommendations	Articulate the results of the HRIA and proposals to mitigate or prevent threats or human rights impacts that the HRIA identified.
Publication	Publish and disseminate a report that details the HRIA process, its results and recommendations.

256. *Supra* note 227: Harrison and Stephenson, *Human Rights Impact Assessment: Review of Practice*, 41.

257. *Supra* note 178: Harrison, “Human Rights Measurement,” 172.

258. *Supra* note 227: Harrison and Stephenson, *Human Rights Impact Assessment: Review of Practice*, 41.

STAGE

Monitoring and Follow-up

DESCRIPTION

Establish and maintain an ongoing monitoring system of the human rights impacts as well as the compliance of those responsible for preventing or mitigating the impacts highlighted in the HRIA report.

These eight steps do not necessarily have to be carried out in chronological order; rather, they may overlap or coincide. Exactly how these stages will interact with one another depends on the implementing organization, the needs of the affected communities, and the particular context for the investment project. In the next chapter, we will look at different examples of best practice for each stage.

In this chapter, we arrived at a definition of an HRIA. We saw that through the implementation of an HRIA, it is possible to identify, measure and/or prevent the actual and potential human rights impacts brought about by a specific investment project or resulting from policies, laws, or programs.

We also highlighted the difference between an HRIA and other types of impact assessments. Subsequently, we analyzed the essential elements that should be a part of all HRIAs, especially being based on the human rights normative framework, ensuring effective participation processes involving all stakeholders throughout the assessment, equality and non-discrimination, transparency and access to information, accountability and finally, applying an intersectoral approach.

We then reviewed the different practical applications of an HRIA, concentrating on business and human rights. Finally, guided by the classification provided by Harrison, we looked at the eight methodological stages that an HRIA should contain, clarifying that they do not necessarily need to be implemented in strict chronological order and should be adapted to the specific characteristics of the project being evaluated.

In the following chapter we will identify and discuss examples of best practice with a view to positively influencing future implementation of HRIAs, including by informing the design of existing and new HRIA tools.

4. BEST PRACTICES IN HUMAN RIGHTS IMPACT ASSESSMENT

In recent years, different entities, including civil society organizations, companies, and governments, have used HRIA tools to measure the human rights impact brought about by a wide range of activities, including policies, laws, programs, and investment projects. The results obtained vary in scope and quality. However, these experiences provide ample material for generating some recommendations for future practices around HRIAs.

In the first section of this chapter, we will take a detailed look at two HRIA tools and evaluate them against the essential characteristics of an HRIA presented in the previous chapter. The two HRIA tools that we submit to this evaluation are the Guide to Human Rights Impact Assessment and Management (hereinafter, HRIAM) and the Getting it Right tool. The former is meant to be applied by companies, while the latter is for communities and accompanying organizations. Next, we will identify some best practices specific to each methodological stage of an HRIA.

In the final section of this chapter, we will look at lessons learned from case studies of implemented HRIAs. To this end, our focus will be on the experience of the Getting it Right tool, the only HRIA tool specifically designed for affected communities. This analysis will provide guidance and principles to be considered in the design, improvement, and later in the implementation of an effective HRIA tool.

4.1 ANALYSIS OF EXISTING HRIA TOOLS

In this section, we will first analyze the HRIAM Guide, developed by the International Business Leaders Forum and the International Finance Corporation, in conjunction with the UN Global Compact.²⁵⁹ Second, we will review the Getting it Right methodology, designed by Rights and Democracy.²⁶⁰ We have chosen these two methodologies in order to provide a comparative analysis between an HRIA tool designed for companies and a tool designed to be used by affected or potentially affected communities.

259. *Supra* note 204: Abrahams, HRIAM.

260. "Rights and Democracy," accessed on February 25, 2014, hria.equalit.ie/en/index.html.

4.1.1. GUIDE TO HUMAN RIGHTS IMPACT ASSESSMENT AND MANAGEMENT

On June 25, 2010, a revised version of the Guide to HRIAM was launched.²⁶¹ Although many HRIA tools have been developed for companies, we decided to analyze the Guide to HRIAM due to the fact that it may be used by all business sectors and that it is designed in a way that permits companies to either elaborate an independent HRIA or integrate it into existing risk analysis procedures.

The Guide to HRIAM describes itself as follows:

Developed for companies committed to assessing and managing the human rights risks and impacts of their business activities, the Guide to HRIAM provides guidance on how to:

- > Identify any potential and/or existing human rights risks
- > Assess any potential and/or existing human rights impacts
- > Integrate findings from the assessment into the company management system.²⁶²

The Guide to HRIAM contains a series of tools designed to orient companies on the potential or actual risks to human rights. These tools include a total of 35 different human rights together with the respective definition and corresponding international instrument that protects that right. In this way, each human right is linked to a potential risk or impact caused by the company.²⁶³ Although this is useful for companies to familiarize themselves with the extensive range of human rights which may be affected, it is the company itself that decides which rights to assess and to what extent. This methodology leaves considerable scope for discretion.

The Guide to HRIAM also establishes that the assessment should contemplate “the key human rights risks associated with the country of operation, the human rights risks of key business relationships, including associated facilities and third party organizations, [and] the human rights risks and impacts relating to the business activity itself.”²⁶⁴ The indications are

261. “Human Rights Impact Resource Centre: Guide to Human Rights Impact Assessment and Management,” accessed February 25, 2014, www.humanrightsimpact.org/resource-database/toolsets/resources/view/75/user_hria_toolsets.

262. *Ibid.*

263. *Supra* note 204: Abrahams, HRIAM, 136.

264. *Ibid.*, 45.

thorough and comprehensive. That said, the shortcoming lies in the process for answering these questions. It is precisely with regard to these issues that considerable discrepancies may emerge between different stakeholders.

As we saw previously, effective participation processes involving all stakeholders is an essential element of an HRIA.²⁶⁵ Indeed, stage three of the Guide to HRIAM provides a series of recommendations for companies to establish contact with the community, social actors, and other interested parties.²⁶⁶ It is therefore necessary to identify and analyze these actors, and provide guidance on how to carry out the participation process with the community.²⁶⁷ The Guide to HRIAM leaves it to the discretion of the company to decide with which stakeholders to establish contact, as well as who may be affected or may be considered a vulnerable group.

With respect to the essential element of transparency and access to information, the Guide to HRIAM contains a small section, approximately half a page, entitled “Ensuring Accessibility, Inclusivity and Transparency.” This section states that the “transparency of information and openness of discussion will be paramount in developing constructive and trustful relationships with stakeholders. In some circumstances, in order to facilitate the process, companies should consider services of an intermediary to convene and facilitate discussion.”²⁶⁸

The Guide to HRIAM’s indications on transparency are thus considerably sparse, as they do not propose specific guidelines for facilitating access to information, nor does it make reference to the importance of making known the reasons behind, and the content of, the assessment itself. Moreover, there is no elaboration upon who may be considered a stakeholder and how to ensure that information on the project and the HRIA reach said stakeholders. Finally, no guidance is provided with respect to the type of information required in order to be able to assess the true human rights impact of a specific operation.

One positive aspect of the Guide to HRIAM is that it indicates that it is “important for the company to report back regularly to its affected

265. *Supra* note 227: Harrison and Stephenson, *Human Rights Impact Assessment: Review of Practice*.

266. *Supra* note 204: Abrahams, HRIAM, 55.

267. *Ibid.*

268. *Ibid.*, 40.

stakeholders throughout the lifecycle of the human rights impact assessment process, especially on key issues they may have been consulted on in the past, in particular: Key lessons learned for the company throughout the HRIA process... key decisions taken and changes made to the business activity following the HRIA process.”²⁶⁹ Furthermore, the Guide recommends that the manner in which risks and impacts to human rights are dealt with be disseminated.²⁷⁰ This is of course positive, however, once again it is left to the broad discretion of the company precisely how to fulfill these recommendations and to make the determination of which social groups could be affected by the project.

With regard to accountability, in the previous chapter, we concluded that an HRIA guarantees accountability by clearly defining the relevant human rights obligations and those responsible for ensuring their respect or protection, as well as accountability mechanisms. The Guide to HRIAM recommends that companies develop a grievance mechanism to deal with human rights issues that is proportionate, culturally appropriate, accessible, transparent, and offers protection.²⁷¹ These characteristics are indeed essential for an effective grievance mechanism; the challenge however, is implementation in concrete cases. For instance, how does one guarantee that a mechanism is objective and allows for the participation of all stakeholders? It would be an advance if such mechanisms involve not only company personnel, but also civil society representatives and independent experts. Moreover, it is important not to conflate grievance mechanisms with accountability mechanisms. A human rights approach requires not only that a violation be remedied, but also that responsible actors be held accountable.

Finally, the intersectoral focus is based on the premise that all human rights are indivisible, interrelated and interdependent, and together can have an accumulated impact on human rights. This should be reflected in the assessment process. The Guide to HRIAM makes reference to, and contains examples of, the possible infringements on all human rights. Furthermore, the fact that the Guide highlights the importance of considering future and accumulated impacts is certainly positive. In this respect, the Guide mentions:

269. *Ibid.*, 58.

270. *Ibid.*

271. *Ibid.*, 42–43.

- > **Unintended consequences:** Companies should look for any unintended consequences arising from the business activity. This could be positive or negative impacts.
- > **Futures foregone:** Companies should look beyond the immediate rights to identify the long-term consequences of loss of rights; for example, reduced access to education or disruption of water supply.²⁷²

However, the Guide does not include a mechanism to assess how distinct corporate operations could collectively affect rights. It is necessary to expand on the impacts that can result from the interaction of unrelated corporate operations.

Generally speaking, the Guide to HRIAM is quite comprehensive and would add value as a guidance tool for companies that wish to conduct an HRIA as part of their due diligence processes. The recommendations and examples included are particularly illustrative and refer to likely scenarios, contemplating a range of human rights and possible infringements by companies. However, the implementation of an HRIA in line with this Guide is ultimately left up to the good faith of the company, especially because of the broad discretion left to the company in key decision-making moments. In fact, the Guide does not make reference to the involvement of rights-holders in the process, but rather, focuses only on stakeholders. The participation of both rights-holders (communities, employees) and other stakeholders (investors, human rights organizations, banks, lenders, etc.) is left entirely to the discretion of companies. The HRIAM Guide mentions that the “human rights impact assessment has been explicitly developed to help companies assess the risks and impacts of their business activity.”²⁷³ That this process is carried out almost exclusively by the company is not ideal, and therefore, measures should be put in place in order to ensure the effective participation of all stakeholders.

4.1.2. GETTING IT RIGHT GUIDE

The Getting it Right Guide is unique because it was designed to be used by communities that are or may be adversely affected by a foreign investment project. It has also been used to evaluate national investment projects.²⁷⁴

272. *Ibid.*, 45.

273. *Ibid.*

This methodology has been implemented in various cases, including some in which both national and international civil society organizations such as Oxfam America and the International Federation for Human Rights (FIDH) participated.²⁷⁵ In the following section, we highlight examples of best practices learned through the implementation of the Getting it Right tool.²⁷⁶

In the same way as we discussed the Guide to HRIAM, we will examine the Getting it Right tool by comparing it with the essential elements of an HRIA tool as defined in the previous chapter. We will also consider whether there is room for improvement.

The Getting it Right tool organizes the HRIA process in six phases (A through F), each of which contains various stages:

- > Phase A: Preparation of the study
- > Phase B: Legal framework
- > Phase C: Adapting the guide
- > Phase D: Investigation process
- > Phase E: Analysis and report
- > Phase F: Engagement, monitoring and follow-up

The Getting it Right tool complies with the first essential element of all HRIAs, that of basing the evaluation on the international human rights normative framework. In Phase A, “specific human rights that may be affected by the project are ... addressed so that you can keep them in mind throughout your investigation.”²⁷⁷ A comprehensive list of human rights that may be violated

274. See: *A State of Fear: Human Rights Abuses in North Carolina's Tobacco Industry*, Research Report, accessed January 14, 2014, www.oxfamamerica.org/publications/a-state-of-fear-human-rights-abuses-in-north-carolinas-tobacco-industry/?searchterm=A%20state%20of%20fear. Hereinafter: *A State of Fear*.

275. The reports of these HRIAs are: Justiça Global, Justiça nos Trilhos, and International Federation for Human Rights, *How Much Are Human Rights Worth in the Brazilian Mining and Steel Industry?*, May 2012, www.fidh.org/en/americas/brazil/How-much-are-human-rights-worth-in-9662. Hereinafter: *Justiça Global, How Much Are Human Rights Worth in the Brazilian Mining and Steel Industry?*; Large Scale Mining in Ecuador and Human Rights Abuses, FIDH, accessed January 14, 2014, www.fidh.org/IMG/pdf/Exec_Summary_Large-scale_Mining_Human_Rights_Ecuador-LD.pdf. Hereinafter: *Large Scale Mining in Ecuador*.

276. *Community-based Human Rights Impact Assessments: Practical Lessons Learned* (Oxfam America & Rights and Democracy, 2010), www.oxfamamerica.org/static/oa3/files/community-based-human-rights-impact-assessments-practical-lessons.pdf. Hereinafter: Oxfam, “Practical Lessons Learned.”

277. “Rights and Democracy Phase A,” accessed February 24, 2014, hria.equalit.ie/es/fases/index.html#/fase/a.

is included, and similar to the Guide to HRIAM, the tool references the international instruments that protect these rights.²⁷⁸ In Phase B, international and regional human rights legal instruments of which the state is signatory are analyzed in order to clearly define the state's expressed human rights commitments and obligations. Furthermore, a review of the state's track record in upholding its rights commitments at a domestic level is integrated into this part of analysis.²⁷⁹ In this way, the Getting it Right tool incorporates a perspective of accountability from the outset of the HRIA process.

In Phase A, the tool proposes that all stakeholders be identified and that their points of view be included to ensure the report's credibility. An actor-mapping exercise is recommended and the tool suggests including affected communities, the host government, the home government, and representatives and employees of the company.²⁸⁰ This is one effective way to ensure that the essential element of **participation** is fulfilled. The tool emphasizes achieving the active participation of members of the affected communities.²⁸¹

Phase C focuses on gathering information from different sources, including through interviews with the different stakeholders. Once the rights to be evaluated are selected, the tool generates a series of questions for the company, community, and government. This methodology ensures that the positions of all stakeholders are taken into account.²⁸²

With regard to the essential element of **equality and non-discrimination**, the Getting it Right tool integrates an explicit gender perspective. For instance, it suggests that the working group that carries out the HRIA be comprised of both women and men, and that at least one of the team members have prior experience working on gender issues.²⁸³ The tool suggests that female

278. "Rights and Democracy Step 5: Meeting with the Community," accessed February 24, 2014, hria.equalit.ie/es/fases/index.html#/fase/a/Step/5. Hereinafter: "Rights and Democracy Step 5: Meeting with the Community."

279. "Rights and Democracy, Phase B: Legal Framework," accessed February 24, 2014, hria.equalit.ie/en/phases/index.html#/phase/b. Hereinafter: "Rights and Democracy, Phase B: Legal Framework."

280. "Rights and Democracy Step 3: Identify Stakeholders," accessed February 24, 2014, hria.equalit.ie/en/phases/index.html#/phase/a/etape/3. Hereinafter: "Rights and Democracy Step 3: Identify Stakeholders."

281. *Supra* note 278: "Rights and Democracy Step 5: Meeting with the Community."

282. "Rights and Democracy Step 14: Select Questions," accessed February 24, 2014, hria.equalit.ie/en/phases/index.html#/phase/c/etape/14. Hereinafter: "Rights and Democracy Step 14: Select Questions."

283. "Rights and Democracy Step 2: Build your Team," accessed February 24, 2014, hria.equalit.ie/en/phases/index.html#/phase/a/etape/2.

members of the assessment team consider holding meetings separately with the women of the affected community in order for the latter group to feel comfortable sharing sensitive information.²⁸⁴ Furthermore, while carrying out HRIA interviews, particular emphasis should be placed on capturing women's perspectives.²⁸⁵ Finally, the recommendations should take into account that women may be affected by the investment project differently from men, and this should be reflected in the HRIA results.²⁸⁶

Another essential element is that of **transparency and access to information**. According to the tool itself, one of the most difficult stages of an HRIA is obtaining and analyzing information concerning who is behind the company, ties with government and, more generally, the legal framework in which the company operates.²⁸⁷ This difficulty emerges because this information is not always available or the analysis involved may be very technical and complex. It is likely that experts with extensive legal and corporate experience would need to be involved in the examination of the information gathered in this stage.²⁸⁸ The tool generates a series of important questions regarding the company and the legal framework for the investment and offers some suggestions on where to locate this information. However, in practice, if this information is not obtained, there is a risk that the HRIA results may be incomplete and unreliable.

With respect to **accountability**, the questions generated by the tool attempt to clarify the company's history, policies, measures taken and the possible impact related to each human right selected for assessment.²⁸⁹ The Getting it Right tool does not focus specifically on determining whether accountability mechanisms exist for the investment project and if they are effective. Although an accountability mechanism may form part of a company's human rights policies or programs (which the tool can detect), it is imperative that communities be aware of these mechanisms, therefore more emphasis should be placed on researching them. Furthermore, it is not enough to merely determine whether a mechanism exists; it is necessary to evaluate its effectiveness.

284. *Supra* note 278: "Rights and Democracy Step 5: Meeting with the Community," 5.

285. "Rights and Democracy Step 15: The Community and Human Rights," accessed August 18, 2014, hria.equalit.ie/en/phases/index.html#/phase/d/etape/15.

286. "Rights and Democracy Step 20: Develop Preliminary Recommendations," 20, accessed February 24, 2014, hria.equalit.ie/en/phases/index.html#/phase/d/etape/20.

287. *Supra* note 279: "Rights and Democracy, Phase B: Legal Framework."

288. *Ibid.*

289. *Supra* note 282: "Rights and Democracy Step 14: Select Questions."

The Getting it Right tool deals particularly well with the second purpose of the accountability focus, that is, strengthening the capacities of communities to recognize human rights impacts and articulate their concerns and demands before companies and governments using a discourse of human rights and accountability. As the tool itself mentions, the “human rights impact assessment seeks to improve policy and increase the accountability of the government and the company when it comes to human rights.”²⁹⁰

A key aspect which is absent from the Getting it Right Tool is that of a clear monitoring system subsequent to completion of the assessment and publication of the report, to monitor if the HRIA has led to any changes, either positive or negative, in the actions of the company, or in preventing, mitigating or remedying human rights impact. This is important considering that it is crucial to evaluate whether the HRIA had a concrete impact or not. In addition, effective follow-up to the report, including lobbying and advocacy, could be vital for inducing positive changes in the company’s conduct.²⁹¹

The tool highlights that during the analysis stage, it is possible to create links between events that initially appear to be unrelated. For example, a community may initially only recognize the adverse effects on their right to food, while later on, they may realize that their right to health will also be affected.²⁹² In this way, the HRIA may assess the accumulated impact of a project on various human rights. This approach is in line with the essential element of adopting an **intersectoral focus**. The tool also considers that a violation may be committed by more than one person or entity, and may have various impacts on affected communities.²⁹³

There are many other HRIA tools that were briefly mentioned in section 3.4, but will not be analyzed individually in this report. We will limit ourselves to observing that all of these tools were designed for company use and thus the scope of application is left to the discretion of the companies. Much of the criticism surrounding the Guide to HRIAM, and in particular, the lack of participation of rights-holders, including communities and other

290. “Rights and Democracy Step 20: Develop Preliminary Recommendations,” accessed February 24, 2014, hria.equalit.ie/en/phases/index.html#/phase/d/etape/20.

291. James Harrison, “Establishing a Meaningful Human Rights Due Diligence Process for Corporations,” *Impact Assessment and Project Appraisal*, Volume 31 (Number 2). pp. 107-117.

292. “Rights and Democracy Step 21: Analysis and Report,” accessed February 24, 2014, hria.equalit.ie/en/phases/index.html#/phase/e/etape/21.

293. *Ibid.*

stakeholders, also applies to these tools. That said, the NomoGaia HRIA Toolkit may be considered an exception in this sense because, although it was designed for corporate use, it places great importance and provides detailed guidance on facilitating the participation of affected communities.

4.2 BEST PRACTICES FOR EACH STAGE

In section 3.5, we identified the essential stages of an HRIA tool, namely: screening, scoping, gathering evidence, consultation, analysis, conclusions and recommendations, publication, monitoring and review. In this section, we will identify best practices for each of these stages.

In the screening stage, a preliminary revision is carried out on the investment project with a view to determining whether it is appropriate and necessary to carry out an HRIA.²⁹⁴ It is important that rightsholders and other stakeholders, including affected communities, home government, host government, company representatives and employees, shareholders, lenders and other parties involved in the project are identified.²⁹⁵ During the screening, it is necessary to take into account the stage of the project and forecast how it is likely to develop over time.

The planning and implementation of an HRIA requires a considerable amount of time. It is important to keep the course and the timeframe of the project in mind when establishing objectives. For instance, if a project is already in advanced stages, it would not be very strategic to carry out an HRIA for the purpose of determining whether the community agrees or not with a project, because of the high likelihood that the project would already be completed by the time the results of the HRIA are available.

In the screening stage, it is necessary to account for the potential or actual risk associated with conducting an HRIA, both for the assessment team and the affected community.²⁹⁶ The involvement of the communities from the beginning of the HRIA process is crucial in order to guarantee their

294. *Supra* note 227: Harrison and Stephenson, *Human Rights Impact Assessment: Review of Practice*, 41.

295. *Supra* note 280: “Rights and Democracy Step 3: Identify Stakeholders.”

296. See “Rights and Democracy Step 4: Protect yourself and your Team,” accessed February 24, 2014, hria.equalit.ie/en/phases/index.html#/phase/a/etape/4.

participation and support for the HRIA throughout the assessment. In fact, it is the affected community itself that should decide to conduct, or at a minimum, endorse an HRIA, as well as its extent and purpose, for its results to achieve maximum credibility and legitimacy.²⁹⁷

Once the decision is made to carry out an HRIA, it is necessary to delimit the information or evidence that should be gathered, including questions and associated activities. This is the specification or scoping stage, which is critical because it lays out the route for the entire research and analysis stage of the HRIA. At this stage, the extent of the assessment, as well as the composition of the implementation team, is defined. Usually, the project to be assessed has a wide range of possible human rights impacts affecting different populations and stakeholders. There are also variations in the duration of an impact, including short, medium and long term. Unfortunately, in the majority of cases, it is not possible to assess all aspects of impact because of time and resource constraints. Consequently, it is necessary to delimit which human rights will be the focus of the assessment.

It is important that the selection of rights draw from an extensive consultation process with various rights-holders and other stakeholders, ensuring that the focus of the HRIA be the result of an inclusive process that grants due consideration to the perspective of rightsholders. Participation of rightsholders is not only a question of respect and inclusion. Rightsholders arguably possess unique information about which rights are most vulnerable in the particular social, economic and political context of the investment project, information to which a company or third party alone would not have access. Thus the practical utility of an HRIA depends largely on adequately integrating the information and analysis of rightsholders themselves. Lastly, during the specification stage, it is important to take care not to elevate expectations of any stakeholders by clearly establishing the scope and limitations of the assessment.

In order to ensure an effective HRIA, it is necessary to gather and analyze information on the country, company, government and communities. In gathering information, different sources should be used to maximize the HRIA's objectivity. It is also important to construct a solid system for

297. *Ibid.*

organizing and coding data at the outset of the research phase.²⁹⁸ Similarly, it is essential that the accuracy of the information be verified at different moments in data gathering and analysis.²⁹⁹ Specific questions to integrate into research and analysis include government's commitment to human rights, corporate governance, as well as the community's level of vulnerability. It is also important to evaluate the company's human rights record, as well as that of the community and the government.³⁰⁰

The consultation stage should ensure that those who are likely to be affected be heard and that their perspectives be taken into account. A genuinely participatory consultation should be guaranteed.³⁰¹ It is important to remember that when indigenous people are at the center of this process, special care must be taken to guarantee the right to free, prior and informed consultation, as explained in section 3.3 above. The consultation - or rather, the process for obtaining consent - is ongoing. Relevant information should be made available to the rights-holders and other stakeholders at all stages, and affected communities should participate throughout the HRIA process. In order to guarantee an authentic representation of the community, it is important to identify various groups within the affected community and ensure that different perspectives from within the community have space for expression in the HRIA process. The key concern with respect to consultation is that the community directly influence decisions made in the HRIA process, including the prioritization of rights to be assessed and the objectives of the HRIA.³⁰² Although it is not strictly necessary, it would be beneficial to include one or more community members in the assessment team.

The analysis stage should follow the principles and standards outlined in the international human rights normative framework. As mentioned previously, ensuring that the HRIA is firmly based on human rights

298. See "Rights and Democracy Phase D: Investigation Process," accessed February 24, 2014, hria.equalit.ie/en/phases/index.html#/phase/d.

299. See "Rights and Democracy Step 19: Validate your information," accessed February 24, 2014, hria.equalit.ie/en/phases/index.html#/phase/d/etape/19. Hereinafter: "Rights and Democracy Step 19: Validate your information."

300. *Supra* note 279: "Rights and Democracy, Phase B: Legal Framework."

301. James Harrison and Mary-Ann Stephenson, "Assessing the Impact of the Public Spending Cuts: Taking Human Rights and Equality Seriously," Warwick Law School, Hart Publishing, 2012, 2011–07. Hereinafter: Harrison and Stephenson, "Assessing the Impact of the Public Spending Cuts."

302. Interview with Caroline Brodeur, April 23, 2014. Caroline Brodeur has participated in a range of HRIA studies, initially with Rights & Democracy and afterwards as an independent expert.

standards is fundamental. According to some authors, it is in fact the most important characteristic of an HRIA that distinguishes it from other types of assessment. In the previous chapter, we also mentioned the importance of involving relevant human rights actors in this process, such as national human rights institutions, CSOs, or regional experts.

Although in the analysis stage, it is necessary to arrive at clear conclusions about the likely human rights impacts, it is also important to conduct a robust analysis of the company and the project. It is vital that an adequate methodology be applied to examine the company, investors, shareholders, lenders, regulators, clients, the supply chain, as well as relationship among these actors. This is useful because once the impacts have been assessed, the strategy that follows will involve presenting the human rights violations detected to the all company stakeholders to whom the results of the HRIA could represent material risk. This strategy is directed at pressuring or incentivizing these actors to act to guarantee improvements in corporate respect of human rights. The analysis stage should integrate this strategy of identifying and presenting human rights impacts as material risk. This is a pragmatic approach to influencing corporate behavior with respect to human rights.

The analysis stage may also be strengthened by integrating the effective use of human rights indicators when measuring changes in enjoyment of human rights that are linked to investment projects. There are various initiatives at the international level for the development and use of human rights indicators. For human rights indicators generally, the UN Office of the High Commissioner for Human Rights has published guidelines. More specific indicators have been developed as well, such as the Key Performance Indicators for Investors to Assess Labor & Human Rights Risks Faced by Global Corporations in Supply Chains, which focuses on labor rights, the Good Corporation Framework on Human Rights, which is aimed at companies, and the academic project Measuring Business and Human Rights.³⁰³ These

303. *Human Rights Indicators*, accessed June 19, 2014, www.ohchr.org/EN/Issues/Indicators/Pages/HRIndicatorsIndex.aspx; “Key Performance Indicators for Investors to Assess Labor & Human Rights Risks Faced by Global Corporations in Supply Chains,” accessed June 19, 2014, www.irrcinstitute.org/projects.php?project=52; “GoodCorporation Human Rights Framework,” accessed June 19, 2014, www.goodcorporation.com/services/human-rights-framework; “Business & Human Rights Resource Centre: Measuring Business & Human Rights,” accessed June 19, 2014, www.business-humanrights.org/Documents/Measuring_Business_and_Human_Rights.

projects differ not only in their focus, but also in their use of methodologies, definitions, and application of indicators. A systematic assessment of these and other human rights indicator proposals should be carried out to evaluate how human rights indicators may enhance an HRIA methodology.

In the conclusions and recommendations stage, the results of the HRIA are presented together with suggested actions to avoid, mitigate, or remedy negative impacts on human rights.⁵⁰⁴ Once an assessment team reaches certain conclusions or before publication, it is good practice to consult with all rights-holders, including affected communities and employees, again, in order to verify the results and provide an opportunity to submit further inputs, and ensure that no determining factors were omitted from the assessment.⁵⁰⁵

The penultimate stage of an HRIA is that of publishing the report. An HRIA is considered effective when its conclusions contribute to improving respect for human rights. It is therefore important that stakeholders, including communities, governments, company representatives, employees, shareholders, investors, lenders, human rights organizations, activists, and the media are made aware of the conclusions of the HRIA.⁵⁰⁶ In this regard, it is essential to time the publication of the report to achieve maximum effect. Finally, the community itself should be directly involved in validating the content of the report before publication, as well in the decision of if and when to publish it. This is because the publication of the report itself could cause an increase in the risk level for community members or endanger other aspects of the community's overall human rights defense strategy.

In the monitoring and follow-up stage, the implementers undertake measures to guarantee that the HRIA is an ongoing process and that the results obtained have a positive impact.⁵⁰⁷ In fact, one of the principle opportunities for improvement in HRIA methodology is ensuring adequate time and resources for follow-up after the publication of the report. In some cases, organizations have only been able to accompany the affected communities until the report has been published because by this stage, most of the resources have been used

304. *Supra* note 227: Harrison and Stephenson, *Human Rights Impact Assessment: Review of Practice*.

305. Comments provided by Kendyl Salcito, July 23, 2014.

306. See "Rights and Democracy Step 25: Undertake follow-up activities," accessed February 24, 2014, hria.equalit.ie/en/phases/index.html#/phase/f/etape/25.

307. *Supra* note 227: Harrison and Stephenson, *Human Rights Impact Assessment: Review of Practice*.

up on the assessment and production phases (which usually take longer than expected) leaving little or no resources for monitoring and follow-up. To avoid this risk, it is recommended that funding and human resources be earmarked from the outset of the HRIA process for monitoring and follow-up.⁵⁰⁸

In relation to follow-up, if pressure is not placed on those stakeholders that have the power to improve the human rights situation, the HRIA will not have reached its maximum potential. Most importantly, it is important to consider the situation of risk in which the members of the community and assessment team may find themselves. In some cases, it may be necessary to seek the support of organizations that provide protection to human rights defenders as well as to adhere to strict security protocols. A risk assessment should be carried out before initiating the HRIA, and protection measures should be modified if the level of risk changes.⁵⁰⁹

4.3 LESSONS LEARNED FROM CASE STUDIES

In 2004, Rights and Democracy launched an interesting project to test and improve the Getting it Right methodology. The tool was put into practice to assess investment projects in the Philippines, Tibet, the DRC, Argentina, and Peru.⁵¹⁰ The resulting report, published in 2007, identified the following areas of improvement:

- > Integrate more capacity building
- > Place greater emphasis on accompaniment
- > Provide a more realistic budget and time allocation
- > Revise the methodology and research guide.⁵¹¹

The first lesson is that capacity building in human rights be continuous throughout the assessment process.⁵¹² Capacity building should by no means be limited to the assessment team; rather, it should be targeted at the affected community. In this way, an HRIA not only serves to assess the human rights

508. *Supra* note 502: Interview with Caroline Brodeur.

509. *Supra* note 296: “Rights and Democracy Step 4: Protect yourself and your Team.”

510. Carole Samdup et al., *Human Rights Impact Assessments for Foreign Investment Projects: Learning from Community Experiences in the Philippines, Tibet, the Democratic Republic of Congo, Argentina and Peru*. (Montreal: Rights & Democracy, 2007). Hereinafter: Samdup et al., *Human Rights Impact Assessments for Foreign Investment Projects*.

511. *Ibid.*, 9-10.

512. *Ibid.*, 9.

impact, it also represents an opportunity for communities and accompanying organizations to strengthen their capacities as human rights defenders. In addition, the creation of mixed teams of local and international researchers may favor a process of mutual learning.³¹³ The HRIA can also serve as an organizing tool, helping communities in defining and articulating priorities as well as in reaching internal agreements.

The second recommendation focuses on accompaniment, suggesting that local organizations require a considerable amount of support before, during, and after the implementation of the HRIA.³¹⁴ This is important, both for the development of capacities, as well as for strategic and security issues. The latter is key, particularly in a climate of insecurity for human rights defenders and in a context of criminalization of activism. From a strategic perspective, the accompaniment of prestigious international or national organizations may bring legitimacy and greater visibility to the results of the assessment and also deter reprisals against the affected community.³¹⁵

With respect to resource allocation, the report concluded that it is useless and potentially harmful to initiate an HRIA that cannot be completed due to insufficient time or economic resources. It is indispensable to prepare a budget and feasible timeframe before the assessment begins, and ensure that the resources required to complete the HRIA, including follow-up, are available.³¹⁶

The final recommendation concerns the methodology and research guide. The importance of simplicity of language and accessibility in the design of an impact assessment tool cannot be overstated. At the same time, for implementation teams, the tool proved too general and lacking in clarity and detail on specific practical questions.³¹⁷

The Getting it Right methodology has been applied in other contexts as well. For example, it was used by Oxfam America and by FIDH, together with local organizations, to evaluate projects in the United States, Brazil, and Ecuador. Oxfam America and Farm Labor Organizing Committee (FLOC) carried out

313. *Ibid.*, 29.

314. *Ibid.*, 10.

315. *Ibid.*, 30

316. *Supra* note 310: Samdup et al., *Human Rights Impact Assessments for Foreign Investment Projects*.

317. *Ibid.*, 10.

a study on the human rights impact on agricultural workers in the tobacco industry in North Carolina.⁵¹⁸ In another example, Justiça Nos Trilhos and Global Justice, with the support of FIDH, evaluated the impact of the steel and mining industry on health and the environment in the Brazilian State of Maranhão.⁵¹⁹ In a third HRIA, FIDH and the Ecuadorian Ecumenical Human Rights Commission assessed the Corriente Resources project looking at the impact of large-scale mining in Ecuador.⁵²⁰

Following the implementation of these HRIAs, Rights and Democracy, Oxfam America and FIDH organized an international event in 2010 attended by various CSOs with experience in HRIAs. The result of this meeting was the drafting of a report *Community-based Human Rights Impact Assessments: Practical Lessons*.⁵²¹ The report arrived at the following “critical success factors of an ideal HRIA process”:

- > Responds to the interests of the communities,
- > Conducted early and is ongoing,
- > Contains clear objectives,
- > Is credible, comprehensive and independent,
- > Is grounded in a gender perspective and analysis,
- > Is transparent, participatory, inclusive and locally empowering,
- > Makes concrete and actionable recommendations,
- > Is actively used by communities to promote the accountability of states and companies.⁵²²

In another study, University of Warwick researchers conducted an HRIA of public spending cuts and their impacts on equality and human rights on vulnerable groups and individuals in Coventry.⁵²³ One of the main findings of this study was that the combination of a series of different cuts in public spending on the same group of people would have the most severe effects with respect to equality and other human rights. For example, it was observed that the right to health of women would be affected, not only by the cuts to spending in the health sector, but also by cuts in social benefits and in social

318. *Supra* note 274: *A State of Fear*.

319. *Supra* note 275: *Justiça Global, How Much Are Human Rights Worth in the Brazilian Mining and Steel Industry?*

320. *Supra* note 275: *Large Scale Mining in Ecuador*.

321. *Supra* note 276: Oxfam, “Practical Lessons,” 13.

322. *Ibid.*

323. *Supra* note 301: Harrison and Stephenson, “Assessing the Impact of the Public Spending Cuts.”

324. *Ibid.*

services.³²⁴ In this way, the Coventry study provides empirical support for the importance of the intersectoral dimension of an HRIA.

Another recommendation from the Coventry study looks at achieving a mid-point with respect to the degree of complexity of an HRIA. If the assessment methodology is too technical or specialized, with complicated research, data collection and analysis systems, it would be impossible for many to use. It goes without saying that there are minimum standards that must be met, without which the results of the HRIA would be invalid. However, as the Coventry study states, “if HRIAs can only be utilised by a very few experts they are unlikely to have significant or widespread impacts on practice. Therefore care needs to be taken to design models that combine usability and rigour.”³²⁵

The review of existing HRIA tools, as well as the examples of best practices and lessons learned, provides a comprehensive panorama of what should be included in an HRIA and opportunities for perfecting HRIA methodologies. We hope that some of the recommendations captured in this report will provide a foundation on which to continue to advance the design of HRIA tools and their application.

CONCLUSIONS

Although it may be true that investment projects can bring about benefits such as economic development and employment, too often they lead to negative impacts on human rights. Experience has demonstrated that business enterprises frequently fail to respect human rights and that such situations are aggravated when they do not contemplate human rights, social and environmental risks. This report therefore advocates for a tool that serves both to assess human rights impact while also encouraging companies to carry out due diligence processes that consider human rights risks, impacts, and the consent of affected communities.

We propose that a community-driven human rights impact assessment tool complement existing strategies of prevention, negotiation and defense

³²⁴. *Ibid.*

³²⁵. *Ibid.*, 25.

traditionally used by communities to confront the negative impacts of investment projects. An effective community-based HRIA tool should fulfill three functions. First, make clear the manner in which a company operates, its business logic, and its method for measuring risk. From the business perspective, a human rights violation can be a risk for investment. If the human rights impacts can elevate investment risk, then these risks should be assessed and made known to the relevant stakeholders, who in turn can influence the decisions made by the company. Second, the tool should facilitate the direct and continuous participation of affected communities in the assessment. Third, the tool should build capacity within communities to conduct human rights impact assessments and articulate demands for corporate accountability.

The UN framework to “protect, respect, and remedy” establishes clear obligations for companies to respect human rights and remedy any adverse consequences provoked by their operations. In practice, the obligation to conduct human rights due diligence is one of the main outcomes of a company’s responsibility to respect human rights. The due diligence process encompasses identifying, preventing, mitigating and accounting for how the company will deal with its impact on human rights. This process should include an assessment of the actual and potential impact of its activities on human rights – an HRIA.

In the second chapter, we analyzed how companies currently measure and disclose information, including risks and human rights impacts. Reporting has positive effects, both for companies, which can gain value by complying with transparency standards and can identify how to modify their behavior in case of violations, and for communities who can use this information to demand respect for their rights. We also observed that information on human rights is becoming “material” for the purposes of financial reporting.

Although the upward trend in company reporting on human rights issues is positive, existing mechanisms are insufficient. Voluntary disclosure of human rights risks results from a self-assessment, that is, a review conducted by the potentially non-compliant company itself. In such circumstances, companies can be selective not only in what they disclose to the public, but also in what they choose to evaluate. It is therefore necessary that affected communities or rightsholders themselves assess and identify situations where their human rights risk being violated as a result of business activities.

In the third chapter, we introduced the HRIA, including its definition, essential elements, applications and methodology. We saw that an HRIA measures the discrepancies between commitments made by the state, and the real possibility for individuals, groups and communities to enjoy human rights.

We observed that an HRIA should be based on the human rights normative framework and should include an effective participation process for all stakeholders. Equality should be respected with a focus on non-discrimination. A key focus and feature of the HRIA should be transparency and access to information. The emphasis throughout the evaluation should be on accountability, and the HRIA should take care to maintain an intersectoral perspective on human rights impacts. We then reviewed the eight essential methodological stages for an HRIA: screening, scoping, gathering evidence, consultation, analysis, conclusions and recommendations, publication, and follow-up.

In the fourth and final chapter, we identified examples of best practices through three lenses: existing tools, essential stages, and case studies. Our principle conclusion was that the HRIA should prioritize direct participation by affected communities. These communities should be the motor of the HRIA throughout the implementation process. We also learned that the stage involving the analysis of the investment project and the company are often complicated by the inherent difficulties of obtaining and understanding technical data. We concluded that a community-driven HRIA process must strengthen rightsholders' capacities not only in human rights, but also in corporate research.

Another key finding is the importance of understanding and presenting human rights violations as risk factors. In other words, linking the human rights impacts to the company's assessment of material risk can be an effective strategy for influencing decision makers within the company as well as investors. The HRIA results should be shared with key internal and external stakeholders, including rightsholders, employees, shareholders, investors, lenders, regulators, human rights organizations, and the media.

One of the principle areas for improvement in existing HRIA methodologies is follow-up. It is important to think long term and consider that an HRIA does not conclude with the publication of the final report. An adequate

follow-up stage should analyze whether the HRIA had an impact, including whether its recommendations were implemented or not.

A key opportunity for improvement concerns the participation of communities in an HRIA. It is not enough to insist on the importance of community participation in an HRIA implementation guide. HRIAs should comply with concrete benchmarks for what effective participation looks like. These criteria should specify, for example, (1) the formats and frequency of community participation, (2) measures that ensure the representativeness of the community, and (3) clarity regarding the extent of community participation in the HRIA, that is, if it was limited to consultation, or if it included direct participation in decision making.

Finally, the conclusions of the HRIA should lead to tangible results that improve the human rights situation. A good HRIA tool should be simple and accessible to all stakeholders, in both technical and economic terms. The central challenge facing HRIA developers today is achieving this ideal balance between accessibility and effectiveness.



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