

# **Walking the Talk**

**Exploring Methodologies and Applications  
for Human Rights Impact Assessment  
by the United Nations**

**-- Sabbatical Report --**

Rory Mungoven

Office of the High Commissioner for Human Rights

February 2016

## **Acknowledgement**

I would like to thank the Sabbatical Program of the United Nations and the Office of the High Commissioner for Human Rights for giving me the opportunity to undertake this sabbatical research during a three-month period between October 2015 and January 2016. I am particularly grateful to my supervisors and team colleagues who both encouraged and supported me and assumed additional burdens during my absence.

I would also like to thank the Applied Anthropology and Participatory Development Program and Crawford School of Public Policy at the Australian National University in Canberra for providing me with a supportive research environment, and in particular Associate Professor Lesley Potter and Associate Professor Colin Filer for their supervision of my research. As a mature, mid-career researcher, I was made to feel extremely valued and was greatly stimulated by both the teaching staff and fellow students.

Unfortunately due to continuing professional commitments on Sri Lanka, I had to reduce the length of my sabbatical and was not able to undertake the field work planned in Cambodia. However I was fortunate to be able to conduct research in Geneva and the United Kingdom and participate in several expert seminars as well as the annual UN Business and Human Rights Forum where I made many contacts with companies, national institutions and NGOs working in the field. My research also benefited greatly from discussions and exchanges with leading practitioners of Human Rights Impact Assessment, in particular Dr Simon Walker and Ms Susan Mathews at OHCHR, Dr James Harrison at Warwick University, Ms Tulika Bansal at the Danish Institute of Human Rights, as well as colleagues at OHCHR, UNDP, UNICEF and other parts of the UN system.

Last but not least, I am deeply grateful to my wife Rachael and children Finnian and Esther for putting up with a house full of papers and a husband/father lost in thought.

## **Table of Contents**

|      |   |        |
|------|---|--------|
| I.   | Introduction  | 4      |
| II.  | The evolution of HRIA   | 5      |
| III. | Common methodological features and challenges                               | 9      |
| IV.  | A typology of HRIA practice   | 13     |
|      | a. NGO or community-led   | 13     |
|      | b. Company-led  | 17     |
|      | c. Government-led   | 20     |
| V.   | HRIA and human rights due diligence by the United Nations                   | 23     |
| VI.  | Conclusions   | 33     |
| VII. | Recommendations for OHCHR   | 35     |
|      | <br>Annex 1: Human Rights Impact Assessment of the Marlin Mine in Guatemala | <br>38 |
|      | Annex 2: Equality Impact Assessment of Public Policy in the United Kingdom  | 46     |
|      | <br>Bibliography  | <br>49 |

## **I. Introduction**

Over the past two decades, human rights impact assessment (HRIA) has emerged as a distinct methodology for anticipating or measuring the positive or negative impact of policies and projects on human rights. It has fast been adopted by civil society for advocacy as well as mobilizing and empowering local communities, by governments as a public policy tool, and increasingly by business as a form of corporate due diligence. But although HRIA has its origins in the international human rights framework and has been advocated by the United Nations (UN) human rights mechanisms, the UN itself has been slow to adopt and apply it in its own practice. This study suggests ways HRIA could help United Nations agencies exercise due diligence in avoiding or mitigating negative human rights risks associated with their projects and programmes, as well as optimize their positive human rights benefits in support of broader sustainable development outcomes.

Section Two of this study looks at the evolution of human rights impact assessment as a distinct methodology against the backdrop of wider trends in the development and human rights world. While HRIA has taken a wide variety of forms and often overlaps with or is integrated into other forms of impact assessment, Section Three outlines some of its common methodological features and challenges. Section Four then sets out a typology of practice in different fields defined by who leads or conducts the assessment, highlighting case examples and some of the available methodological tools. Section Five looks at the relevance of HRIA for the work of the specialized and development agencies of the United Nations and the degree to which this is reflected in some new and emerging policy frameworks. Finally, I make some general conclusions and practical recommendations in Section Six for how United Nations agencies might make use of or promote HRIA methodologies in their work, as well as some specific recommendations for my own department OHCHR. Two annexes provide case studies of HRIA methodology applied to private sector (Marlin Mine) and public sector actors (UK Government) respectively.

Although there has been a growing stream of academic commentary on HRIA over the past decade, much of the material available is “grey literature” in the form of guides, tools, checklists and reports by different NGOs and agencies. A number of HRIAs have been published, mainly by NGOs and/or academics and mainly concentrated on private sector activities or trade and investment agreements. As will be discussed below, one of the challenges for evaluating HRIAs is the limited number and scope of those that have been published, particularly by corporate actors who have an interest in protecting the information under commercial privilege (Harrison 2013, p. 113). In recent years, there have been several initiatives to draw together and reflect on the experience of practitioners so far, notably a comprehensive World Bank study (Felner 2013) and a number of expert roundtables convened by the United Nations or universities (Berne Declaration et al 2010, OHCHR & FES 2014, Columbia Center et al 2014). Several other independent experts holding United Nations mandates have also published conceptual frameworks or guidance for the conduct of HRIA (Hunt & MacNaughton 2006, Ruggie 2007, De Schutter 2011). In this study, I have sought to synthesize rather than replicate this material, and in particular to focus on those how HRIA could be developed and applied further.

## **II. The evolution of HRIA**

HRIA is usually presented as having developed as a specialized stream of the social impact assessment (SIA) field. From its origins in environmental regulatory frameworks in the 1970s, social impact assessment has integrated new concepts and methodologies (Vanclay 2006, p.13) and become progressively mainstreamed by development agencies and in the corporate world. Since then, SIA has proliferated (or fragmented) into a variety of forms - health impact, gender impact, child impact assessment and so on - of which HRIAs have been one of the latest to emerge, largely in the context of trade and investment agreements and large scale resource and infrastructure projects.

The evolution of HRIA over the past two decades can be seen as a convergence of several different trends in the human rights, development, corporate and governance world. (Simon Walker first highlighted these factors in his book on HRIA of trade agreements (Walker 2009, pp. 5-6) but I have updated and expanded on his analysis.)

The first trend is the increasingly holistic conception of environmental policy and planning that saw the incorporation of social dimensions into environmental regulatory processes. One of the first manifestations of this can be found in the extension in the 1980s of the US National Environment Protection Act (NEPA) to human rights issues of discrimination by looking at environmental impacts through a racial equality lens (GSA 1998). SIA has often been treated as secondary to environmental impact assessment and is less legally entrenched, however both have been progressively subsumed into a broader sustainable development agenda and come to include human rights dimensions. In 2003, the International Association for Impact Assessment (IAIA) framed a set of international principles for SIA in which fundamental human rights are the first core value; “human rights should underpin all actions” in development; and “development processes that infringe the human rights of any section of society should not be accepted” (Vanclay 2003, p 9). IAIA guidelines consistently emphasize as good practice what are commonly regarded as “rights-based approaches” such as participation, empowerment and transparency (Kemp & Vanclay 2013, p. 93).

A second trend has been developments in the human rights sphere in which the human rights community and international human rights mechanisms have sought to engage more squarely with economic, social and cultural rights issues (beyond the traditional civil and political rights domain) and with the development agenda more broadly. This has required new tools and strategies, for instance the use of social science research methods as opposed more traditional law-based forms of analysis. It also involves focusing on “upstream” processes such as budget and policy formulation, rather than just the “downstream” violations that result. As MacNaughton and Hunt argue, “in

contrast to the traditional approach to human rights accountability which looks backward at past violations, this new policy approach demands new tools to bring human rights concerns into forward-looking policy-making processes” (MacNaughton & Hunt 2011, p.360). In this way, HRIA methodology offers the human rights community a glimpse of the “Holy Grail” of prevention.

At the same time, other forms of social activism such as environmental, development or indigenous groups have increasingly sought to leverage the international human rights framework in their campaigns and advocacy. Beyond their normative power, human rights add a dimension of legal obligation and accountability – certainly of state but increasingly of non-state business actors – as well as potential tools and mechanisms for enforcement. As will be seen in section three, both international NGOs and community organisations have found HRIA to be a useful new tool for empowerment and for confronting businesses and the state.

A third trend has been developments in the corporate social responsibility sphere, in particular the emergence of “human rights due diligence” as an essential requirement for socially responsible business practice. The due diligence concept is at the core of the new *UN Guiding Principles on Business and Human Rights* (United Nations 2011) which are increasingly being used as the benchmark by other international organisations such as the OECD, International Standards Organisation and international development finance institutions. The Guiding Principles require companies to have in place an assessment process “to identify, prevent, mitigate and account for how they address their adverse human rights impacts” (United Nations 2011, p.16). Although HRIA is not explicitly required, nor is it the only way to conduct due diligence, companies and industry associations are beginning to apply HRIA as a new tool for managing social risk.

A fourth trend feeding into the evolution of HRIA can be found in the policies and approaches of international financial institutions and other development actors. Over the past decade, most bilateral or multilateral donor agencies have adopted

human rights policies of one kind or another (World Bank & OECD 2012, p. xxx). In the case of Canada, human rights considerations in aid policy are entrenched in national legislation (World Bank & OECD 2012, p. 71). The notable exception of course remains the World Bank Group that arbitrarily defines human rights as “political” and thereby outside its mandate.

This has in turn seen some donors apply versions of HRIA in two different ways. First, donors are increasingly focused on aid effectiveness and so have adopted business-based means of accounting for and measuring impact; at the same time, donor requirements are leading recipient organisations to develop new “evidence based” methods for demonstrating impact and results (Merry 2011, p. S84). For those donors investing in the human rights field or advocating rights-based approaches, this has meant finding new ways to assess and evaluate impact (Landman 2006, p. 129, ICHRP 2011, p. 4-6). This trend will only accelerate with the rise of private actors in the philanthropic and development sphere and new concepts such as “impact investing”.

Second, some donors – like companies - are beginning to apply their own version of “human rights due diligence” to their programming, in order to maximize positive human rights impacts and/or minimize negative ones. This is becoming more necessary as the aid and trade agendas converge, public-private partnership becomes the flavor of the day, and business takes on an increasing role in development. The International Finance Corporation’s Performance Standards are an early and influential example of such safeguards, although not framed in human rights terms. A human rights “screening” procedure was established by the Norwegian Agency for Development Cooperation in 2001 with its Handbook in Human Rights Assessment (NORAD 2001). The UK’s Department for International Development (DfID) experimented with a form of “participatory rights assessment” methodology around the same period (Blackburn et al 2005, pp. 93-96). Probably the most rigorous framework developed by a bilateral donor to date is the mandatory and detailed procedure applied by Germany’s Federal Ministry for Economic Cooperation and Development (BMZ) to “appraise the relevant human rights risks and impacts”



before any project or programme is commissioned (BMZ 2013, p.1). As will be seen in Section Five, the human rights safeguards required by donors have been a stimulus for UN agencies and other recipient organisations to adopt similar practices.

The four trends outlined above should not be seen in isolation but in many ways have converged, influenced and informed each other. Merry contextualizes this as part of a wider phenomenon of “dissemination of the corporate form of thinking and governance into broader social spheres” (Merry 2011, p. S83). She highlights how “technologies that were developed in the sphere of business regulation have jumped domains to human rights and corporate social responsibility” (Merry 2011, p. S84). Ironically, just as human rights actors are seeking to influence the practices of business, they are adopting discourses and tools from the business world like impact assessment.

### **III. Common methodological features and challenges**

The different ways in which HRIA has evolved means there is a wide spectrum of potential applications and practice. This variation makes it difficult to frame a single model but from the range of tools that exist it is possible to identify some common methodological features and challenges.

The first and fundamental distinction, as with other forms of impact assessment, is between *ex ante* (before) and *ex post* (after) assessments. Landman also suggests distinguishing between assessments of direct and indirect, intended and unintended impact (Landman 2006, p.128). To this should be added the distinction between positive and negative impacts (De Beco 2008, p.140). An assessment of direct, positive and intended impact, for instance, would apply to a donor evaluating the impact of a human rights program it funds. A direct or indirect, negative and unintended impact, by contrast, would fall more within the “due diligence” processes described above. As de Beco notes, most HRIAs therefore - whether *ex ante* or *ex post* - tend to be focused on the unintended and negative impacts of policies or projects on human rights (De Beco 2008, p.144).

A review of the many guides and tools available shows that HRIAs mostly follow a similar methodology to other forms of impact assessment. Various terms are used but, in essence, the assessment process involves the following basic steps: (1) an initial screening to establish the need for an assessment; (2) a scoping process to prioritize the issues and establish a baseline; (3) evidence gathering, including consultation with the affected stakeholders; (4) an analysis stage in which the impacts are assessed; (5) developing recommendations, including possible mitigating measures; (6) designing appropriate monitoring, management and grievance mechanisms; and (7) reporting on the outcome of the assessment, ideally in a transparent and published form.

A common question therefore is how human rights impact assessment is distinct from other forms of social impact assessment? The first difference for most commentators is that HRIA is based on the explicit normative framework provided by international human rights law. This provides a very different baseline in which impacts are measured against human rights standards rather than against the status quo. For Walker, this provides a more objective standard of assessment and framework for analysis than the subjective opinion of an assessor (Walker 2009, p. 45). Second, using a human rights framework also brings a dimension of legal obligation that reinforces the assessment's conclusions and accountability for the implementation of its recommendations (Walker 2009, p. 47).

A second feature is the way a human rights lens goes beyond a utilitarian focus on aggregate welfare to look at the distributional impacts on vulnerable and disadvantaged groups (Hunt and MacNaughton 2006). Walker notes that the human rights framework draws on the much more clearly defined concepts of "discrimination" and "equality" rather than terms such as "fairness" and "equity" which are commonly found in the SIA discourse, and can help to identify underlying patterns of discrimination embedded within the social context (Walker 2009, p. 46). Human rights standards also set limits to the "trade-offs" implicit in many SIAs in which the interests of some individuals or groups are sacrificed for the common good (Walker 2009, p. 47).

A third difference is that the process of HRIA should itself respect human rights principles, in particular participation and transparency. Although participation should be the hallmark of any good social impact assessment, there is an expectation that HRIAs should empower and contribute to the capacity of rights holders (McNaughton 2015, p. 66) and involve human rights actors and mechanisms (Walker 2009, p. 37). Harrison also argues that “transparency must be a core and overriding principle of the assessment process” and that both the process and results of assessments should be published (Harrison 2013, p. 113).

Nevertheless, many commentators argue that human rights can be successfully integrated into existing models of social impact assessment, or that social impact assessment can be conducted in a “rights-based” way. Hunt, for instance, argues for such a “right-based” approach to health impact assessment highlighting the advantages of mainstreaming human rights into policy development and programming (Hunt & MacNaughton 2006, p. 5). Ruggie goes further to suggest that “any impact assessment could be considered a human rights impact assessment if it demonstrates human rights-based principles, regardless of its label” (Ruggie 2007, p.7).

Many government and corporate actors seeking to apply human rights in their impact assessment or due diligence frameworks have certainly favoured this “integrationist” approach. The European Commission, for instance, has developed guidance on how human rights should be taken into account in each of the methodological steps of its standard impact assessments (EU p.3). Industry bodies such as the International Council on Mining and Metals and IPIECA (for the oil and gas industry) have published guidance for their members on integrating human rights into risk management processes (ICMM 2012) and environmental, social and health impact assessments (IPIECA & Danish Institute 2013). This is often justified on efficiency grounds, particularly for smaller companies that lack the capacity to conduct full-fledged HRIAs.

While clearly integration offers benefits, it also presents similar challenges to gender and other forms of mainstreaming. There is a risk that human rights impact assessments become a bureaucratic “tick-the-box” exercise or technocratic audit process, rather than participatory and democratic (Harrison 2011, p. 171). Social impact assessment is already often subsidiary to environmental impact assessment and human rights may prove to be an even poorer cousin to other issues. Integration can involve little more than the “rhetorical repackaging” that is common to much human rights mainstreaming (Uvin 2007, p. 600).

Stand-alone HRIA is beset however with a number of methodological and practical challenges. Like other forms of impact assessment, HRIA can struggle with causality, particularly when human rights outcomes are multi-dimensional and may result from several converging drivers that may or may not be the result of a policy or project. This is particularly challenging in the trade policy sphere, where HRIAs attribute local impacts back to bilateral agreements or global trade rules (Walker 2009, Berne Declaration 2014). HRIAs can also become politicized: on one hand, governments or corporations may use them to rationalize or legitimize policies or projects; on the other, civil society and communities use HRIAs to campaign against them, and the line between advocacy and assessment becomes blurred (Kemp & Vanclay 2013, p. 93). For this reason, involvement of an independent third party, such as a national human rights institution or UN agency can be helpful. Full-fledged HRIA can also be demanding in terms of time, resources and the inter-disciplinary expertise required, beyond the capacity of smaller organisations or companies, and too slow for the project cycle. Even a company the size of Nestlé observed in its assessments how much more demanding HRIA was than its regular audit procedures (Nestlé 2013, p. 9).

HRIA is also not necessarily any better at addressing gender than other forms of impact assessment. While some tools identify women as a special category and there have been some good HRIAs focused on women (see Bakker et al 2009, Stephenson & Harrison 2011), most fail to use a more feminist analysis of gender

roles or adequately reflect the agency of women (Lahiri-Dutt & Ahmed 2011, p. 118, 124). Issues of sexual orientation and gender identity are generally overlooked, with a notable exception now in the UK (Sauer et al 2013, p. 141). This suggests HRIA is not a substitute and still needs to be complemented by specific gender analysis tools.

#### **IV. A typology of HRIA practice**

As Hunt and MacNaughton observe, HRIA practice varies according to what is being assessed, when it is being assessed and who is doing the assessment (Hunt & MacNaughton 2006, p. 25; Harrison 2011, p. 165). Harrison sets out a broad categorization of HRIAs conducted by different actors (Harrison 2011, p. 168), but most fall into the following typology of NGO or community-led, company-led or government-led impact assessments. In this section, I will discuss each of these types of HRIA and use recent case examples to demonstrate their strengths and weaknesses in practice. I will also highlight some of the newer, hybrid forms of HRIA that are emerging, including sector-wide and multi-stakeholder impact assessments.

##### *i) NGO or community-led*

The majority of publicly available HRIAs to date have been undertaken by NGOs, sometimes working in support of local communities and sometimes working in cooperation with business. These have generally focused on the impact of business activities or on trade policies and agreements, although there are also examples of NGOs conducting HRIAs of government policies (De Beco 2009, Bakker et al 2009). HRIAs by NGOs and communities are usually *ex post*, when negative impacts have become apparent and more information is available, which often places them in an adversarial position with companies or governments (Columbia Center et al 2014, p. 8). They are consciously designed for the purposes of advocacy and in some cases community empowerment.

Some of the first HRIA tools were developed by NGOs, and these have in turn been adapted and used by other NGOs in different contexts. The Dutch NGO, Aim for Human Rights, pioneered an early model called the *Health Rights of Women Assessment Instrument* (Bakker et al 2009). This was designed as an advocacy tool with a focus on public policies. It was successfully applied by Dutch NGOs to changes in maternity care that reduced access for undocumented migrant women, and the closure of prostitution areas which reduced the access of sex workers to health services (De Beco 2008, p. 141). Women's groups in Kenya also used it to challenge discriminatory impacts of maternity laws (Bakker et al 2009, p. 446). The methodology is qualitative in nature and lacks the participatory element that is a core component of HRIAs today. By contrast, the UK NGO, Coventry Women's Voices and University of Warwick have produced a series of much more state-of-the-art HRIAs on the impact of austerity measures on women and minority groups in the city of Coventry using a mixture of quantitative, qualitative and participatory methods (Stephenson & Harrison 2011).

A second influential tool for HRIA of business activities is that produced by US non-profit research organization, NomoGaia. NomoGaia's *Human Rights Impact Assessment Toolkit* (NomoGaia 2012) involves a cataloguing of issues derived from the context, project and company policies, from which key topics (eg labour, health) are identified. Each key topic is then elaborated in terms of rights, rights-holders and the available baseline information. From this, a set of "impacted rights" is identified, and scored according to intensity and extent. This results in a ranking of human rights impacts similar to other SIA methodologies. Unlike many HRIAs, the NomoGaia methodology uses a more quantitative than qualitative approach. NomoGaia has conducted several HRIAs of major extractive projects in Indonesia, Malawi, Uganda, agribusiness and forestry projects in Costa Rica and Tanzania, with and without the cooperation of the companies concerned. It has now begun to apply HRIA to projects backed by the World Bank and other development finance institutions in Jordan and Myanmar. The NomoGaia tool is weaker on participation but is easy to use and has been adapted by a number of other organisations.

The independent Canadian institution Rights and Democracy developed arguably the most comprehensive HRIA tool called *Getting it Right*. *Getting it Right* is designed for HRIA of private sector activities but through a community-led approach. The philosophy is to make HRIA a “bottom-up” process, as opposed the “top down” models applied by companies, through which communities have ownership and are capacitated and empowered by the process. The tool guides communities in scoping the range of rights affected and generating an evidence-gathering framework based on human rights standards. Oxfam reports successful results from using this methodology in support of local communities in DRC and Bolivia and tobacco farmworkers in the United States (Watson et al 2013, p. 120). But challenges for community-led HRIAs include the time and resources required for capacity building, questions of methodological rigor, and the lack of cooperation or dialogue with companies. They also can raise unrealistic expectations and create or exacerbate tensions within communities (Columbia Center et al 2014, p.10).

Two recent examples of NGO-led HRIAs in the trade field engage simultaneously with government and business actors. A consortium of NGOs produced an *ex post* HRIA of the impact of the European Union’s “Everything but Arms” (EBA) preferential trade arrangement with least developed countries, with a focus on the sugar industry in Cambodia (Equitable Cambodia et al 2014). EBA provides duty free access and a guaranteed minimum price on average three times the world price for sugar. This has encouraged the Cambodian Government to lease land to private investors (mainly Thai companies but part of global supply chains) to develop large-scale agro-industrial cane plantations, resulting in significant forced eviction and displacement (Equitable Cambodia et al 2014, p. 1). Unfortunately, little information is given on its methodology and the evidence presented is largely qualitative in nature. But it is an interesting example of how human rights impacts can be followed up a causal chain of responsibility from local government and local companies, to global supply chains and international trade policy.

A separate group of NGOs also recently published an *ex ante* HRIA of new plant variety protection (PVP) laws which are being developed in line with global patent rules (Berne Declaration 2014). This was based on a much more rigorous methodology involving case studies by local research teams in Kenya, Peru and the Philippines. The study highlights in particular the impact on the right to food, cultural rights and indigenous rights of new restrictions on the informal seed system and traditional knowledge and practices; it also warns of the stresses increased production costs could place on household budgets, thereby impacting on a wider set of rights such as to health and education. The study also assessed the transparency and quality of participation by local communities in the development of PVP laws (Berne Declaration 2014, p. 7). This HRIA was an extremely ambitious undertaking, taking more than two years by seven NGOs, and it struggled with the complexity of the causal chains required to demonstrate and conclusively assess impact (Berne Declaration 2014, p. 44).

Another new and promising approach to HRIA by NGOs has been sector-wide impact assessments (SWIAs). These go beyond looking at a particular project to identify human rights risks and opportunities for a sector as a whole. The methodology is particularly well-suited to an *ex ante* assessment, which can provide initial guidance to companies in conducting more detailed due diligence, particularly smaller firms that might not have the capacity themselves, and provides a good advocacy tool for engaging governments to shape law and policy. SWIAs are also good for capturing the cumulative impacts of multiple projects over time, and highlighting examples of good practice for others. Some early examples have been produced for the oil and gas, telecommunications and tourism sectors in Myanmar, which is seeing rapid incoming investment but has only recently developed legal requirements for environmental and social impact assessment, and has no tradition of stakeholder engagement and consultation (Myanmar Centre for Responsible Business et al 2014, p.55).



## *ii) Company-led*

An increasing number of companies report they are using HRIA as a tool of human rights due diligence, particularly as they align with the UN Guiding Principles on Business and Human Rights. As noted above, most businesses and industry associations are opting for an “integrationist” approach in which HRIA is integrated into existing systems of environmental and social impact assessment or risk analysis. They argue this is more efficient in terms of time and resources, but also effective by mainstreaming human rights into core management processes.

A number of HRIA tools have been developed for use by business, although these mostly provide only a generic level of guidance and advice. The International Finance Corporation of the World Bank and International Business Leaders Forum, together with the UN Global Compact (the United Nations’ corporate social responsibility initiative) produced a major *Guide to Human Rights Impact Assessment and Management (HRIAM)* aimed at business in 2010 (IFC et al 2010). HRIAM provides macro-level guidance following the steps familiar from other impact assessment methodologies, but includes a number of fictional scenarios from different sectors to illustrate the range of issues that should be covered. The Danish Institute for Human Rights (DIHR) has also produced a number of tools for corporate due diligence, such as the *Human Rights Compliance Assessment* (DIHR 2006), has partnered with industry associations such as IPIECA to produce more specialized products (IPIECA 2013), and launched a new “road-test” version of a comprehensive HRIA tool kit for the private sector in 2016 (DIHR 2016). Some consultancy firms and private actors conducting HRIA for business are also promoting their own products, for instance Business for Social Responsibility (BSR 2013).

Unfortunately, very few business-led HRIAs have been published, which would allow their methodology and results to be critically evaluated (Harrison 2013, p. 113), although a few examples are examined below. Most companies conducting HRIAs are reluctant to expose sensitive and critical information and so treat

them as commercial-in-confidence. A second shortcoming is that business-led HRIAs are often framed in terms of risk management and due diligence, and so focus on the risks to the company's investment or reputation, rather than to the affected communities (Oxfam 2015, p. 15). Business HRIAs are usually *ex ante* and rely for follow up on the company's own monitoring or grievance mechanisms which are often limited. Third, businesses generally adopt a "top down" approach that is much weaker on community engagement, often reliant on desk research and interviews with local NGOs (Oxfam 2015, p. 1-2). This lack of transparency and participation is in tension with a rights-based approach and generates criticism and mistrust among civil society and local communities.

The Swiss companies Kuoni and Nestlé have published good examples of "stand-alone" corporate HRIAs in recent years. Kuoni, a travel operator with a strong corporate human rights policy, undertook *ex post* HRIAs of its operations in Kenya in 2012 and India in 2014 (Kuoni 2012, 2014). Interestingly, Kuoni involved the international NGO Tourism Concern in its assessment team, which led the community engagement parts of the process; it also drew on advice from UNICEF and other independent experts. The HRIA followed a qualitative research methodology based on the tools developed by the Danish Institute, Rights and Democracy and UNICEF mentioned above. Its main (acknowledged) weaknesses were in its scope, which focused on accommodation providers rather than other parts of its supply chain, and the relatively limited nature of community participation, particularly by women (Kuoni 2012, pp. 12-13). One problem Kuoni encountered which is common to other forms of impact assessment was causality, or the difficulty of distinguishing between the impacts of Kuoni's operations and the cumulative impacts of the tourism sector as a whole, for instance the inequitable distribution of economic benefits (Kuoni 2012, p.14). The HRIA at least prompted thinking within the company about what was in its sphere of influence to improve, including through advocacy with the government and broader tourism industry.

Nestlé has incorporated HRIA as an explicit element of its due diligence framework and published the lessons learned from *ex post* HRIAs conducted in

seven of its country operations (Nestlé 2013). Again, the company involved an independent, external partner, in this case the Danish Institute for Human Rights, although says it will internalize the process in future. The HRIAs identified a number of issues in relation to the living wage, road safety issues, security contractors, procurement policies and the absence of grievance mechanisms; interestingly Nestlé's HRIA framework included anti-corruption and integrity issues as well (Nestlé 2013, pp. 7-8). The company acknowledges, however, that consultation with communities was relatively limited and that the HRIA proved sensitive with host governments (Nestlé 2013, p. 25).

It is no coincidence that these two published company HRIAs are in lower risk sectors and produced relatively positive findings, which is not the case, for instance, in the extractive sector. One well-known and controversial HRIA in the mining sector was commissioned by Goldcorp of its Marlin gold mine in Guatemala in 2008 in response to local community opposition and international criticism, including shareholder activism and complaints to international mechanisms. The Marlin HRIA was conducted by a Canadian consultancy, On Common Ground, and represented a major investment in time and resources (OCG 2010). But its efforts at consultation had to be curtailed due to the deepening conflict between the company and local communities and its legitimacy and outcome were compromised as a result (Coumans 2012, pp. 51-54). A fuller description and analysis of the Marlin HRIA is included in Annex One.

Some HRIA practitioners have begun to look for ways to overcome this disconnect between community-led and company-led HRIAs. On one hand, company-led HRIAs lack transparency and are often distrusted by communities; on the other community-led HRIAs often do not receive cooperation or respect from companies because of their adversarial nature (Columbia Center et al 2014, p. 10). Ruggie stresses that HRIA and due diligence should be an "inherently dialogical process that involves engagement and communication" and can serve as a platform for company-community dialogue (Ruggie 2010, p. 17). This has led some organisations like Oxfam to suggest the possibility of "hybrid"

or “multi-stakeholder” HRIAs, in which the company agrees to a parallel community-led process, or the stakeholders are brought together in a collaborative process to conduct the HRIA together (Columbia Center et al 2014, p. 14, Oxfam 2015, p. 24). Such an approach has yet to be tested, and questions such as who would convene or fund such a process would need to be resolved (Oxfam 2015, p. 28). In the UK, for instance, the national human rights institution has played such a convening role, bringing together public authorities, business, labour representatives, civil society and other stakeholders to conduct human rights assessments of particular sectors such as the cleaning industry and aged home care (EHRC 2013).

### *iii) Government-led*

Although NGOs and academic institutions have sometimes carried out HRIAs of public policies, there are relatively few examples of government authorities undertaking HRIAs themselves. This is all the more striking given human rights are ultimately state obligations, and international human rights mechanisms have long advocated for governments to undertake HRIAs in different fields. Perhaps the widest body of experience has developed in the United Kingdom with the use of “equality impact assessment” which shares similar objectives and characteristics to HRIA.

Public authorities in the UK were required to undertake equality impact assessments on disability and race under the Disability Discrimination Act, 1995 and Race Relations (Amendment) Act, 2000. But in 2010, the UK adopted a comprehensive Equality Act that extended protection to age, gender reassignment, religion or belief, pregnancy and maternity, sexual orientation, and marriage and civil partnership. The Act also created a general “Public Sector Equality Duty” – essentially a due diligence requirement – that requires public authorities in the exercise of public functions to have “due regard” to the need to eliminate conduct prohibited by the Act and advance equality of opportunity (House of Commons Library 2015, p. 7).

Although the Act does not explicitly require this to take the form of “equality impact assessments” (EIAs), these are widely used by many Government departments and local authorities in the UK. Interestingly, in the devolved systems in Scotland and Wales, specific duties have been added in the law to explicitly require EIAs. In Northern Ireland, where these issues are more sensitive post-conflict, even more onerous duties have been placed on public authorities to report on equality issues (House of Commons Library 2015, p.17). Of course, the quality of EIAs by public authorities varies considerably and is often degraded as a “tick-the-box” exercise. Harrison and Stephenson have highlighted a number of common challenges and failings of EIAs, including lack of consultation, narrow scope, weak analysis of data and political selectivity of findings (Harrison & Stephenson 2013, pp. 229-30).

The use of EIAs has been reinforced by a growing number of court cases in which people have sought judicial review of Government decisions on the basis that the Public Sector Equality Duty has not been fulfilled. In these cases, the courts have given significant weight to the existence (or not) and quality of EIAs as evidence of compliance. There are also some cases that have produced similar jurisprudence in the European Court of Human Rights. This is a good example of how the legal basis of HRIAs in human rights gives them an additional edge over other forms of SIA in terms of accountability and enforcement. Civil society organisations have used this as an effective strategy to challenge the austerity policies and budget cuts imposed by the central Conservative Government. As a result, there has recently been a political pushback on the use of EIAs with the system now being subjected to review on grounds of “red tape”. A fuller discussion of the EIA system in the UK is included in Annex Two.

The European Union has followed a similar path since the European Charter of Fundamental Rights came into force in 2009. The European Commission already had an elaborate system of impact assessment but in 2011 adopted guidelines for integrating fundamental rights into this process that apply to all “internal and external actions” of the EU (EC 2011, p. 5). These require “impact assessments to identify fundamental rights liable to be affected, the degree of

interference with the right in question, and the necessity and proportionality of the interference in terms of policy options and objectives” (EC 2011, p. 6). EU policy makers are required to show a range of policy options have been considered, favouring those which are least intrusive or have the highest positive impact (EC 2011, p.20). The EU’s “Better Regulation” initiative launched in May 2015 reinforced this new policy. In May 2015, the EC Directorate-General for Trade also issued new guidelines for analyzing the human rights impacts of trade-related policy initiatives, but these largely rely on the existing system of “sustainability impact assessment” (EC 2015).

Although it is too early to evaluate these EU initiatives, it is important to note they are based on the European Charter that covers a more limited range of largely civil and political rights. The policy also uses a “necessity and proportionality” test that is highly legalistic and will be difficult to apply. It also relies on a “checklist” approach that risks the same bureaucratization and lack of rigor seen above in the use of EIA by public authorities in the UK.

National human rights institutions, which are independent human rights monitoring and complaints bodies appointed by the state, could also play an important role in promoting or conducting HRIA in both the public and private sector, although relatively few seem to be making use of the methodology. The Human Rights Commission of Thailand, for instance, conducted one of the first *ex ante* HRIsAs of a trade agreement, although it did not follow a standard HRIA methodology (Harrison 2011, p.168). The New Zealand Human Rights Commission, on the other hand, conducted a comprehensive *ex post* human rights assessment of the Christchurch earthquake reconstruction that shared many features of a HRIA (HRCNZ 2013).

The Danish Institute for Human Rights has been a leader in developing human rights compliance tools for the private sector and published a new HRIA tool for business in 2016 (DIHR 2016). The UK’s Equality and Human Rights Commission has published a guidance tool for local authorities on integrating EIA into policy-making and review (EHRC 2010). The Scottish Human Rights

Commission has produced a web-based *“Ten Good Practice Building Blocks for Assessing Impact on Equality and Human Rights”* and has been running pilot assessments with a number of local councils (SHRC 2014). The separate Scottish Children and Young People’s Commissioner developed probably the first Child Rights Impact Assessment model nearly a decade ago (Paton & Munro 2006), which has been made a legal requirement in Scotland since June 2015.

#### **IV. HRIA and human rights due diligence by the United Nations**

Given this proliferation of different forms of HRIA by different actors, it seems surprising therefore that the United Nations system has been slow to apply HRIA or the broader concept of human rights due diligence in its work. This is all the more striking given that HRIA derives from the international human rights framework developed by the UN, and the UN has been at the forefront of advocacy for others (governments, business and international financial institutions) to apply human rights safeguards and due diligence. The United Nations has generally not been subjected to the same scrutiny for the human rights impact of its actions as other actors like the World Bank<sup>1</sup>, and often hides behind its commitment to human rights “mainstreaming” or “human rights based approaches” as an adequate response. But with growing expectations of accountability, that environment is beginning to change: as Aust puts it, international organisations “are no longer seen as a self-evident force for good whose actions escape legal scrutiny” (Aust 2015, p. 72).

Interestingly, one of the first ever references to HRIA was made in a report by the UN Secretary-General on the Right to Development as far back as 1979, which recommended that United Nations agencies prepare *“a ‘human rights impact statement’, which might be similar in concept to an environmental impact statement, ... prior to the commencement of specific development projects or in connexion with the preparation of an overall development plan or programme”* (cited by MacNaughton 2015, p. 64). There was no echo of this idea for more

---

<sup>1</sup> For the purposes of this study, I am treating the World Bank Group as distinct: although it has the status of a UN specialized agency, it maintains its independence.

than a decade until it was picked up in 1990 by the Committee on Economic, Social and Cultural Rights (which oversees and interprets the Convention on Economic, Social and Cultural Rights) in its General Comment No. 2 on “international technical assistance measures”. The Committee observed, “many activities undertaken in the name of ‘development’ have subsequently been recognized as ill-conceived and even counterproductive in human rights terms,” and encouraged UN agencies to adopt a practice of “human rights impact statements” (CESCR 2002, p. 2).

This was reinforced at the 1993 World Conference on Human Rights in Vienna, which recommended United Nations bodies “assess the impact of their strategies and policies on the enjoyment of all human rights” and called on “regional organizations and prominent international and regional finance and development institutions to assess also the impact of their policies and programmes on the enjoyment of human rights” (United Nations 1993, Section II, paras 1-2). What is noteworthy is that these very first applications of the idea of HRIA were directed to UN and international development agencies, rather than to governments or business by whom the approach is now more commonly applied.

Since that time, a large number of UN human rights mechanisms have promoted HRIA, but they have tended to look outwards rather than inwards, advocating its use by state and more recently non-state actors like business. In 2003, the Committee on the Rights of the Child (which oversees the Convention on the Rights of the Child) also advocated a similar concept of “child impact assessment” or “child impact evaluation” by governments to predict “the impact of any proposed law, policy or budgetary allocation which affects children and the enjoyment of their rights” (CRC 2003, p. 11). The Committee extended this recommendation in 2013 to encourage governments to introduce the practice of child rights impact assessments into their regulation of the business sector (CRC 2013, p. 21). In their review of various states’ implementation of the Conventions, the Committee on Economic, Social and Cultural Rights and Committee on the Rights of the Child have regularly recommended to states they undertake HRIA or child rights impact assessments of various domestic policy or



budget measures, or of their trade agreements, development assistance and development financing programs with other countries.

During the same period, various UN Special Rapporteurs (independent experts appointed by the Human Rights Council to work on various thematic issues) have applied or advocated for HRIA in relation to their specific mandates, and these ideas have in turn cross-fertilized with the treaty body comments above. The most formative work was by the Special Rapporteur for health, Paul Hunt, who developed a methodology for a human rights-based approach to health impact assessments (Hunt & MacNaughton 2006). This was followed by the Special Rapporteur on the right to food, Olivier de Schutter, who put forward a set of *Guiding Principles on Human Rights Impact Assessments of Trade and Investment Agreements* which were seen to encourage land-grabbing and undermine agricultural livelihoods and food security, as well as impact in other areas such as access to medicines (De Schutter 2011).

The greatest impetus was given to HRIA however by the Special Representative of the Secretary-General on business and human rights, John Ruggie, who over several years led the broad-based consultative process that culminated in the adoption of the *UN Guiding Principles on Business and Human Rights* (United Nations 2011). Ruggie's initial mandate included developing materials and methodologies for HRIA and this was the subject of one of his first reports (Ruggie 2007). Ruggie later moved away from explicitly advocating business conduct HRIAs, towards the broader concept of "human rights due diligence", by which companies should assess the human rights impacts of their activities (Ruggie 2008, p. 17). But application of the Guiding Principles has led to the proliferation of HRIAs being conducted in the corporate field described above.

HRIA has also been advocated by other UN Special Rapporteurs in their respective fields, for instance the Special Rapporteurs on education and water and sanitation (impact of privatization), the Special Rapporteur on housing (forced evictions and tenure security), the Special Rapporteur on toxic wastes (extractive industries) and most recently, the Special Rapporteur on unilateral coercive measures (impact of sanctions regimes). In December 2015, the Special

Rapporteur on foreign debt concluded a mission to Greece calling on the Greek authorities and European creditors to undertake a comprehensive HRIA of the adjustment programme.

In the case of unilateral coercive measures, a special procedure created by the Human Rights Council has an almost explicit HRIA mandate. A thematic study by OHCHR in 2012 suggested that unilateral coercive measures must be subjected to appropriate human rights safeguards, including human rights impact assessments (OHCHR 2012). In November 2013, the Human Rights Council tasked its Advisory Group with preparing a study containing recommendations for a mechanism to “assess the negative impact of unilateral coercive measures on the enjoyment of human rights” (HRC Resolution 24/24). This subsequently led to the establishment of a new Special Rapporteur on human rights unilateral coercive measures in November 2014 (HRC Resolution 27/21). In his first reports, the Special Rapporteur has indicated he will work on draft guidelines on ways and means to prevent, minimize and redress negative impacts. Impact assessment of unilateral coercive measures is highly vexed given the politicized nature of the debate, its extra-territorial dimension and challenges of causality.

Flowing from this normative work, several UN agencies have developed their own HRIA-related tools in their own areas of specialization that they have promoted in their advocacy with both states and business. The most prominent of these are the *Children’s Rights and Business Tools* developed by UNICEF, which are aimed at companies and corporate social responsibility users and include a guide for integrating children’s rights into impact assessments (UNICEF 2013). This tool is more of a “compliance checklist” than an impact assessment methodology and draws like others on the models developed by the Danish Institute for Human Rights. As noted above, UNICEF is now taking a sectoral approach and developing initiatives in specific industries that pose higher risks for children such as extractives, tourism, ICT, food and beverage and consumer goods.

Other examples are the *Right to Food Assessment* guide produced by the Food

and Agriculture Organisation, which is not a HRIA methodology as such but sets out a rights-based approach to food security (FAO 2009), and a handbook for assessing the impact of evictions published by UN Habitat and the UN Human Rights Office (OHCHR) which includes both preventive (*ex ante*) and remedial (*ex post*) assessment methods (UN Habitat & OHCHR 2014).

There are so far only a few examples of United Nations agencies actually conducting HRIAs themselves. UNICEF piloted an *ex ante* assessment of the impact electricity privatization would have on children in Bosnia Herzegovina (UNICEF 2007). This comprehensive study adapted the methodology used for Poverty and Social Impact Assessment by the World Bank, using mixed research methods but with a child rights lens and stronger component of child participation through interviews and focus groups. It mapped a number of ways in which increased electricity prices would impact public service providers (schools, children's homes and health services) and place stress on household income and affect children's quality of life, education opportunities and health (through burning of wood fuel); provided a monitoring framework of indicators; and suggested mitigating measures such as reduced tariffs for certain public institutions and vulnerable groups (UNICEF 2007, pp. 70-71).

The UN Human Rights Office (OHCHR) has concentrated its work in the trade policy domain, convening roundtables of practitioners to share practice and lessons learned (OHCHR & FES 2014). In 2015, OHCHR and the United Nations Economic Commission for Africa (UNECA) commissioned a scoping study using a HRIA methodology of the Continental Free Trade Agreement proposed by the African Union (Gathli 2016). The study was informed by a series of multi-stakeholder consultations to identify areas of risk and recommendations for safeguards to ensure monitoring, remedies and social protection. OHCHR, UNDP and WHO previously published HRIA of the PACER-plus free trade agreement for the Pacific region (UNDP et al 2014), although this is largely an advocacy report with case studies than a comprehensive impact assessment. In 2012, OHCHR's country office in Cambodia prepared an assessment of the human rights impacts of evictions and resettlement in Cambodia, although this followed a more

traditional human rights investigation rather than HRIA methodology (OHCHR 2012).

In recent years there have also been two important new policy developments within the United Nations system that make the use of HRIA even more urgent and relevant. These mirror the broader trends in development, corporate social responsibility and governance highlighted in Section Tne. The first of these is the United Nations' growing embrace of the concept of human rights due diligence in at least some high-risk spheres of activity. The second is new thinking around the broader sustainable development agenda that has come to integrate human rights into the social, economic and environmental dimensions of development. The third is the rising concern with aid effectiveness and the demands from donors for new approaches to evaluate and measure results and impact.

An important dimension of human rights due diligence has arisen for the United Nations in the context of peacekeeping. This came to the fore in the context of operations in the Democratic Republic of Congo (DRC), where the UN force MONUC has a robust mandate from the Security Council to conduct "targeted, offensive operations" against rebel groups, "either unilaterally or jointly" with the DRC armed forces (Aust 2015, p. 62). At the same time, MONUC was mandated to protect civilians and uphold international human rights and humanitarian law, which raised serious questions about the United Nations' possible complicity in serious violations committed by the DRC armed forces. In 2009, this dilemma led initially to a "conditionality policy" in which UN support to DRC armed forces was "strictly conditioned" on their compliance with international humanitarian, human rights and refugee law (Aust 2015, p. 64), but this was subsequently reframed and broadened as a "human rights due diligence policy" applicable to all United Nations support to non-United Nations security forces (United Nations 2013).

The core principles of the policy follow the corporate due diligence logic, setting a precautionary principle that *"United Nations support cannot be provided where there are substantial grounds for believing that there is a real risk of the receiving*

*entities committing grave violations of international humanitarian law, human rights or refugee law and where the relevant authorities fail to take the necessary corrective or mitigating measures”* (United Nations 2013, p. 1). The policy requires “an assessment of the potential risks and benefits involved in providing support”, including whether providing or withholding support will affect the ability of the United Nations to influence the recipient (United Nations 2013, p. 5).

This new policy is still in its early phase of implementation, and its scope is currently limited to situations that meet a very high threshold involving a risk of war crimes, crimes against humanity or other gross violations (Aust 2015, p. 65). But its potential for application is much broader: for instance, UN support to police projects in countries where there is endemic use of torture, or UN support to drug control and counter-narcotics programmes which involve crop destruction and hardline law enforcement measures.

Due diligence approaches should also be reinforced in the context of the new Human Rights Up Front policy adopted by Secretary-General Ban Ki-Moon. Although approaches to applying Human Rights Up Front are still evolving, it should provide an imperative to examine the human rights impact of UN programming in countries with a high risk of grave human rights violations. For instance, one could contemplate a HRIA of UN development and humanitarian programming in a context like DPRK or in a setting like Rakhine State of Myanmar where UN programs risk reinforcing entrenched discrimination or exclusion of the Rohingya community.

The United Nations has also been under increasing pressure in the broader development sphere to strengthen its environmental and social safeguards in which practice has lagged more than a decade behind the World Bank and other lenders. The World Bank has implemented a system of Poverty and Social Impact Assessments since the early 2000s, but these lack the participatory dimension of HRIA (Felner 2013, p. 13). The World Bank has environmental and social safeguards, reviewed in 2016, but these avoid human rights terminology with the exception of indigenous peoples (Alston 2015, p.10). The Performance

Standards developed by the International Finance Corporation for the financing of private sector projects have important human rights implications, particularly in relation to resettlement and indigenous peoples, and have in turn influenced the policies of other lending institutions, for instance through the Equator Principles.

In 2011, in the run-up to the Rio+20 UN Conference on Sustainable Development, the UN Secretary-General commissioned a High Level Panel on Global Sustainability. One of its findings was the need to internalize and strengthen environmental, social and economic sustainability practices within the UN system itself. This led to the development of a first ever Framework for Advancing Environmental and Social Sustainability in the United Nations System (United Nations 2012) that included a “system wide commitment to integrate simultaneous economic, environmental and social impact assessments in major policy and decision making processes” (United Nations 2012, p. 7).

An inter-agency process began to take stock of the existing frameworks in place and to develop a common UN system approach to environmental and social safeguards. But reading between the lines of the published documentation, it is clear this review found the application of such measures to be “uneven” (United Nations 2012, p. 10) and it proved impossible to reconcile the different approaches of different agencies: some argued the UN should lead the way and set a precedent for addressing social issues such as human rights, others resisted the imposition of such additional programming constraints and “transactional costs” (United Nations 2012, p. 11). The result was to “balance accountability and flexibility” (United Nations 2012, p. 19) and leave individual agencies to choose their own implementation path (which in UN-speak means a lowest common denominator).

Nevertheless, a number of new or updated safeguards frameworks have emerged, most notably the new Social and Environmental Standards adopted by UNDP in 2014 which came into force on 1 January 2015 (UNDP 2014). In many respects, the new UNDP policy mirrors the safeguards policies and performance standards of the World Bank and IFC. It identifies many of the same areas of

project level risk, in particular relating to forced displacement and resettlement, indigenous peoples and workers' rights. It provides for a screening and risk assessment procedure for all programmes and projects, which can in turn trigger more comprehensive environmental and social impact assessments, mitigation and management plans (UNDP 2015). It also provides for the establishment of "stakeholder response" (complaints) mechanisms at project level, country level with an international "compliance unit" to perform an independent review function (UNDP 2014, pp. 55). UNDP has chosen an integrated model, which is embedded within its broader risk management and quality assurances processes.

What is interesting is the degree to which the new UNDP safeguards go further than the IFC and similar standards in integrating human rights. First, UNDP makes human rights the first "overarching principle" of the policy and defines (albeit in a footnote) "social and environmental" as "including the breadth of issues in the standards, including the cross-cutting principles of human rights" (UNDP 2014, p.6). Second, the UNDP policy covers "upstream" activities such as policy advice not just the "downstream" impact of projects (UNDP 2014, p. 48). Third, several of the specific project-level standards also exceed those of the IFC, for instance a more expansive application of FPIC of indigenous peoples (UNDP 2014, p. 36), and a more rights-based framing of displacement and resettlement issues (UNDP 2014, pp. 30-35).

It is too early to evaluate the new UNDP policy in terms of implementation and impact, but from a human rights perspective, two major challenges or weaknesses are apparent. Firstly, the policy rightly emphasizes the importance of monitoring risks and impacts identified in the assessment process throughout the project cycle. But the policy explicitly asserts, "UNDP does not have a monitoring role with respect to human rights" (UNDP 2014, p. 9). How then will UNDP ensure effective monitoring of the human rights risks and impacts it has identified? Secondly, when it comes to human rights, the screening procedure essentially looks at whether a human rights-based approach has been used in the project design (UNDP 2015, p. 36). But as much literature in this field has shown, "human rights-based approaches" remain a fuzzy standard and vary

enormously in quality, rigor and integrity, and there is a need to drill much further to achieve meaningful human rights due diligence.

Several other safeguards frameworks have emerged in the UN environmental world, particularly for climate change-related programmes like the Green Climate Fund and UN REDD+ (Reducing Emissions from Deforestation and Forest Degradation). These variously require recipients to have in place frameworks for environmental and social impact assessment, stakeholder consultations and grievance and redress mechanisms, but are inconsistent in their approach (Carbon Market Watch 2015, p. 13). This is in turn leading to a scramble by different UN agencies to put such policies in place in order to be eligible for funding. The UN Food and Agriculture Organisation and International Fund for Agricultural Development, for instance, published new environmental and social safeguards in recent years (IFAD 2014, FAO 2015) that include much less normative rights content and lack any complaints mechanism. UNICEF is also reportedly in the process of developing its own framework. In the absence of the common UN system approach recommended above, this risks a further lack of coherence.

These are examples of the way United Nations and donor policy are inter-twined in new forms of global governance. Normative standard setting in the United Nations – for instance on sustainable development or human rights – influences the policies and approaches of donor countries; donor policies in turn shape the practice of United Nations agencies, particularly when they are made requirements for funding eligibility. This dynamic is reinforced by the increasing preoccupation of donors with development impact and aid effectiveness, reflected in the rise of results-based management with its emphasis on measuring impact, manifested even more extremely in new donor approaches such as “impact investing” or “evidence based” and “value for money” programming. Eyben problematizes these as “technologies of power” that reinforce “top-down” approaches to development and “upward accountability” to donors (Eyben 2013, p. 7). For Merry they are an extension of the “audit culture” theorized by Michael Power that represents a new form of governmentality in which the subjects of regulation are required to manage and



monitor themselves (Merry 2011, p. S83).

These trends present both opportunities and challenges for the use of HRIA. On one hand, as Landman argues, HRIA can be a tool to measure positive impacts as well as anticipating negative ones (Landman 2006, p. 127). At the same time, there can be a tension between “results-based” evaluation frameworks with their demands for quantitative and positivist forms of evidence, and “rights-based” approaches like HRIA that place emphasis on process and qualitative analysis (ICHRP 2012, p. 4). A methodology predicated on participation and empowerment risks becoming another technocratic form of audit and compliance. There is also a danger that relying on tools like impact assessment could undermine the traditional forms of obligation and accountability that underpin human rights law (Merry 2011, p. S88).

## **VI. Conclusions**

As both an impact assessment methodology and advocacy technique, HRIA is still in its infancy. But at this formative stage of its development, I believe there are a number of roles the United Nations could play in nurturing and consolidating good practice. The United Nations has a number of comparative advantages in this regard: it is the custodian of international human rights standards and should play a leadership role in their application by the wider development community; its different agencies and mandates reflect the spectrum of specialisations (from gender to child rights to environment) required for the inter-disciplinary approach of HRIA; and it is well placed to play a “convening” role in bringing together the different stakeholders (government, business, civil society, communities) who should be engaged in a HRIA process.

As described above, the United Nations has gone a long way in developing the normative basis for HRIA, and with its new human rights due diligence policy and sustainable development frameworks is beginning to apply these to its own work. The new generation of environmental and social safeguards being developed by UNDP and other agencies present a significant opportunity to integrate HRIA into the project cycle and make broader human rights “mainstreaming” or “rights based approaches” more robust. Although coherence

appears to be elusive at this stage, with different agencies developing different frameworks and approaches, a realistic goal would be to frame a common United Nations “performance standard” on human rights that could be applied across the system.

Leadership by the United Nations in this regard could in turn promote good practice by others, including governments in developing countries, donors and even the corporate world. Agencies like UNDP play an important role in capacity-building and policy advice, for instance in the formulation of environmental and social assessment laws and regulations, and in some cases even support impact assessments (UNDP 2014, p. 49). This provides an opportunity to promote and build capacity in government for HRIA or the integration of human rights into other forms of impact assessment. UN agencies could also strengthen the capacity of other local partners, such as national human rights institutions and civil society to conduct HRIA, both of public policies and corporate activities. As shown in the examples above from New Zealand, the UK and Thailand, national human rights institutions are particularly well suited to use HRIA given their independent monitoring role.

Further, although practice is limited so far, United Nations agencies could play a strategic and catalytic role in conducting HRIAs themselves either at the country level or on broader policy and sectoral issues. As UNICEF is showing in the child rights sphere, the United Nations can play an independent convening role for a new form of multi-stakeholder HRIA that brings together government, business and civil society in one collaborative process, facilitates participation and dialogue, and ensures quality and standards. This is already proving relevant in relation to trade and investment policies. The United Nations also has the capacity and inter-disciplinary skills needed for a comprehensive and rigorous HRIA which civil society actors on their own struggle to provide.

Finally, the United Nations could serve as a repository for HRIA practice and support to practitioners. As Harrison writes, “the HRIA landscape is littered with guidance and toolkits. In fact there are almost as many toolkits as there are actual HRIAs” (Harrison 2011, p.181). Some academics and civil society groups

have advocated that an independent body like the United Nations could play a “monitoring” role of the quality of HRIAs or have a standing capacity to conduct them (Harrison 2011, p. 182, Columbia Center et al 2014, p. 14). This is unrealistic, but it would be a short order for the United Nations to develop and host an accessible web-based portal of HRIA tools and practice. Currently a few of these have been created in the academic and NGO world, but the major one hosted by Aim for Human Rights in the Netherlands ceased to exist even during the life of this project when the organization closed for financial reasons.

In conclusion, HRIA has a lot to offer the United Nations and the United Nations could do much more to advance HRIA. HRIA has evolved out of a number of converging trends that are as relevant to the United Nations as to public authorities or the private sector. These include a more holistic understanding of sustainable development, a concern for human rights due diligence in project activities, and an interest in aid effectiveness and impact. While the United Nations has shaped the normative development of HRIA, actual practice has been led by civil society and business, and the United Nations has been slower than other development institutions to apply HRIA and human rights due diligence in its own work. That situation is beginning to change with the adoption of new due diligence and sustainability frameworks. Applied well, these can reinforce existing approaches to human rights mainstreaming, be a tool for prevention, and serve as a platform for participation and empowerment. HRIA can help the United Nations, like business and other development actors, not only “do no harm” but become better at doing good.

### **Recommendations for OHCHR**

Following are some specific recommendations for how OHCHR could build internal capacity for HRIA both at headquarters and in the field, apply and/or promote HRIA through both its monitoring and technical cooperation mandates, and promote the use of HRIA within the broader UN system as an extension of current HRBA and due diligence policies:

HRIA tools: There is already an abundance of HRIA tools available and producing a definitive UN tool at this stage is probably superfluous. OHCHR could however develop an accessible web-based portal of HRIA tools and practice, including published HRIA studies, which would be more comprehensive and sustainable than previously created by NGO or academic institutions.

Promote awareness and interest in HRIA methodology: The potential for OHCHR and UN human rights mechanisms to use HRIA should be promoted at annual field presences, Treaty Body and Special Procedures meetings.

Specialist support and training: OHCHR already employs a few staff with specialist expertise in HRIA, but they are dispersed within different divisions. A specialist capacity for HRIA training and support should be retained within RRDD (possibly METS) and a network of staff practitioners trained and developed in RRDD, HRTD, SPD and FOTCD. A specialized training module should be developed in partnership with an experienced institution like the Danish Institute for Human Rights.

Build capacity of national institutions: Several national institutions have shown they are well placed to conduct HRIA, particularly of public policy, as well as to play a convening role among different stakeholders. HRIA should be promoted actively through the NI networks and a targeted HRIA training program developed for national institutions, for instance in partnership with UNDP or the Danish Institute.

Commission more pilot HRIAs: So far OHCHR's experience in conducting HRIAs has been relatively limited. OHCHR should commission a variety of different HRIAs covering different subjects and actors (eg private sector, public policies), using different methodologies (eg single issue, sector-wide) and partnerships (eg with other UN agencies or a national institution) and subject these to systematic evaluation to capture the lessons learned. Similarly, OHCHR should support Special Procedures country and thematic mandate-holders to conduct the HRIAs on a wider range of subjects and issues. Until now, OHCHR has tended to

undertake HRIA in the relatively broad and complex domain of trade policy, and it would be advisable to focus in areas where impacts can be more accurately identified and addressed (eg specific infrastructure projects or public policies).

Advocate for HRIA with Government and business actors: OHCHR should advocate for HRIA as part of its promotion of the Guiding Principles on Business and Human Rights and create fora for sharing methodology and experience among private sector practitioners at country level. With Governments, OHCHR could seek the integration of human rights into legal frameworks for social and environmental assessment and work with other UN agencies to build the capacity of relevant state institutions to undertake HRIA.

Advocate for HRIA within the UN system: Through the Human Rights Theme Group of UNDG, OHCHR should press for the adoption of a common human rights screening and assessment procedure as a reinforcement of the Common Understanding on Human Rights Based Approaches and evolving UN sustainability frameworks. This could be the basis for a system-wide human rights “performance standard” and external complaints and review mechanism, as practiced by the IFC and UNDP. HRIA could also be recommended in the context of the Human Rights Up Front Policy, for instance as a form of due diligence for UN development and humanitarian programs in situations where there is a risk of grave human rights violations.

Integrate HRIA into OHCHR monitoring and evaluation frameworks: Given the results framework in the Office Management Plan is predicated on positive human rights impact, OHCHR could experiment with the application of HRIA methods against some selected results both for the purposes of evaluation and reporting to donors.

## **Annex One**

### **Human Rights Impact Assessment of the Marlin Mine in Guatemala**

The Marlin HRIA was commissioned by Canadian mining company Goldcorp in 2008 in response to rising local opposition to the mine, international criticism of the project (including the Compliance Advisor Ombudsman (CAO) of the International Finance Corporation which had underwritten the project) and shareholder pressure. The mine has been operational since 2005 with a projected lifespan of 10 years, so the HRIA represents a *mid-term* evaluation. It was undertaken by On Common Ground Consultants (OCG), a Canadian firm specializing in corporate social responsibility and sustainable development.

#### The Marlin mine

The Marlin mine is an open-pit and underground gold and silver mine in the western highlands of Guatemala. The Marlin mine is 100 per cent owned by a Guatemalan-registered company, Montana Explorada de Guatemala (Montana). A separate company named Peridot was also created by Montana to acquire and hold the land rights associated with the project. After a series of acquisitions and mergers, the operation came under the control of Goldcorp in 2006.

Montana undertook an original ESIA in 2003 (Montana 2003). The company also obtained a loan of US\$45 million from the IFC and, in order to comply with IFC policies, prepared an Indigenous Peoples Development Plan (IPDP), Land Acquisition Procedures and a Public Consultation and Disclosure Plan.

#### Social and economic context

The impactees of the Marlin project are the communities living around the mine in the municipalities of San Miguel Ixtahuacán and Sipacapa. According to the ESIA, only 3 towns comprising 1,408 residents would be directly affected by the mine (Montana 2003, p.12), although this was expanded to 12 villages comprising 4,086 persons in the IPDP (Montana 2004, p.3). The narrow

definition of impactees in the ESIA would later prove to be one of the major areas of contestation surrounding the project.

95 per cent of the population of San Miguel Ixtahuacán is indigenous Maya Mam. The population of Sipacapa, while also Mayan, represents a distinct indigenous and linguistic group. The failure to identify these cultural, linguistic or socio-economic differences was a further, fateful omission in the original ESIA (CAO 2005, p.3; OCG 2010, p.44).

According to the HRIA, 97 per cent of San Miguel's population was living in poverty with 81 per cent in extreme poverty (OCG 2010, p.32). The main economic activity is subsistence farming, with seasonal labour migration and remittances from migrant workers abroad (OCG 2010, p.30).

The Marlin mine has been an important source of local employment, vocational training and national (not local) procurement (Zarsky & Stanley 2013). Given the royalties and tax revenues it provides to the government, its indirect impacts can be considered at the national level. The company has also invested in a social development programme, although this has been poorly documented and accounted for (OCG 2010, pp.144-151).

### Political and regulatory context

Guatemala has been a democracy since 1986, but was deeply affected by a 36-year internal armed conflict until peace accords in 1996, which included far-reaching provisions for indigenous people. The conflict left a deep legacy of criminal violence and impunity.

Significantly for the purposes of the HRIA, Guatemala has ratified most international human rights treaties, including significantly ILO Convention 169, which imposes obligations for consultation in relation to land acquisition and resource projects affecting indigenous people. ILO 169 has not however been incorporated into national laws governing the resources sector.

The ESIA for the Marlin mine was conducted in accordance with Guatemala's 1997 mining law, which provides no guidance to companies on what the ESIA must contain and gives the environmental authorities only 30 days to review the study, after which approval will be automatically granted (Fulmer et al 2008, p.98). The HRIA also observed the lack of government capacity to enforce environmental standards (OCG 2010, p.62).

While municipal representatives signed statements in support of the project (CAO 2005, p.29), the mine quickly generated local opposition, protests and violence (Coumans 2012, Zarsky & Stanley 2013). As the first mining project approved under the 1997 law, Marlin became a proxy for broader national debates about foreign investment, trade agreements and the rights of indigenous people (CAO 2005, p.6; OCG 2010, pp.13,42).

#### The origins of the HRIA

Against this backdrop, the Marlin mine quickly became the focus of advocacy by national and international NGO networks with international compliance mechanisms. In March 2005, local communities in Sipacapa filed a complaint with the CAO raising concerns about water access and pollution and the consultation process. Although the CAO did not suspend the loan, it made some damning observations on the original ESIA and consultation process (CAO 2005).

Similar complaints were made to other international oversight bodies, including the OECD, the ILO Committee of Experts on Convention 169, and the Inter-American Commission on Human Rights. The UN Special Rapporteur on indigenous people also issued two special reports on the mine (Anaya 2010 and 2011).

The initiative behind the Marlin HRIA needs to be seen in this context. In February 2008, a group of Canadian Socially Responsible Investment (SRI) firms invested in Goldcorp visited Guatemala and decided to file a shareholder



resolution requesting the company to commission an independent HRIA. Following negotiations, Goldcorp agreed to the proposal on which basis the SRI shareholders agreed to withdraw the resolution (Coumans 2012).

A memorandum of understanding was agreed providing the terms of reference and establishing a steering committee for the HRIA. Concerns were expressed that there was no representative of the affected local community on the steering committee. In the face of community opposition, one of the SRI firms subsequently withdrew its participation in the HRIA.

Coumans, who is affiliated with the NGO MiningWatch Canada, argues there was no prior consultation by the SRI firms with affected communities and the objectives of the HRIA ran counter to community demands for a cessation of the operation. The HRIA therefore served to divert criticism, sew further divisions in the community, and delay actions that should have been taken immediately (Coumans 2012, p.51-54).

Fulmer et al also use the Marlin case to show the dangers of global governance regimes of corporate responsibility undermining local democratic processes and state responsibility (Fulmer et al 2008, p.97). This concern echoes the critiques of other corporate governance regimes, such as industry certification and verified legality schemes (Lecture and readings, week 3).

### Methodological issues

The Marlin HRIA process involved a major time and financial investment that is unusual for impact assessment processes. The study involved a mixed method and took 18 months to complete, with an extensive review of company documentation and secondary literature and the assessment team spending more than 180 days in Guatemala including over 80 days in the mine's locale (OCG 2010, p.10-14). Nevertheless, the HRIA report reveals a number of methodological problems and constraints.

Although the assessors conducted 183 interviews and 10 focus groups comprising 95 people, a closer examination of the interviewees' profiles raises questions about the representativeness of the sampling. In the first phase only 2 community leaders were interviewed and one large meeting held with 75 people from Sipacapa. In the second phase only 3 interviews were with community representatives, 6 with community members and 2 with relocated people. The focus group discussions were with beneficiaries of Montana's social programmes (OCG 2010, Appendix C). Community opposition in fact led On Common Ground to abandon its plans for a participatory approach and adopt a more limited research methodology (OCG 2010, p.9).

On Common Ground framed its assessment questions using the same Danish HRCA tool used by INEF above (OCG 2010, p.16). But these benchmarks were developed primarily for internal compliance reporting rather than external assessment, and so lead to a company-centered bias. Many of the interview questions are framed in terms of "Did the company...?" rather than the impacts of the mine itself (OCG 2010, Appendix B). This is exacerbated by the weakness of documentation by Montana of its consultation process, land acquisition and social investment programmes, and the absence of any baseline studies (OCG 2010, pp.9,18). Although the political context ultimately did not permit, a better approach would have been to develop an evaluative rubric with community participation, which could also have laid the basis for an ongoing monitoring framework.

A broader challenge for HRIAs is that of causality and attribution. Their theory of change is that projects impact positively and negatively on a pre-existing human rights environment (NomoGaia 2009, p.10). But in cases where that human rights environment was already negative, the cumulative impacts of the project – and responsibilities of the company – may be difficult to determine. NomoGaia also warns of the trend for communities (and outside activists) to present normal operational and environmental impacts as human rights violations, reflecting again the tensions between advocacy and assessment (NomoGaia 2009, p.5; Kemp & Vanclay 2013, p.93).

Notwithstanding these problems and critiques, the HRIA methodology presents a number of other important advantages over regular SIA methodologies. As a result, the Marlin HRIA captures a number of important dimensions that were conspicuously absent from the original flawed ESIA.

First, it helps address the common problem of social impacts being treated separately and secondarily to environmental concerns. The Marlin HRIA's dismissal of concerns about water management and contamination remains contentious however. On the basis of independent technical reviews it concluded, like the CAO, that the mine did not impact on water availability and that water quality monitoring met international standards (OCG 2010, pp.69-73). A number of NGO-commissioned expert studies, before and after the HRIA, have continued to report high cyanide levels and related health problems, the discharge of contaminated water from tailings ponds which have reached their capacity, the threat of extreme weather events, and longer-term risks after the mine's closure (Goodland 2012, Zarsky & Stanley 2013). The Marlin ESIA also did not adequately address downstream users or provide sufficient baseline information (CAO 2005, p.23).

Second, a HRIA lays greater emphasis on consultation with communities. In the Marlin case, the CAO had already found the original consultation process to be deficient (CAO 2005, p.1-2). The Marlin HRIA uses ILO Convention 169 as the normative basis for its findings, but notably does not reference the UN Declaration on the Rights of Indigenous People and the FPIC principle that has not been endorsed in Goldcorp's policies. However, as noted above, the Marlin HRIA suffered from its own political constraints in applying participatory methods.

Third, HRIAs by their nature address governance issues and state responsibilities more squarely. The Marlin HRIA, for instance, highlights the lack of any Government action in providing information or ensuring consultation with affected communities, as required by ILO Convention 169 (OCG 2010, p.50).

It hints at corruption by highlighting the institutional weakness of the municipalities in handling increased revenues (OCG 2010, p.137). It also looks at the conduct of state security forces in maintaining order around the project, not just private security guards (OCG 2010, pp.163-171). This however raises the question of corporate responsibility beyond its 'sphere of operations' to its 'sphere of influence', and it is dependent on the level of ratification of international human rights treaties by the state concerned.

Fourth, the HRIA methodology is more attuned to other issues of discrimination and vulnerability, particularly affecting indigenous people. An example of this is in the Marlin HRIA's treatment of land acquisition. According to the original ESIA and Land Acquisition Procedures, land was purchased from existing owners on a voluntary basis, most of who had possession rights rather than formal ownership (OCG 2010, p.115-6). According to the company no communal land was involved, and only 11 per cent of landowners had their principal residence on the property (Montana 2004, p.7). The CAO also found that "the land transactions appear to have been conducted successfully" (CAO 2005, p.2).

By using a human rights lens, particularly indigenous people's rights, the Marlin HRIA raises a number of significant concerns with the land acquisition process. Land in the mining area had only been privately held since a short-lived land redistribution program in the 1950s and there was an underlying collective title. In some cases, elders held private title in order to preserve communal lands, or individual owners had usufruct (use and possession) rights only. Reportedly, the Sipacapa community has an even stronger collective approach to land ownership.

While the company conducted title searches with the municipal authorities, it did not conduct broader consultations within the community about individual land sales (OCG 2010, pp.129-30). Nor was any specific assessment made of any cultural or religious perspectives on the use or loss of land (p.131). The HRIA could have further clarified these issues by using a more participatory

methodology, perhaps even utilizing GIS, although recognizing the potential for conflict in this area.

The Marlin HRIA at least highlights some impacts on women, including disputation over women's inheritance rights in land acquisition deals and equality of employment opportunity in the mine workforce (OCG 2010, pp.92). But it does not pick up other gender concerns cited in NGO literature, such as increased prevalence of alcohol and related violence against women or a reported increase in prostitution (Goodland 2012, p.9). A more comprehensive gender impact assessment might also have shed light on further changes in women's productive, reproductive and community roles.

### Conclusion

The Marlin HRIA undertaken by On Common Ground provides an interesting case study of the opportunities and dilemmas of HRIA as a SIA methodology. HRIA's strong normative base, attention to context, framing of environmental rights and focus on discrimination add value to traditional SIA methods. But HRIAs can struggle with attribution and causality, carry an advocacy bias, and their engagement with community politics can be just as fraught. If framed and conducted in a participatory way, however, HRIA offers a powerful new tool to empower communities, deepen impact assessment and strengthen accountability for corporate and state actors.

## **Annex Two**

### **Equality Impact Assessment of Public Policy in the United Kingdom**

Most HRIAs focus on private sector activity, but in relation to the public sector, a further strand of impact assessment methodology has developed in the UK in the form of “equality impact assessment”. This procedure, required under different statutes, provides an interesting example of the kind of human rights screening procedure which could be applied within the United Nations.

Public authorities in the UK were first required to undertake equality impact assessments on disability and race under the Disability Discrimination Act, 1995 and amendments to the Race Relations (Amendment) Act, 2000. But in 2010, the UK adopted a comprehensive **Equality Act** that brought together more than 100 separate pieces of legislation covering different issues and groups. The Equality Act extended pre-existing coverage of race and disability to six other protected categories: age, gender reassignment, religion or belief, pregnancy and maternity, sexual orientation, and marriage and civil partnership. The Act also created a general “Public Sector Equality Duty” – essentially a due diligence requirement – that requires public authorities in the exercise of public functions to have “due regard” to the need to eliminate conduct prohibited by the Act and advance equality of opportunity.

Although the Act does not explicitly require this to take the form of “equality impact assessments” (EIAs), these have been promoted as a good practice by the UK’s Equality and Human Rights Commission and are widely used by many Government departments and local authorities in the UK. Interestingly, in the devolved systems in Scotland and Wales, specific duties have been added in the law to explicitly require EIAs. In Northern Ireland, where these issues are even more sensitive post-conflict, even more onerous duties have been placed on public authorities to report on equality issues. The Equality and Human Rights Commission has published a guidance tool for local authorities on integrating EIA into policy-making and review:

[http://www.equalityhumanrights.com/sites/default/files/documents/PSD/equality\\_impact\\_assessment\\_guidance\\_quick-start\\_guide.pdf](http://www.equalityhumanrights.com/sites/default/files/documents/PSD/equality_impact_assessment_guidance_quick-start_guide.pdf)

Scotland has gone even further in adding a Child Rights and Wellbeing Impact Assessment since June 2015. The Scottish Children and Young People's Commissioner has been promoting a Child Rights Impact Assessment model since 2006:

[http://www.cypcs.org.uk/uploaded\\_docs/children's%20rights%20impact%20assessment.pdf](http://www.cypcs.org.uk/uploaded_docs/children's%20rights%20impact%20assessment.pdf)

Of course, the quality of EIAs by public authorities varies considerably and is often degraded as a “tick-the-box” exercise. James Harrison and Mary-Ann Stephenson provide a critical review of some of the common challenges and failings of EIAs in, *'Human Rights, Equality and Public Spending'* (Harrison J & Stephenson M-A 2013). These include the lack of consultation, narrow scope, weak analysis of data and political selectivity of findings. But a comprehensive human rights and equality assessment of the impact of spending cuts on women and minorities by Coventry Women's Voices and the Centre for Human Rights Practice show the full potentiality of this tool:

[http://www2.warwick.ac.uk/fac/soc/law/research/centres/chrp/publications/unravelling\\_equality\\_full.pdf](http://www2.warwick.ac.uk/fac/soc/law/research/centres/chrp/publications/unravelling_equality_full.pdf)

The use of EIAs has been reinforced, however, by a growing number of court cases in which people have sought judicial review of Government decisions on the basis that the Public Sector Equality Duty has not been fulfilled. In these cases, the courts have given significant weight to the existence (or not) and quality of EIAs as evidence of compliance, and a number of decisions/policies have been successfully challenged on this basis. There are also some cases that have produced similar jurisprudence in the European Court of Human Rights. A very up-to-date analysis of the case law in this area is provided by McColgan (2015). A comprehensive database of all relevant UK court decisions on the human rights and equality impact of spending cuts has been compiled by the University of Warwick at

[http://www2.warwick.ac.uk/fac/soc/law/research/centres/chrp/projects/spe  
ndingcuts/resources/database/legal](http://www2.warwick.ac.uk/fac/soc/law/research/centres/chrp/projects/spe<br/>ndingcuts/resources/database/legal)

- . Civil society organisations are increasingly using this as an effective strategy to challenge the austerity policies and budget cuts imposed by the central Conservative Government. As a result, there has now been a political pushback by the Conservative Government on the scope of the Public Sector Equality Duty and the use of EIAs. In a speech to an industry group in November 2012, former Prime Minister Cameron provocatively said: *“We have smart people in Whitehall who consider equalities issues while they’re making the policy. ☒ We don’t need all this extra tick-box stuff. So I can tell you today we are calling time on Equality Impact Assessments. You no longer have to do them if these issues have been properly considered.”*
- . The Government launched an independent review on grounds of “red tape”, although surprisingly the panel found “broad support” for the principles behind the equality duty but problems in its implementation; it concluded it was too early to make a final judgment and recommended a further review after five years of experience with the legislation in 2016. Separately, the Government is also moving to withdraw from the European Convention on Human Rights, which could further close this course of judicial review.
- . The UK experience is a useful case study of the application of HRIA methodology to public policy; the risks of HRIA becoming a superficial or bureaucratic exercise; how national human rights institutions can use HRIAs or play a convening/capacity-building role for others to use them; and how the legal basis of human rights gives HRIA an additional edge over other forms of SIA and can be used as the basis for litigation strategies.



## **Bibliography**

Alston P 2015, *Report of the Special Rapporteur on extreme poverty and human rights*, A/70/274, United Nations.

Anaya J 2010 and 2011, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people*, A/HRC/15/37/Add.8 and A/HRC/18/35.Add.3, United Nations.

Aust HP 2015. 'The UN Human Rights Due Diligence Policy: An Effective Mechanism against Complicity of Peacekeeping Forces?', *Journal of Conflict & Security Law*, vol. 20, no. 1, pp. 61–73.

Bakker S, Van Den Berg M, Du Zenli D & Radstaake M 2009, 'Human Rights Impact Assessment in Practice: The Case of the Health Rights of Women Assessment Instrument (HeRWAI)', *Journal of Human Rights Practice*, vol. 1, no. 3, pp. 436-458.

Berne Declaration 2014, *Owning Seeds, Accessing Food: A Human Rights Impact Assessment of UPOV 1991 based on case studies in Kenya, Peru and the Philippines*, Berne Declaration, Zurich.

Berne Declaration, Canadian Council for International Co-operation & Misereor 2010, *Human Rights Impact Assessment for Trade and Investment Agreements. Report of the Expert Seminar, June 23-24, 2010*, Geneva, viewed 15 December, <[http://www2.ohchr.org/english/issues/food/docs/report\\_hria-seminar\\_2010.pdf](http://www2.ohchr.org/english/issues/food/docs/report_hria-seminar_2010.pdf)>

Blackburn J, Brocklesby MA, Crawford S & Holland J 2005, 'Operationalising the Rights Agenda: Participatory Rights Assessment in Peru and Malawi', *IDS Bulletin*, vol. 36, no. 1, pp. 91-99.

BMZ Federal Ministry for Economic Cooperation and Development 2013, *Guidelines on incorporating Human Rights Standards and Principles, including Gender, in Programme Proposals for Bilateral German Technical and Financial Cooperation*, viewed 15 December 2015, <[https://www.giz.de/expertise/downloads/Guidelines\\_on\\_incorporating\\_human\\_rights\\_standards\\_and\\_principles.pdf](https://www.giz.de/expertise/downloads/Guidelines_on_incorporating_human_rights_standards_and_principles.pdf)>

Business for Social Responsibility (BSR) 2013, *Conducting an Effective Human Rights Impact Assessment: Guidelines, Steps and Examples*, BSR, Paris.

CAO 2005, *Assessment of a complaint submitted to CAO in relation to the Marlin Mining Project in Guatemala*, 7 Sept 2005, International Finance Corporation.

Carbon Market Watch 2015, *Social and Environmental Accountability of Climate Finance Instruments: Policy Brief*, Carbon Market Watch, Brussels.

Coumans C 2012, 'Mining, human rights and the socially responsible investment industry: considering community opposition to shareholder resolutions and implications of collaboration', *Journal of Sustainable Finance and Investment*, vol. 2, no. 1, pp. 44-63.

Columbia Centre on Sustainable Investment (CCSI), Sciences Po Law School Clinic & Columbia Law School Human Rights Institute 2014, *Human Rights Impact Assessments of Large-Scale Foreign Investments: A Collaborative Reflection*, New York, viewed 15 December, <<http://ccsi.columbia.edu/files/2014/12/Human-Rights-Impact-Assessments-A-Collaborative-Reflection.pdf>>

Committee on Economic, Social and Cultural Rights (CESCR) 1990, *General Comment No. 2: International technical assistance measures (Art 22 of the Covenant)*, United Nations.

Committee on the Rights of the Child (CRC) 2003, *General Comment No. 5: General measures of implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44, para. 6)*, CRC/GC/2003/5, United Nations.

Committee on the Rights of the Child (CRC) 2013, *General Comment No. 16 on State obligations regarding the impact of the business sector on children's rights*, CRC/C/GC/16, United Nations.

Coumans C 2012, 'Mining, human rights and the socially responsible investment industry: considering community opposition to shareholder resolutions and implications of collaboration', *Journal of Sustainable Finance and Investment*, vol. 2, no. 1, pp. 44-63.

Danish Institute for Human Rights (DIHR) 2006, *Human Rights Compliance Assessment (HRCA) Quick Check*, DIHR, Copenhagen.

Danish Institute for Human Rights (DIHR) 2016, *Human rights impact assessment guidance and toolbox*, DIHR, Copenhagen, viewed 15 January 2017 at <http://www.humanrights.dk/business/tools/human-rights-impact-assessment-guidance-and-toolbox>

De Beco G 2009, 'Human Rights Impact Assessments', *Netherlands Quarterly of Human Rights*, vol. 27, no. 2, pp. 139-166.

De Schutter O 2011, *Report of the Special Rapporteur on the right to food: Guiding principles on human rights impact assessments of trade and investment agreements*, A/HRC/19/59/Add.5, United Nations.

Equality and Human Rights Commission (EHRC) 2010, *Equality Impact Assessment Quick Start Guide*, EHRC, Manchester.

Equality and Human Rights Commission (EHRC) 2013, *Guidance on human rights for commissioners of home care*, EHRC, Manchester.

Equitable Cambodia & Inclusive Development International 2013, *Bittersweet Harvest: A Human Rights Impact Assessment of the European Union's Everything but Arms Initiative in Cambodia*, Phnom Penh.

European Commission (EC) 2011, Operational Guidance on taking into account of Fundamental Rights in Commission Impact Assessments, Brussels, viewed 15 December 2015, <<http://www.statewatch.org/news/2011/may/eu-com-fra-assessment-sec-0567-11.pdf>>

European Commission (EC) 2015, *Guidelines on the analysis of human rights impacts in impact assessments for trade-related policy initiatives*, Brussels, viewed 15 December 2015, <[http://trade.ec.europa.eu/doclib/docs/2015/july/tradoc\\_153591.pdf](http://trade.ec.europa.eu/doclib/docs/2015/july/tradoc_153591.pdf)>

Eyben R 2013, *Uncovering the Politics of 'Evidence' and 'Results': A Framing Paper for Development Practitioners*, viewed 15 December 2015, <<http://bigpushforward.net/wp-content/uploads/2011/01/The-politics-of-evidence-11-April-20133.pdf>>

Felner E 2013, *Human Rights Impact Assessments: A Review of the Literature, Differences with other forms of Assessments and Relevance for Development*, World Bank, Washington.

Food and Agriculture Organisation of the United Nations (FAO) 2009, *Guide to Conducting a Right to Food Assessment*, FAO, Rome.

Food and Agriculture Organisation of the United Nations (FAO) 2015, *Environmental and Social Management Guidelines*, FAO, Rome.

Fulmer A, Godoy A & Neff P 2008, 'Indigenous Rights, Resistance and the Law: Lessons from a Guatemalan Mine', *Latin American Politics and Society*, vol. 50, no. 4, pp. 91-121.

Gaetz G & Franks DM 2013, 'Incorporating Human Rights into the Corporate Domain: Due Diligence, Impact Assessment and Integrated Risk Management, *Impact Appraisal and Assessment*, vol. 31, no. 2, pp. 97-106.

Gathli JT 2016, *Scoping Study: Designing the Continental Free Trade Area (CFTA): An African Human Rights Perspective*, Office of the High Commissioner for Human Rights, United Nations Economic Commission for Africa, Friedrich Ebert Stiftung, Geneva.

Goodland R 2012, *Guatemala's Marlin Gold Mine: Suggestions to rectify its most serious errors*, Business and Human Rights Resource Centre, viewed 3 Nov 2014, < <http://business-humanrights.org/en/guatemala's-marlin-gold-mine-suggestions-to-rectify-its-most-serious-errors-paper-on-suggestions-to-reduce-its-social-and-environmental-impact#c67739>>

Harrison J 2011, 'Human Rights Measurement: Reflections on Current Practice and the Future Potential of Human Rights Impact Assessment', *Journal of Human Rights Practice*, vol.3, no.2, pp. 162-187.

Harrison J 2013, 'Establishing a meaningful human rights due diligence process for corporations: learning from experience of human rights impact assessment', *Impact Assessment and Project Appraisal*, vol. 31, no. 2, pp. 107-117.

Harrison J & Stephenson M-A 2013, 'Human Rights, Equality and Public Spending' in Nolan A, O'Connell R & Harvey C 2013, *Human Rights and Public Finance: Budgets and the Promotion of Economic and Social Rights*, Hart Publishing, Oxford.

Hunt P & MacNaughton G 2006, *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, UNESCO, Paris.

House of Commons Library 2015, *The Public Sector Equality Duty and Equality Impact Assessments*, Briefing Paper no. 6591, London.

Human Rights Commission of New Zealand (HRCNZ) 2013, *Monitoring Human Rights in the Canterbury Earthquake Recovery*, HRCNZ, Auckland.

Institute for Human Rights and Business 2011, *The 'State of Play' of Human Rights Due Diligence: Anticipating the next five years*, London.

International Centre for Human Rights and Democratic Development (Rights & Democracy) 2011, *Getting it Right: Human Rights Impact Assessment Guide*, Montreal, viewed 15 December 2015, <<http://hria.equalit.ie/en/>>

International Council for Human Rights Policy (ICHRP) 2012, *No Perfect Measure: Rethinking Evaluation and Assessment of Human Rights Work: Report of a Workshop*, ICHRP, Geneva.

International Council on Mining and Metals (ICMM) 2012, *Integrating human rights due diligence into corporate risk management practices*, ICMM, London.

International Finance Corporation (IFC), International Business Leaders Forum & UN Global Compact 2010, *Guide to Human Rights Impact Assessment and Management (HRIAM)*, World Bank, Washington.

International Fund for Agricultural Development (IFAD) 2014, *Managing Risks to Create Opportunities: IFAD's Social, Environmental and Climate Assessment Procedures*, IFAD, Rome.

IPIECA & Danish Institute for Human Rights (DIHR) 2013, *Integrating Human Rights into environmental, social and health impact assessments: A practical guide for the oil and gas industry*, IPIECA & DIHR, London.

Kemp D & Vanclay F 2013, 'Human rights and impact assessment: clarifying the connections in practice', *Impact Assessment and Project Appraisal*, vol.31, no.2, pp. 86-96.

Kuoni Travel Holding Ltd 2012, *Assessing Human Rights Impacts: Kenya Pilot Project Report*, Zurich.

Kuoni Travel Holding Ltd 2014, *Assessing Human Rights Impacts: India Project Report*, Zurich.

Lahiri-Dutt K & Ahmad N 2011, 'Considering gender in social impact assessment', *New Directions in Social Impact Assessment: Conceptual and Methodological Advances*, Edward Elgar, Cheltenham.

Landman T 2006, *Studying Human Rights*, Routledge, New York.

MacNaughton G 2015, 'Human Rights Impact Assessment: A Method for Healthy Policy Making', *Health and Human Rights Journal*, vol. 17, no. 1, pp. 63-75.

MacNaughton G & Hunt P 2011, 'A human rights-based approach to social impact assessment', *New Directions in Social Impact Assessment: Conceptual and Methodological Advances*, Edward Elgar, Cheltenham.

McColgan A 2015, 'Litigating the Public Sector Equality Duty: The Story So Far', *Oxford Journal of Legal Studies*, vol. 35, no.3, pp. 453-485.

Merry SE 2011, 'Measuring the World: Indicators, Human Rights, and Global Governance', *Current Anthropology*, vol. 52, no. S3, pp. S83-S95.

Montana Exploradora de Guatemala 2003, *Social and Environmental Impact Assessment Study: Marlin Mining Project*, viewed 3 Nov 2014, <<http://ifcext.ifc.org/ifcext/spiwebsite1.nsf/2ede8724e4cc8a0d852578a70062>

[e743/060a86a906546c1c852576c10080cc1f/\\$FILE/E&SIA%20Study%20Executive%20Summary.pdf](http://ifcext.ifc.org/ifcext/spiwebsite1.nsf/2ede8724e4cc8a0d852578a70062e743/060a86a906546c1c852576c10080cc1f/$FILE/E&SIA%20Study%20Executive%20Summary.pdf)>

Montana \_\_ 2004, *Indigenous Peoples Development Plan*, viewed 3 Nov 2014, <[http://ifcext.ifc.org/ifcext/spiwebsite1.nsf/2ede8724e4cc8a0d852578a70062e743/060a86a906546c1c852576c10080cc1f/\\$FILE/IPDP%2002-19-04.pdf](http://ifcext.ifc.org/ifcext/spiwebsite1.nsf/2ede8724e4cc8a0d852578a70062e743/060a86a906546c1c852576c10080cc1f/$FILE/IPDP%2002-19-04.pdf)>

Myanmar Centre for Responsible Business, Institute of Business and Human Rights & Danish Institute for Human Rights (DIHR) 2014, *Myanmar Oil and Gas Sector Wide Impact Assessment*, Yangon.

Myanmar Centre for Responsible Business, Institute of Business and Human Rights & Danish Institute for Human Rights (DIHR) 2015, *Myanmar Tourism Sector Wide Impact Assessment*, Yangon.

Nestlé & Danish Institute for Human Rights (DIHR) 2013, *Talking the Human Rights Walk: Nestlé's Experience Assessing Human Rights Impacts in its Business Activities*, Vevey.

NomoGaia 2009, *Human Rights Impact Assessment on the proposed Nuiguyo mine in Indonesia*, viewed 3 Nov 2014 at <<http://nomogaia.org/2009/01/aimec-nuiguyo-gold-mine-indonesia/>>

NomoGaia 2012, *Human Rights Impact Assessment: A toolkit for practitioners conducting corporate HRIAs*, Denver.

On Common Ground Consultants (OCG) 2010, *Human Rights Assessment of Goldcorp's Marlin Mine*, Vancouver.

Office of the High Commissioner for Human Rights (OHCHR) Cambodia Country Office 2012, *Eviction and Resettlement in Cambodia: Human Costs, Impacts and Solutions*, Phnom Penh.



OHCHR 2012, *Thematic study on the impact of unilateral coercive measures on the enjoyment of human rights, including recommendations on actions aimed at ending such measures*, A/HRC/19/33, United Nations.

Office of the High Commissioner for Human Rights (OHCHR) & Friedrich Ebert Stiftung (FES) 2014, *'Making the Right Impact?': Expert Workshop on Evaluating Human Rights Impact Assessments in Trade and Investment Regimes*, viewed 15 December 2015,  
<[http://www.ohchr.org/Documents/Issues/Globalization/Report\\_HRIA\\_Workshop.pdf](http://www.ohchr.org/Documents/Issues/Globalization/Report_HRIA_Workshop.pdf)>

On Common Ground Consultants (OCG) 2010, *Human Rights Assessment of Goldcorp's Marlin Mine*, OCG, Vancouver.

Oxfam America 2015, *Community Voice in Human Rights Impact Assessments*, Oxfam, Boston.

Ruggie J 2007, *Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises: Human rights impact assessments - resolving key methodological questions*, A/HRC/4/74, United Nations.

Ruggie J 2008, *Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises: Protect, Respect and Remedy: A Framework for Business and Human Rights*, A/HRC/8/5, United Nations.

Ruggie J 2010, *Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises: Further steps towards operationalization of the 'protect, respect and remedy' framework*, A/HRC/14/27, United Nations.

Sauer AT & Podhora A 2013, 'Sexual orientation and gender identity in human rights impact assessment', *Impact Assessment and Project Appraisal*, vol. 31, no.2,

pp. 135-145.

Paton L & Munro G 2006, *Children's Rights Impact Assessment: The SCCYP Model*, Scotland's Commissioner for Children and Young People, Edinburgh.

Scottish Human Rights Commission (SHRC) 2014, *10 Good Practice Building Blocks for Assessing Impact on Equality and Human Rights*, Edinburgh, viewed 15 December 2015, <

<http://www.scottishhumanrights.com/eqhria/eqhriagoodpractice>>

Stephenson MA & Harrison J 2011, *Unravelling Inequality: A Human Rights and Equality Impact Assessment of the Public Spending Cuts on Women in Coventry*, University of Warwick, Warwick.

UNICEF 2007, *Child Rights Impact Assessment of Potential Electricity Price Rises in Bosnia and Herzegovina*, UNICEF, Bosnia and Herzegovina.

UNICEF & Danish Institute for Human Rights (DIHR) 2013, *Children's Rights in Impact Assessments: A guide for integrating children's rights into impact assessments and taking action*, UNICEF, New York.

United Nations 1993, *Vienna Declaration and Programme of Action*, United Nations.

United Nations 2011, *Guiding Principles on Business and Human Rights*, United Nations, New York and Geneva.

United Nations 2012, *A Framework for Advancing Environmental and Social Sustainability in the United Nations System*, United Nations, Geneva.

United Nations 2013, *Human rights due diligence policy on United Nations support to non-United Nations security forces*, A/67/775-S/2013/110/Annex, United Nations.

United Nations Development Programme (UNDP), World Health Organisation (WHO) and Office of the High Commissioner for Human Rights (OHCHR) 2014, *Pacific Trade and Human Rights*, Suva.

United Nations Development Programme (UNDP) 2014, *Social and Environmental Standards*, UNDP, New York.

United Nations Development Programme (UNDP) 2015, *Social and Environmental Screening Procedure*, UNDP, New York.

UN Habitat & Office of the High Commissioner for Human Rights (OHCHR) 2014, *Assessing the Impact of Evictions Handbook*, UN Habitat, Nairobi.

US General Services Administration (GSA) 1998, *NEPA Fact Sheet*, GSA, Washington.

Uvin P 2007, 'From the right to development to the rights based approach: how 'human rights' entered development', *Development in Practice*, vol. 17, no. 4-5, pp. 597-606.

Vanclay F 2003, 'International Principles for Social Impact Assessment', *Impact Assessment and Project Appraisal*, vol. 21, no. 1, pp. 5-11.

Vanclay F 2006, 'Principles for social impact assessment: A critical comparison between the international and US documents', *Environmental Impact Assessment Review*, vol. 25, pp. 3-14.

Walker S 2009, *The Future of Human Rights Impact Assessments of Trade Agreements*, Intersentia, Utrecht.

Watson G, Tamir I & Kemp B 2013, 'Human rights impact assessment in practice: Oxfam's application of a community-based approach', *Impact Assessment and Project Appraisal*, vol. 31, no. 2, pp. 118-127.

World Bank & OECD 2012, *Integrating Human Rights into Development: Donor Approaches, Experiences and Challenges*, 2<sup>nd</sup> edition, World Bank, Washington.

Zarsky L & Stanley L 2013, 'Can Extractive Industries Promote Sustainable Development? A Net Benefits Framework and a Case Study of the Marlin Mine in Guatemala', *Journal of Environment and Development*, vol. XX, no. X, pp. 1-24.