



# Human Rights Impact Assessments:

A Review of the Literature, Differences with other forms of  
Assessments and Relevance for Development

Commissioned by the Nordic Trust Fund  
The World Bank

# Study on Human Rights Impact Assessments

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other Forms of Assessments and Relevance for Development

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## Foreword

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A Human Rights Impact Assessment (HRIA) is an instrument for examining policies, legislation, programs and projects to identify and measure their effects on human rights. HRIAs provide a reasoned, supported and comprehensive answer to the question of “how does the project, policy or intervention affect human rights?” Their fundamental purpose is to help prevent negative effects and to maximize positive effects. As such, HRIAs are an indispensable part of making human rights considerations operational in a range of legal and policy contexts. In recent years there has been increasing demand for various actors to undertake HRIAs before adopting and implementing policies, projects, agreements and programs. The development of this tool is part of a growing effort by the human rights community to operationalize the relevance of human rights in various fields, including development, and thus to advance an understanding of the ways in which public policies and development projects affect the enjoyment of people’s rights.

The purpose of this report is to review the various existing approaches to HRIAs in order to assess their current form, content, methodology and use, as well as their potential relevance to development policy and practice. It considers the essential elements of HRIAs and compares those with other forms of assessments used in development, such as environmental impact assessments (EIAs) and social impact assessments (SIAs) or environmental and social impact assessments (ESIAs). By comparing the two sets of tools, the study draws out the similarities between them as well as the value added of HRIAs.

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Aniruddha Dasgupta  
Director, Knowledge and Learning Department  
Operations Policy and Country Services  
The World Bank

Nordic Trust Fund (NTF) is a knowledge and learning initiative to help the World Bank develop a more informed view on human rights. It is designed to improve existing Bank involvement on human rights in the overall context of the Bank's core mission of promoting economic growth and poverty reduction. The NTF is managed by a secretariat in the Operations Policy and Country Services vice-presidency (OPCS). Financial and staff support for the NTF is provided by Denmark, Finland, Iceland, Norway, and Sweden, with additional funding provided by Germany.

## Abbreviations

CAFTA	Dominican Republic-Central American-US Free Trade Agreement	IA	Impact Assessment
CESCR	Committee on Economic, Social and Cultural Rights	IAIA	International Association for Impact Assessment
CRA	Country Risk Assessments	IBLF	International Business Leaders Forum
CRC	Committee on the Rights of the Child	ICESCR	International Covenant on Economic, Social and Cultural Rights
CRPD	Convention on the Rights of Persons with Disabilities	ICMM	International Council on Mining and Metals
CSO	Civil Society Organization	IEG	Independent Evaluation Group
CSR	Corporate Social Responsibility	ILO	International Labor Organization
EIA	Environmental Impact Assessment	IMF	International Finance Corporation
EIUC	European Inter-University Centre for Human Rights and Democratisation	LHA	Local Housing Allowance
ESIA	Environmental and Social Impact Assessment	NGO	Non-Governmental Organization
EU	European Union	NTF	Nordic Trust Fund
FIDH	International Federation for Human Rights	ODI	Overseas Development Institute
FTA	Free Trade Agreement	OHCHR	Office of the High Commissioner on Human Rights
HeRWAI	Health Rights of Women Assessment Instrument	PSIA	Poverty and Social Impact Assessment
HIV/AIDs	Human immunodeficiency virus infection / acquired immunodeficiency syndrome	SCCYP	Scotland's Commissioner for Children and Young People
HRCA	Human Rights Compliance Assessment	SIA	Social Impact Assessment
HRIA	Human Rights Impact Assessment	TOR	Terms of Reference
HRIAM	Human Rights Impact Assessment and Management	TSIA	Trade and Sustainability Impact Assessment
HRIRC	Human Rights Impact Resource Center	TTL	Task Team Leader
		UK	United Kingdom
		UN	United Nations
		UNICEF	United Nations Children's Fund
		WHO	World Health Organization



## Executive Summary

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A Human Rights Impact Assessment (HRIA) is an instrument for examining policies, legislation, programs and projects to identify and measure their effects on human rights. HRIAs provide a reasoned, supported and comprehensive answer to the question of “how does the project, policy or intervention affect human rights?” Their fundamental purpose is to help prevent negative effects and to maximize positive effects. As such, HRIAs are an indispensable part of making human rights considerations operational in a range of legal and policy contexts. They provide a framework for systematic human rights methodology and assist in advancing an understanding of the impact of a range of interventions on human rights and, conversely, of the multifaceted relevance of human rights to a broad spectrum of other sectors and spheres.

In recent years there has been increasing demand for various actors to undertake HRIAs before adopting and implementing policies, projects, agreements and programs. The development of this tool is part of a growing effort by the human rights community to operationalize the relevance of human rights in various fields, including development, and thus to advance an understanding of the ways in which public policies and development projects affect the enjoyment of people’s rights.

HRIAs can contribute to the process of formulating public policies by calling attention to overlooked human rights effects of a given policy or by projecting human rights into the decision-making process. They can help influence policy options, foster public participation in the formulation and monitoring of public policies and strengthen accountability about these policies.

The purpose of this Study is to review the various existing approaches to HRIAs in order to assess their current form, content, methodology and use, as well as their potential relevance to development policy and practice.

An HRIA can be used to assess actions that are specifically designed to have an impact on human rights, in which case it will be used to determine maximum positive impact. They can also be used for activities and interventions that are not intended to impact on human rights but could do so indirectly. Thus, HRIAs sometimes focus on public policies, legislative initiatives or development projects that have a direct, intended impact on human rights, freedom of expression legislation or

education policy initiatives aiming to equalize access across genders and/or socio-economic classes.). The majority of HRIAs carried out to date, however, have focused on policies or projects whose primary purpose was not directly related to human rights—such as those utilized to increase trade flow, provide development assistance or construct a dam—but which could have had unintended negative impacts on human rights, particularly at the implementation stage. HRIAs are therefore particularly useful in cases where the human rights implications of a proposed policy or project are not clear at the outset.

The value added of HRIAs is their ability to enhance accountability for impacts on human rights. HRIAs

promote accountability through their anchorage in binding legal frameworks since they are based on human rights legal obligations which bind states. This changes the language and emphasis in a project to “rights-holders” and “duty-bearers” and gives the recommendation that ensues from HRIAs additional force and significance. HRIAs tend to offer a highly comprehensive appraisal of the impacts of an intervention on a wide array of rights, underscoring the interconnectedness of rights concerns and obligations. HRIAs can also advance other aims and objectives through inter-sectoral analysis, such as the promotion of international policy coherence and avoidance of fragmentation of international human rights law. They may also be part of human rights due diligence processes for business—their use is implied in the recently adopted UN principles on business and human rights developed by John Ruggie.

## HRIAs and other types of impact assessments

HRIAs have developed out of other types of impact assessments, such as environmental impact assessments (EIAs) and social impact assessments (SIAs), which constitute a well-established practice and are regularly carried out in many countries to evaluate proposed policies, programs and projects. Although EIAs and SIAs are typically *ex ante* assessments, the majority of HRIAs so far have been *ex post* assessments.

While there are important similarities between HRIAs and other forms of impact assessments, there are also significant substantive and procedural differences among them. Many of these traditional impact assessments are implicitly underpinned by human rights values, but the extent to which HRIAs and these other types of impact assessments overlap depends partly on the type of impact assessment that HRIAs are compared with and on which specific frameworks are used to analyze these other types of assessments. Nevertheless, there are some important differences between HRIAs and other types of impact assessments, which are briefly outlined in this section and elaborated upon throughout the paper.

First, what distinguishes HRIAs from other types of impact assessments is the fact that HRIAs are based on the normative framework of binding international human rights law to which governments around the world have voluntarily committed themselves through ratification of international treaties. The human rights framework requires measuring the extent to which the policy or project complies with human rights both in terms of substance and process.

Using the framework of international human rights law as the objective standard of assessment contributes both moral legitimacy and legal accountability to the whole exercise as human rights have become the dominant language for social justice claims in many parts of the world. It gives the recommendations a unique significance and force and may limit the extent to which trade-offs are acceptable.

Second, and related to the first element, is the fact that HRIAs can draw upon a developed jurisprudence for concepts such as equality or participation, whether it emanates from international or domestic courts and tribunals, or from the findings and conclusions of expert bodies charged with monitoring implementation of the international treaties that form the foundation of HRIA. Emanating from this element is the potential for HRIAs to draw on human rights institutions and networks to play a role in implementing the recommendations of assessment.

Third, HRIAs differ from other types of impact assessments on both the level of detail and specificity with which human rights issues are addressed and in the comprehensive way in which they are covered. For instance, the notions of equality, participation, transparency and accountability are fundamental principles of a human rights framework. Although other types of assessments often address some of these issues—particularly those of equality and participation—HRIAs do so more systematically and comprehensively.<sup>1</sup>

Fourth and finally, HRIAs are universal and comprehensive—they typically consider economic, social and cultural aspects as well as civil and political ones since they are based on a legal framework that includes all these rights—civil, political, economic, social and cultural. The fact that the human rights framework incorporates these rights as interdependent and interrelated reinforces a cross-sectoral approach in the assessment process. This feature of HRIAs can also advance broader aims which have a special relevance for human rights, including the promotion of international policy coherence. Other forms of assessment, such as PSIAs and EISAs, tend to be more narrowly focused and can fail to capture the full range of factors that might prompt or exacerbate human rights risks involved in a particular intervention or activity. That being said, HRIAs do not usually include environmental protection or a particularly strong economic dimension<sup>2</sup> unless these overlap directly with human rights obligations.

<sup>1</sup> On the other hand, while PSIAs and ESIAs often contain detailed analysis of economic or environmental impacts, HRIAs generally address these issues only in cases where they overlap with human rights issues.

## Essential elements of HRIAs

**Normative human rights framework:** What clearly distinguishes HRIAs from other types of impact assessments is that HRIAs are based on a framework of binding international human rights. As such, HRIAs introduce distinct normative, moral and legal elements into the assessment process and, fundamentally, do not assume the legitimacy or acceptability of the status quo. The human rights framework requires measuring the extent to which the policy or project complies with human rights law both in terms of substance and process. The legal nature of the human rights framework can give greater force to recommendations arising from a HRIA, since the framework imposes clear legal obligations on states and other duty-bearers, i.e. those who have responsibility to remedy any human rights problems identified in the impact assessment. At the same time, this framework empowers people as rights-holders to claim their rights when these would be undermined by the policy or project. It is important to note, however, that HRIAs will be based upon different standards of accountability depending on what is being assessed and who is the duty-bearer. Thus, if the activity in question is a public policy or program and the duty-bearer a government, the relevant normative standard will be a legal obligation derived from a treaty or a law. However, if the activity being assessed were a private sector project, the normative standard involved would be the community-derived responsibility to respect human rights, derived from internationally recognized human rights norms or domestic human rights standards.

Yet, the norms and principles of the human rights framework are the subject of interpretation and contestation, and that they will invariably involve complex weighing of factors and the balancing of conflicting rights and claims. That framework should therefore not be viewed as static or immutable, as it continues to evolve.

**Public participation:** HRIAs should assess whether effective participatory mechanisms are in place during the whole life cycle of the development intervention (from formulation to evaluation), as well as ensure that such mechanisms are integrated in the process of the HRIA itself. Stakeholder participation is central to the acceptance and legitimacy of the HRIA process and its results.

**Equality and non-discrimination:** As with other types of impact assessments, the issue of equality is another essential element of HRIAs. But in the case of HRIAs, the issue of equality is intrinsically related to the human rights notion of non-discrimination. HRIAs can draw on decades

of national and international jurisprudence on this right to help analyze the meaning of disparate impact. As a result, the human rights framework considerably broadens and deepens the analysis on equality.

**Transparency and access to information:** Access to information is critical for both meaningful participation processes and effective accountability mechanisms. Transparency relates to: 1) The extent to which the policy or project being assessed is transparent and its contents available to the public in sufficient detail before its adoption; 2) The extent to which the HRIA process itself is transparent both in terms of the methodologies used and the findings of the particular assessment.

**Accountability:** A fundamental contribution of a human rights approach to the development field along with other areas is its focus on accountability. The importance attached to this principle is intrinsically related to the legal nature of the human rights framework. Accordingly, HRIAs contribute clarity about the nature and locus of responsibility for particular human rights processes and outcomes and usually analyze the extent to which the policy, program or project being evaluated include effective accountability mechanisms that enable redress in cases where interventions might undermine the enjoyment of human rights.

**Inter-sectoral approach:** The human rights framework considers all rights—civil, political, economic, social and cultural—as interdependent and interrelated. Drawing on these human rights principles, HRIAs measure the cumulative impact of policy and projects by diverse sectors on the rights of individuals.

## HRIA methodologies

Like other forms of impact assessments, HRIAs are an evidence-based exercise, which aim to contribute to a more informed policy-making process. As such, the effectiveness of HRIAs largely depends on the robustness of the methods used and the quality of the evidence gathered by those methods.

HRIAs are often complimentary to other types of IAs and are often conducted in addition to these. Therefore, whenever possible, human rights assessors build on the research conducted by other assessments and studies, while employing a different perspective to interpret the impacts foreseen in light

<sup>2</sup> By contrast, these elements are integrated in the European Commission's Trade and Sustainability Impact Assessment (TSIA) and the United Nations Environment Programme's Integrated Impact Assessment methodology

of human rights standards. Another distinction worth noting is that between free-standing HRIAs and HRIAs integrated in other IAs, with the latter being the more common option. Many experts also view it as the more preferred option since it assures the integration of human rights considerations into broader and more mainstream assessment processes.

## Stages of HRIA

In general, HRIAs are typically carried out through a series of steps. From a review of various methodological frameworks proposed for HRIAs, it is possible to identify the following core steps for carrying out HRIAs:

- i. **Preparation:** This is the first stage of any HRIA, during which the assessor clarifies the relevant legal, regulatory, economic, environmental and social context of the assessment. During this stage, the outer parameters of the assessment are established.
- ii. **Screening:** This step involves a narrowing of the range of measures and activities to be subject to assessment to determine policies, projects or interventions are most likely to have an impact on the enjoyment of human rights, which helps ensure the specific focus of the assessment. The screening process also helps to identify the exact human rights issues in play and the stakeholders that may be affected by the planned policy or project.
- iii. **Scoping:** This step involves drafting the terms of reference (TORs) for the assessment itself, providing a road map for the process of assessment and the responsibilities of the assessor(s). This stage also involves outlining options and scenarios as well as identifying the relevant indicators to be used in the assessment. At this stage, a baseline assessment of the current human rights situation is carried out from which the potential effects can be foreseen and actual impacts can be measured.
- iv. **Evidence Gathering:** This phase of the impact assessment methodology involves gathering evidence about the impacts of the policy intervention, whether actual or potential, depending on whether the HRIA is *ex ante* or *ex post*. For this purpose, HRIA practitioners often rely on the many methodological tools that have been developed by economists and social scientists, such as statistical methods, surveys, economic modeling, participatory assessment methods, key informant interviewing guides, etc.
- v. **Consultation:** Given the emphasis on human rights principles of participation and transparency, HRIAs are expected to involve a broad degree of consultation both during the process of assessment and in respect of the conclusions and recommendations. It can be argued that the strength and legitimacy of the HRIA itself depends upon there having been a thoroughgoing consultation process based on participatory methods which have been developed for project and policy development.
- vi. **Analysis:** This step consists of implementing the TORs, and the actual assessment of the human rights impacts of the policy intervention, whether potential impacts (in case of *ex ante* assessments) or actual impacts (in case of *ex post* assessments). This stage will involve an analysis of the data gathered during stage (iv) to verify the impacts of the intervention(s) identified during scoping. An essential feature of this analysis—that is likely to differ from other types of IAs—is that it will be conducted in reference to human rights norms and standards, e.g. analyzing the information collected on the potential impacts of the proposed policy or intervention relative to the government’s legal obligations to respect, protect and fulfill human rights.
- vii. **Conclusions and Recommendations:** In this step, assessors develop overall conclusions regarding the impacts of the policy intervention and propose recommendations for corrective action to mitigate negative human rights impacts related to the policy intervention, and optimize positive ones.
- viii. **Monitoring and Evaluation:** This step involves subjecting the HRIA itself to assessment to determine the extent to which it has met its objectives and is acceptable to stakeholders. This step will also involve an examination of the extent to which the duty-bearers have incorporated the recommendations of the HRIAs during implementation of the policy intervention and it enables information-gathering about the actual impacts of the policy intervention.

## Stages of HRIA

- i. Preparation
- ii. Screening
- iii. Scoping
- iv. Evidence - gathering
- v. Consultation
- vi. Analysis
- vii. Recommendation + Conclusions
- viii. Evaluation and monitoring
- ix. Preparation of the report

- ix. **Preparation of the report:** Upon completion of the foregoing substantive steps, the final stage of an HRIA involves the preparation of the report which should outline the impact assessment and recommendations on mitigation and enhanced measures along with an evaluation of the process and a plan for future monitoring

## Quantitative and qualitative indicators

There seems to be agreement in the literature that in order to adequately measure impacts, human rights indicators should be both quantitative and qualitative. However, despite this agreement at a theoretical level, the practice of most HRIA toolkits and concrete assessments has focused almost exclusively on the use of qualitative indicators. Therefore, rather than using indicators, many tools develop a set of key questions regarding human rights conditions. Each toolkit has developed question checklists with varying scope and focus.

## Dilemmas and challenges of HRIAs

There are some recurrent dilemmas and challenges that assessors are faced with when carrying out this type of impact assessment. A basic dilemma is whether to undertake a stand-alone HRIA or rather to incorporate a HRIA into more standard types of impacts assessments, such as ESIA or SIA. There are advantages and drawbacks for each of these options, which partly depend on the timing of each impact assessment and who is carrying them out.

**Political challenges to HRIAs:** Human rights are intrinsically political in the sense that they are used as a language to weigh conflicting claims in the public arena and have become a dominant criterion for legitimacy in political and social debates. Human rights are inherently connected with empowerment and participation, which also introduce a political dimension.

This powerful aspect of the human rights framework is a double-edged sword for HRIAs. On one hand, this normative framework can reinforce the legitimacy of an impact assessment due to its international acceptance, its legal status and the powerful symbolic value of human rights as a dominant moral and political discourse of our times.

On the other hand, the political nature of the human rights framework poses some risks for the effectiveness of HRIAs as a policy and advocacy tool. One significant risk is that government or business companies carrying out an HRIA may be tempted to manipulate its findings and misuse the human rights rhetoric to validate a policy or project they are trying to promote. Alternatively, opponents to those policies

or projects may manipulate the assessment to obtain negative findings regardless of the actual human rights impact of that development intervention. HRIA may also be used more to “name and shame” rather than work progressively to improve human rights enjoyment through gradual engagement and in this way, may result in alienation of stakeholders.

**Technical challenges to HRIAs:** As with other impact assessments, carrying out HRIAs of good quality can be an onerous endeavor in terms of time, financial resources, data collection and types of expertise required. These challenges may also influence the determination of important practical questions such as who should undertake a HRIA and who should pay for a HRIA. There are also a range of technical questions related to the purpose and parameters of a HRIA which require careful consideration including: what scale or type of HRIA is necessary or appropriate, what object should be assessed or evaluated and what methodologies are needed. It is clear also that more work is needed to build capacity on HRIAs as well as enhance the quality of HRIAs with the help of independent experts to identify best practices, reveal poor practices and challenge the validity of superficial assessments. Much of this depends on the existence of an explicit and effective policy of transparency regarding both the methods used and the findings of the assessment.

**Causality and attribution:** A fundamental challenge attendant to HRIA like several other types of assessment is that of causality and attribution. That is, it may be difficult to establish with certainty the causal links between a particular policy, project or intervention and a specific outcome. As such, it may be difficult to attribute responsibility for outcomes to particular actors or duty-bearers.

**Confidentiality and disclosure:** A key principle of a human rights approach and of a HRIA is the principle of transparency. That principle may present its own set of challenges for actors reluctant to publicize sensitive information or damaging findings uncovered through HRIAs. There may be instances in which a HRIA should in principle be disclosed but where it contains proprietary, confidential or sensitive information which militates against such disclosure. When objectives of disclosure and those of confidentiality conflict, host of practical and political challenges for HRIAs may arise.

## Conclusions

While the practice and use of HRIAs is relatively new, their positive potential as a complimentary instrument, either as a stand-alone endeavor or when fully integrated into other assessment procedures, remains clear. Although EIAs, SIAs and PSIA are often underpinned by human

right values, making explicit the conceptual links between social, economic or environmental impacts of development initiatives through the normative framework of human rights is valuable in and of itself. HRIAs can reinforce existing rights-based (or rights-conscious) practices regarding participation and equality, thereby ensuring that these concerns are applied in a more consistent manner while lending moral and legal legitimacy to the whole exercise. In addition, using a human rights framework for assessing

impacts of development interventions can help focus on other community (or human rights) concerns that often do not receive sufficient attention in standard impact assessments, such as issues of transparency, accountability or cultural adaptability.

Furthermore, given the interdependence of human rights, HRIAs build upon a cross-sectoral analytical framework and therefore can help measure the cumulative impact of policy and projects by diverse sectors on the rights of individuals.

## Introduction

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A Human Rights Impact Assessment (HRIA) is an instrument for examining policies, legislation, programs and projects<sup>3</sup> and identifying and measuring their effects on human rights. The objective of this type of assessments is “to inform decisionmakers and the people likely to be affected so that they can improve the proposal to reduce potential negative effects and increase positive ones” (Hunt and MacNaughton 2006). HRIAs provide a reasoned, supported and comprehensive answer to the question of “how does the project, policy or intervention affect human rights?” Their fundamental purpose is to help prevent negative effects and to maximize positive effects. When undertaken by policy makers, they ensure human rights are factored into policy development at the earliest possible stage. When undertaken by a monitoring body—for example, a non-governmental organization—they may prompt policy makers to review and revise decisions or proposals, taking people’s rights into account. (Paton and Munro 2006). As such, HRIAs are an indispensable part of making human rights considerations operational in a range of legal and policy contexts. They provide a framework for systematic human rights methodology and to advance an understanding of the impact of a range of interventions on human rights and, conversely, of the multifaceted relevance of human rights to a broad spectrum of other sectors and spheres

The development of HRIAs in recent years is part of an increasing effort by the human rights movement to operationalize the relevance of human rights to various fields of development, helping to gain a real understanding of the ways in which public policies and other types of interventions affect the enjoyment of people’s rights. As MacNaughton and Hunt point out, in contrast to the traditional ‘violations approach’ to human rights accountability, which looks backward at past violations, the human rights community is beginning to adopt a ‘policy approach’ that demands developing new tools to bring human rights concerns into forward-looking policy-making processes. HRIA is one of these new tools, along with human rights-based indicators and benchmarks and human rights-based budget analysis (MacNaughton and Hunt 2011).

Thus, HRIAs can provide decision makers across sectors with an evidence-based mechanism for analyzing and anticipating the effects of their decisions (Gay 2008). The fact that human rights are used to gauge impacts of policies and programs in other fields can potentially have a significant impact on the ability of human rights to play a role in in new policy debates, ranging “from the liberalization of agricultural products in Ghana to the prevention of maternal mortality in Bangladesh; from the impact of high density housing in New Zealand to the impact of tree plantation in Tanzania” (Harrison 2011).

As with other types of impact assessments (IAs), HRIAs can contribute to the process of formulating

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<sup>3</sup> For the sake of simplicity, these various goals of HRIA are often called in this study ‘development interventions’

public policies, calling attention to oft-neglected information about the human rights effects of a given policy or project into the decision-making process (Maassarani et al 2007). They can help guide policy making, foster public participation in the formulation and monitoring of these public policies and strengthen accountability around these policies. They can also “help to empower rights-holders by making it easier to demonstrate the cause-effect relationships between policies, projects and human rights outcomes; build human rights capacities of organizations undertaking HRIAs; and, raise awareness of human rights and the relationship between norms and standards and the daily work of the people and organizations involved in the HRIA” (Walker 2011).

HRIA also offers instrumental benefits for those actors undertaking it, as illustrated in box 1, related to HRIAs for the private sector.

According to the Danish Institute for Human Rights there are three key risks a private company may face if they fail to adequately address human rights impacts: 1) Reputational risks; 2) Legal liability (companies are increasingly exposed to home, host and extraterritorial legislation concerning their social impacts) and 3) Operational risks (human rights violations can lead to blockades, work stoppages, sabotage and

other actions that could affect output) (Danish Institute for Human Rights, not dated).

Several HRIA toolkits exist providing guidance on how to undertake this type of impact assessment. Thus, rather than offering a guide on how to undertake HRIA, the purpose of this Study is to review the various approaches to human rights impact assessments (HRIAs) in order to assess their current form, content, methodology and use, as well as their potential relevance to development policy and practice. Moreover, the Study is not designed to provide a comprehensive overview of existing HRIAs. Rather, it draws on the literature to highlight key issues of HRIAs and illustrate their application.

The Study will also undertake a critical review of the nature and extent of the similarities and differences between HRIA and other forms of economic, social and environmental assessments, showing the potential synergy between HRIAs and other forms of impact assessments (IAs).

Finally, the Study aims to contribute to the growing discussion between development practitioners and human rights experts on operational implications of human rights in development.

Chapter 1 provides a general background to HRIAs, describing some overall characteristics of this type of impact assessments. Chapter 2 discusses the key elements of HRIAs, highlighting similarities and differences with other types of IAs. Chapter 3 sets out a series of methodological steps typically used in HRIAs and analyzes the use of indicators and question checklists. Chapter 4 discusses some dilemmas arising from and challenges in the use of HRIAs. Finally, chapter 5 provides some concluding remarks on the potential of this tool and on how to make its use more effective.

### Box 1: The business case for HRIA

There is a strong business case for performing an HRIA:

- Maintaining a good company and product reputation
- Effective risk identification and management
- Improvement of stakeholder relations
- Creating a legal and social license to operate
- Increased motivation and productivity of workers
- Understanding the society in which the company works
- Attractive investment climate
- Contribution to CSR and sustainable development

Source: Aim for Human Rights 2009.

# 1. Background

## 1.1 Human Rights – right-holders and duty-bearers<sup>4</sup>

A series of international human rights treaties and other legal instruments adopted since the end of World War II provide a legal basis that protects human rights; these have led to the development of an extensive body of international human rights law under universal, regional and even local instruments.

HRIAs, based on the normative framework of international human rights law, identify rights-holders (and their entitlements) and corresponding duty-bearers (and their obligations) and seek to strengthen the capacities of rights-holders to claim their rights and of duty-bearers to fulfill their human rights obligations.

The principle of universality of human rights—often considered the cornerstone of international human rights law—means that human rights are rights inherent to all human beings. Therefore, every person is a rights-holder. At the same time, given its concern for substantive equality, the human rights normative framework pays particular attention to the realization of the rights of the excluded and marginalized populations, and those whose rights are at risk of being violated.

With regard to duty-bearers, international human rights law lays down obligations of States and State actors to refrain from certain acts (negative duties) and to take certain actions (positive duties), in order to promote and protect human rights. Specifically, by ratifying and ascending to human rights treaties (such as UN Conventions), States assume threefold legal obligations to respect, protect and fulfill human rights.

*The obligation to respect* means that States must refrain from interfering with or curtailing the enjoyment of human

rights. For instance, States should refrain from carrying out forced evictions and not arbitrarily restrict the right to vote or the freedom of association.

*The obligation to protect* requires States' agencies and officials to prevent non-state or private entities (corporations, unions, individuals, religious groups, association or any other non-state institution) to violate human rights. If these have already been violated, state bodies have the obligation to identify and punish offenders (judicial and / or administrative as is appropriate), and to repair the damage caused to the aggrieved persons through remedies. For example, States must regulate the quality of medicines produced by pharmaceutical companies in order to protect the right to health.

*The obligation to fulfill* means that States must take positive action to facilitate the enjoyment of basic human rights. State organs should take legal, judicial, policy, budgetary, programmatic and other actions toward the progressive realization of human rights. The state also has a duty to directly satisfy the rights of those who, being in special situations of dependency, vulnerability, deprivation of freedom, lack of protection or other, cannot access the enjoyment of human rights for themselves.

Although States are the primary human rights duty-bearer, non-State actors, such as private individuals or business companies, also have human rights obligations. In the context of HRIAs, one type of State actor that is of particular importance is private business companies as these companies often undertake the development projects that HRIAs seek to assess.

The UN Guiding Principles on Business and Human Rights, which were adopted by the Human Rights Council in 2011,

<sup>4</sup> This section is based on OHCHR (not dated) and OHCHR 2006.

set out a framework to determine the scope of a company's human rights responsibilities and outlined ways in which companies should avoid and mitigate human rights harm and contribute to the respect, protection, promotion and fulfillment of human rights. One pillar of this framework is the corporate responsibility to respect human rights, because it is the basic expectation that society has of business. The responsibility of companies to respect human rights means that they "should act with due diligence to avoid infringing on the rights of others and to address adverse impacts with which they are involved" (Ruggie 2011)

Concurrently, a State's duty to protect against human rights abuses by third parties includes the protection of marginalized communities or those who have suffered violations at the hands of business. "The State duty to protect is a standard of conduct. Therefore, States are not per se responsible for human rights abuse by private actors. However, States may breach their international human rights law obligations where such abuse can be attributed to them, or where they fail to take appropriate steps to prevent, investigate, punish and redress private actors' abuse." (Ruggie 2011). Likewise, the responsibility of business to respect human rights is also a global standard of expected conduct which "exists independently of States' abilities and/or willingness to fulfill their own human rights obligations, and does not diminish those obligations" (Ruggie 2011).

The fact that—unlike States—the human rights responsibilities of business enterprises are negative duties (i.e. to refrain from infringing on human rights) does not prevent them from undertaking activities to positively support or promote human rights. But, although commendable in themselves, these activities do not offset a failure to respect human rights throughout their operations (Ruggie 2011)

## 1.2 A growing interest on HRIAs

A growing demand by various actors to undertake HRIAs before adopting and implementing policies has emerged in recent years. For instance, within the UN human rights mechanisms, the Committee on the Rights of the Child (CRC) stated that ensuring that all the provisions of the UN Convention on the Rights of the Child are respected in legislation and policy development and delivery at all levels of government demands

"A continuous process of child impact assessment (predicting the impact of any proposed law, policy or budgetary allocation which affects children and the enjoyment of their rights) and child impact evaluation (evaluating the actual impact of

implementation). This process needs to be built into government at all levels and as early as possible in the development of policy (CRC 2003) UN Committee on the Rights of the Child)."

The CRC regularly urges States to undertake impact assessments related to various human rights issues<sup>5</sup> and several other UN human rights Committees have also done so on occasion.<sup>6</sup>

In addition, several UN Special Rapporteurs with mandates on diverse human rights issues have called for the use of HRIAs, as illustrated in box 2.

There is also a growing recognition of the need for HRIAs among international institutions and individual States, although so far this trend has spread among developed countries rather than developing countries. For instance, in its 'impact assessment guidelines', the European Commission set out that "All Commission proposals have to be compatible with the EU Charter of Fundamental Rights, and the Commission has decided that impact assessments must take into account the impacts of initiatives on fundamental rights as laid out in the Charter (European Commission 2009). In several European countries HRIAs are required to evaluate the human rights impact of draft legislation.<sup>7</sup> Some countries also compel government to carry out HRIAs on specific issues or policies. For instance, in the UK, public authorities commonly use Equality Impact Assessments of public policies as a tool to ensure that they are meeting their duties to prevent discrimination and promote equality on grounds of race, gender, disability and other grounds of discrimination (Harrison and Stephenson 2010). In Canada, the Parliament urged the government to "put in place stronger incentives to encourage Canadian mining companies to conduct their activities outside of Canada in a socially and environmentally responsible manner and in conformity with international human rights standards. Measures in this area must include making Canadian government support—such as export and project financing and services offered by Canadian missions abroad—conditional on companies meeting clearly defined corporate social responsibility and human

<sup>5</sup> For instance, this Committee recommended to several countries, including Armenia, Jordan, Bahrain and Cameroon, to establish a systematic assessment of the impact of budgetary allocations on the implementation of the rights of the child.

<sup>6</sup> For example, the Committee on Economic, Social and Cultural Rights has urged Switzerland to "undertake an impact assessment to determine the possible consequences of its foreign trade policies and agreements on the enjoyment by the population of the state party's partner countries of their economic, social and cultural rights" (CESCR 2010)

<sup>7</sup> See details in Beco 2009.

## Box 2: Calls for the use of HRIAs by UN Special Rapporteurs<sup>a</sup>

- *Special Rapporteur on the Right to Education*: “A procedural approach can become an effective method of challenging disregard of human rights in macroeconomic policies through a requirement that a human rights impact assessment be carried out before such policies are developed and implemented” (Tomasevski 1998)
- *Special Rapporteur on the Right to Health*: “Before a State introduces a new law or policy it has to ensure that the new initiative is consistent with its existing national and international legal obligations, including those relating to human rights... Appropriate impact analyses are one way of ensuring that the right to health—especially of marginalized groups, including the poor—is given due weight in all national and international policy-making processes” (Hunt 2003)
- *Special Rapporteur on the Right to Food*: The [Brazilian] authorities should systematically perform ex ante impact assessments on the right to food when engaging in large-scale infrastructural projects, such as dams, with the participation of the communities affected... Brazil could lead by example in conducting a comprehensive participative right to food impact assessment in order to assess the overall and distributional effects of increased agricultural trade.” (de Schutter 2009)

Source: Adapted from de Greiff (2009).

<sup>a</sup> For the demands by the Special Rapporteur on business and human rights on the use of HRIAs for business activities, see below.

rights standards, particularly through the mechanism of human rights impact assessments.” (Standing Committee on Foreign Affairs, 2005).

Much of the work on human rights impact assessment (HRIA) has arisen out of the area of business and human rights, as a result of the recent demands on corporations to make concrete efforts to avoid human rights abuses within their spheres of influence.<sup>8</sup> HRIA has been perceived as one means of operationalizing this call to action, with several HRIA tools being developed to assist businesses in assessing the human rights impacts of their activities (Gay 2008).

As the Special Rapporteur on business and human rights, John Ruggie was a driving force in the calls for business enterprises to undertake HRIAs through the UN Guiding Principles on Business and Human Rights, adopted by the UN Human Rights Council in 2011. Principle 17 of the Guiding Principles states:

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

(a) Should cover adverse human rights impacts that the business enterprise may cause or contribute

through its own activities, or which may be directly linked to its operations, products or services by its business relationships;

(b) Will vary in complexity with the size of the business enterprise, the risk of severe human rights impacts, and the nature and context of its operations;

(c) Should be ongoing, recognizing that the human rights risks may change over time as the business enterprise’s operations and operating context evolve. (Ruggie 2011)

These numerous calls for the use of HRIAs have led to HRIAs on an array of issues. As James Harrison notes in a recent article that critically evaluates the practice of HRIAs: “It is clear from this work that HRIA has, over the last decade, become an increasingly used tool to measure human rights impacts in a great variety of fields—from development projects to activities of multinational companies,

<sup>8</sup> Business enterprises can have negative impacts on the enjoyment of human rights in a whole range of issues. As the Committee on Economic, Social and Cultural Rights points out: “the Committee has also frequently observed that corporate activities can adversely affect the enjoyment of Covenant rights. Multiple examples of the related problems range from child labour and unsafe working conditions through restrictions on trade union rights and discrimination against female workers, to harmful impact on the right to health, standard of living, of including indigenous peoples, the natural environment, as well as to the destructive role of corruption.” (CESCR 2011)

from trade agreements to activities of public authorities.” (Harrison 2011).

In one of the most comprehensive analysis of HRIAs, Walker enumerates four factors why this type of assessments has developed:

First, there has been an increasing call, particularly from donor agencies, to assess the extent to which foreign policies and technical cooperation programs are actually making a difference to human rights enjoyment. This has focused attention on developing impact assessment methodologies that examine the actual impact that programs—and donor financing—have had in real terms on the enjoyment of human rights. Second, with the increasing interest in rights-based approaches to development among European donor agencies and the United Nations (UN), calls for human rights impact assessments have also arisen with a view to incorporating human rights into development planning and programming, thus encouraging *ex ante* human rights impact assessment prior to decision-making and development programming. Third, on a parallel track, human rights practitioners, non-governmental organizations, inter-governmental organizations and increasingly business enterprises, have promoted human rights impact assessments as a means of increasing corporate accountability. While some efforts have sought to examine the past effects of business activities, significant attention has focused on incorporating human rights considerations in the decision-making processes of business activities, making up for the lack of clarity on formal legal responsibilities on business. Fourth, with the increasing focus on cultural, economic and social rights amongst human rights practitioners, greater consideration has been placed on assessing the human rights impact of social and economic policies which may not explicitly intended to affect human rights, but nonetheless do so in unintended ways (Walker 2009).

### 1.3 HRIAs and other types of impact assessments

Compared with assessments like EA, HRIAs are a relatively new tool, having emerged only in the last twenty years. They have grown out of other types of impact assessments, such as environmental impact assessments (EIAs) and social impact

assessments (SIAs). These forms of assessments are now well-established and regularly carried out in many countries to evaluate proposed policies, programs and projects.

Many of these traditional impact assessments implicitly use human rights values as a foundation. Notably, the *International Principles for Social Impact Assessments*, adopted by the International Association for Impact Assessment, has as its first principle that “Respect for human rights should underpin all actions” of the SIA community of practice considers (IAIA 2003). As MacNaughton and Hunt point out, the core values of SIAs that are set out in this IAIA document (see box 3) correlate to internationally recognized human rights norms. (MacNaughton and Hunt 2011)

At the same time, human rights mechanisms sometimes encourage States to carry out these other types of impact assessments.<sup>9</sup>

While there are important similarities shared by HRIA and other forms of assessment, there are also significant substantive and procedural differences between them. The extent to which HRIAs and other types of impact assessments overlap depends partly on the type of impact assessment that HRIAs are compared with and on the frameworks used to analyze other types of assessments.

Comparisons of HRIAs with different types of assessments abound.<sup>10</sup> Generally, considerable substantial practical and conceptual overlaps exist. However, there are some important differences, including what Walker terms “original aspects” of HRIA, which are briefly outlined in this section and elaborated upon through the subsequent sections. These original aspects are the distinguishing elements of HRIAs that go to their ‘value added’. The original aspects are also dependent in large part on the strength and grounding of human rights law in a particular country or policy setting.

<sup>9</sup> For instance, when considering the Report submitted by Nigeria to the Committee on Economic, Social and Cultural Rights, a member of the Committee asked the delegation of Nigeria whether there were any requirements in Nigeria for an environmental impact assessment to be carried out prior to the approval of development plans for the Ogoni region or other areas (CESCR 1998). Similarly, on the report on her mission to Costa Rica, Catarina de Albuquerque, Special Rapporteur on the human right to safe drinking water and sanitation, recommended that in order to avoid the depletion of water sources currently used by local communities, the concession of new water permits or licenses for the drilling of new wells should be made conditional upon the realization of an environmental impact assessment to evaluate the long-term effects that the new development may have on the availability and quality of water resources and, more in general, on the natural environment. (Albuquerque 2009)

<sup>10</sup> Walker has compared HRIAs with SIAs, using two different framework about the latter (Walker 2009); Gay has compared HRIAs with health impact assessments (Gay 2008) and MacNaughton and Hunt compare HRIAs with SIAs (MacNaughton and Hunt 2011).

### Box 3: Core Values of Social Impact Assessments

The SIA community of practice believes that:

1. There are fundamental human rights that are shared equally across cultures, and by males and females alike.
2. There is a right to have those fundamental human rights protected by the rule of law, with justice applied equally and fairly to all,
3. and available to all.
4. People have a right to live and work in an environment which is conducive to good health and to a good quality of life and which enables the development of human and social potential.
5. Social dimensions of the environment—specifically but not exclusively peace, the quality of social relationships, freedom from fear,
6. and belongingness—are important aspects of people’s health and quality of life.
7. People have a right to be involved in the decision making about the planned interventions that will affect their lives.
8. Local knowledge and experience are valuable and can be used to enhance planned interventions.

Source: IAIA 2003.

First, what clearly distinguishes HRIAs from other types of impact assessments is that HRIAs are explicitly based on an objective legal standard of assessment drawn from human rights law, chiefly treaties. This introduces distinct normative, moral and legal elements into the assessment process since HRIAs depart from an openly normative position and do not necessarily accept the existing factual scenario or *status quo* as acceptable or legitimate. The strong normative element limits the extent to which trade-offs are acceptable, which may directly influence the nature and orientation of the HRIA’s recommendations.

Reliance on the human rights framework requires measuring the extent to which the policy or project complies with human rights both in terms of substance and process. This roots the entire process of HRIA in the normative and legal framework of international human rights law to which governments around the world have voluntarily committed themselves. HRIAs may implicate a range of human rights obligations to respect, protect and fulfill, and the nature and scope of the obligations in play will depend on the case at hand. These obligations will themselves imply different types of analysis and yield different types of recommendations. The anchorage of HRIAs in international law introduces legal accountability and gives the recommendations of HRIAs particular force. This feature is connected to the value added advantage of HRIAs in their ability to enhance accountability for negative impacts on human rights through their anchorage in binding legal frameworks. Changing the language during the assessment to “rights-holders” and “duty-bearers” emphasizes the value-added of HRIAs and

gives the recommendations that ensues from the assessment additional force and significance.

Using the framework of international human rights law as a basis for an impact assessment lends both moral and legal legitimacy to the whole exercise since human rights have become the dominant language for social justice claims in many parts of the world. The framework is “a set of universally acknowledged and shared values and norms developed over 60 years and accepted by all States through ratification of international treaties.” (Walker 2009). By contrast, other types of impact assessments are not based on such a universally recognized and legally backed framework and, as such their conclusions may not be capable of making authoritative or legitimate value judgments about the adequacy or appropriateness of particular policies or interventions

Second, and related to the first distinguishing element is the fact that HRIA can draw upon a developed jurisprudence for concepts such as equality or participation, whether it emanates from international or domestic courts and tribunals, or from the findings and conclusions of expert bodies charged with monitoring implementation of the international treaties which form the foundation of HRIA. Flowing from this advantage is the potential for HRIA to draw on human rights institutions and networks to play a role in implementing the recommendations of assessment.

Third, HRIAs differ from other types of impact assessments on the level of detail and specificity with which human rights issues are addressed and in the manner in which they are covered. For instance,, the notions of equality, participation, transparency and accountability are fundamental principles

of a human rights framework. Although other types of HRIAs often address some of these issues—particularly those of equality and participation—HRIAs do so more systematically and comprehensively.<sup>11</sup>

Fourth, HRIAs are universal and comprehensive—they typically consider economic, social and cultural aspects as well as civil and political ones since they are based on a legal framework that includes all rights—civil, political, economic, social and cultural. The fact that the framework incorporates these rights as interdependent and interrelated, reinforces a cross-sectoral approach in the assessment process. Other forms of assessment tend to be more narrowly focused—PSIAs and ESIAAs for instance, can fail to capture the full range of factors that might prompt or exacerbate human rights risks involved in a particular intervention or activity. Having said that, HRIAs do not usually include environmental protection or a particularly strong economic dimension<sup>12</sup> unless these overlap directly with human rights.

## 1.4 Types of HRIAs

There is no one type of HRIA. A wide variety of assessments have emerged, shaped by a number of factors, such as the type of measure being assessed, the nature of evaluation, its timing, what data is being assessed and who is undertaking the assessment.

### 1.4.1 ASSESSMENT OF POLICIES, PROGRAMS AND PROJECTS

Depending on the goal of the assessment, a HRIA can be used to evaluate the impact of legislation, public policy, a business project or a program. For those unfamiliar with the human rights normative framework, using human rights norms and standards to assess impacts of policies, programs or projects may appear overwhelming. But not all aspects of human rights need to be considered in every HRIA; it may even be that only a certain type of human rights obligation is triggered (i.e., perhaps only a negative duty to respect rather than a larger set of responsibilities implied in the obligations to respect or fulfill). Assessment could examine potential impact on a specific group (e.g. children, women, ethnic minorities) or a defined issue (the environment, health, education), or take in an overall picture of the human rights effects of a program. (Foresti 2009). It is also important to recognize that the assessment process and its methodology will vary depending on the nature of the measure being assessed and the nature of the human rights obligation it triggers.

According to Walker, these goals usually influence the nature and scope of the exercise. An assessment of a national policy—whether trade or investment agreements, health policies or anti-trafficking policies—often tracks effects on the entire population of a country. In contrast, development programs or business projects are usually more circumscribed both in terms of the geographic reach and population affected, although this may vary depending on the project or program. (Walker 2011)

### 1.4.2 TIMING OF HRIAs

A key element of any impact assessment is the timing *vis-à-vis* the policy, program or project being evaluated. HRIAs can be undertaken either *ex ante* or *ex post*.

*Ex ante* impact assessments occur before interventions take place and aim to measure the potential future effects of such interventions on human rights, the environment, social issues or health (depending on whether it is a HRIA, EIA, SIA or a health impact assessment). *Ex ante* HRIAs can enhance policy development, enabling policy-makers or business enterprises to adjust or change the policy, project or program in order to prevent human rights violations. They must be carried out at the earliest possible stage of the policy-making process, so that their findings and recommendations can be incorporated while the policy or intervention is still being shaped.<sup>13</sup> As set forth in section 4.3, this practice generates a key methodological challenge for the undertaking of HRIAs.

*Ex post* impact assessments measure the actual impact of implemented policies, programs or projects. Simply put, the current situation is compared with the situation before the intervention or policy was adopted. *Ex post* HRIAs could either be a stand-alone exercise or could constitute the evaluation

<sup>11</sup> On the other hand, while PSIAs and ESIAAs often contain detailed analysis of economic or environmental impacts, HRIAs generally address these issues only in cases where they overlap with human rights issues.

<sup>12</sup> By contrast, these elements are integrated in the European Commission's Trade and Sustainability Impact Assessment (TSIA) and the United Nations Environment Programme's Integrated Impact Assessment methodology

<sup>13</sup> This, of course, is also true for other types of impact assessments, but in practice is not always the case. The International Federation for Human Rights (FIDH) points out that in many cases, the results of the Trade Sustainability Impact Assessments, carried out by the European Commission with regard to trade agreements being negotiated by the European Union and other countries, are made available at a late stage in the process of negotiation, and therefore cannot influence the results; sometimes the results are published only after the negotiations have been finalized. (FIDH 2008)

phase of an *ex ante* HRIA. This is for instance precisely how NomoGaia, a think-tank that specializes in HRIAs, conceives of the backward-looking reports they undertake for each *ex-ante* HRIA that they undertake (NomoGaia, not dated). At the same time, *ex post* HRIAs can help policy makers to predict the human rights impact of future policies through analogy (HRIRC, not dated).

Typically, EIAs and SIAs are *ex ante* assessments. In fact, the *ex ante* component is included as an essential element of many definitions of impact assessments.<sup>14</sup> In contrast, the majority of HRIAs surveyed have been *ex post* assessments. One factor that could influence the timing of the assessment is the identity of the actor carrying it out. The overwhelming majority of HRIAs conducted by Civil Society Organizations (CSOs) have been so far *ex-post* assessments.<sup>15</sup> This may be due to the fact that CSOs encounter difficulties in accessing timely and comprehensive information on the policy or project from a government or corporation before that policy or project is approved. In turn, their ability to conduct *ex-ante* HRIA can be significantly limited. CSOs also might be more adept at conducting assessments of on-going or past policies or projects as assessments are similar to the type of human rights monitoring and research that human rights NGOs have been carrying out for decades.

Generally, carrying out an *ex-ante* assessment is more demanding from a methodological point of view because it entails predicting future impacts. However, conducting a *post-ante* assessment presents its own risks. To illustrate, some of the challenges in identifying impacts that the assessors of the HRIA of the Marlin Mine in Guatemala faced were related to the fundamental fact that it was a *post-ante* exercise. The challenges included: the hindrance of full participation of stakeholders because of the controversial nature of the ongoing operation, which in turn limited the ability to address criticism of the independence of the assessment. Others included the lack of human rights baseline studies prior to the approval of the mine, and the acute timing problem of assessing the quality of the consultation process when several years had passed since the approval of the mine project and when conflicting views had emerged regarding the adequacy of the consultation process. Due to these and other factors, the human rights impact assessor reached the conclusion that it was not possible to make a determinative judgment about the impacts that occurred (Common Ground 2010).

### 1.4.3 INTENDED AND UNINTENDED IMPACTS

HRIAs can sometimes focus on public policies, legislative initiatives, legal agreements or development projects that

have a direct, intended impact on human rights, such freedom of expression legislation or equal access to education policy Initiatives. HRIAs can also assess policies, initiatives or projects that affect human rights indirectly, with unintended human rights impacts, like the consequences of trade agreements, development projects or fiscal policies. In the latter circumstances the challenge of establishing a causal link between the intervention and a negative impact on the enjoyment of human rights is likely to be more pronounced.

The majority of HRIAs that have been carried out focused on policies or projects whose primary purpose is not directly related to human rights, such as those utilized to increase trade flow, provide development assistance or construct large infrastructure—but that could have unintended impacts on human rights, particularly at the implementation stage (Walker 2011). This focus is not surprising, as HRIAs are particularly useful in those cases when the human rights implications of a proposed policy or project are not obvious at the design stage.

Focusing on policies that can have unintended impacts on the enjoyment of human rights raises the issue of how to identify the policies or projects that necessitate HRIAs, since an in-depth examination of the human rights impact of every single policy is impossible.” (De Beco 2009).<sup>16</sup>

### 1.4.4 WHO CARRIES OUT HRIAS?

Diverse actors undertake HRIAs, including state agencies, business corporations and civil society organizations, such as NGOs and academic institutions. It is difficult to determine the total number of HRIAs that have been carried out to date, since there is no single database tracking them comprehensively. A review of the only existing database—the Resource Database of Case Studies of the Human Rights Impact Resource Centre—would suggest that the majority

<sup>14</sup> For instance, the International Association of Impact Assessment defines Impact Assessment as “the “process of identifying the future consequences of a current or proposed action (<http://www.iaia.org/about/>) (emphasis added). Similarly, Health Impact Assessment has been described “as any combination of procedures or methods by which a proposed policy or program may be judged as to the effects it may have on the health of a population.” (emphasis added) (Ratner et al 1997).

<sup>15</sup> A review of the Resource Database of Case Studies of the Human Rights Impact Resource Centre, revealed that out of 26 HRIAs carried out by CSOs, 22 of them were *ex post* and only 4 of them were *ex ante*. (HRIRC not dated (b)).

<sup>16</sup> This issue is addressed during the screening stage of the assessment. See section 3.1.1 below.

of individual HRIAs in developing countries have been conducted by civil society organizations.<sup>17</sup> However, this database is clearly skewed toward overrepresentation of HRIAs by CSOs because as discussed below, business companies are often reluctant to publish reports of the HRIAs that they have conducted.

With regard to policies, projects or programs undertaken in developing countries or in certain cases where a new law is being passed, where an international agreement is being entered into or a treaty being ratified, it is more common for public institutions to undertake HRIAs, particularly when required by statute.<sup>18</sup>

When a public body is required to undertake a HRIA, it is more common for them to undertake the assessment themselves. Similarly, where the HRIA is initiated by a CSO, they too will typically carry out the assessment. Conversely, when HRIAs are initiated by business companies, the assessment is often carried out on their behalf by CSOs. (Harrison and Stephenson 2010)

The identity of the assessor may have significant implications on its implementation. When CSOs conduct the HRIA, they may encounter difficulty obtaining detailed information about the development intervention before it is approved, unless the relevant duty bearers (government or private sector) are ready to fully cooperate with the CSOs. For instance, all five HRIAs for foreign investment projects undertaken by Rights & Democracy faced difficulties obtaining data on the investment. In the Tibet assessment the private company did not participate in the assessment at all. (Rights & Democracy 2007)

On the other hand, when governments or companies carry out impact assessments of policies or projects they are planning, there is a risk that the political or economic interests of the proposed intervention may unduly influence the analysis, conclusions or recommendations of the HRIAs.

At the same time, when HRIAs are carried out by government agencies as a standard procedure, they run the risk of becoming a mere bureaucratic procedure, without much useful content. This was a key finding of Harrison and Stephenson from a review they conducted of EIAs and equality and human rights impact assessment carried out by public bodies in the United Kingdom. They concluded that these types of assessments by public bodies “can become a ‘tick box’ exercise with little use of evidence to support conclusions, minimal consultation, limited understanding of key human rights and equality principles

and little real impact on decision making.” (Harrison and Stephenson 2011)

## 1. 5. Broader aims fulfilled by HRIA

Given the range of policies and interventions which HRIAs may target, and the cross-sectoral approaches they may facilitate, it is clear that HRIAs can also advance other aims and objectives, including promoting international policy coherence and mitigating fragmentation of areas of international law. HRIA applied across other thematic areas can help uphold a ‘do no harm’ principle for human rights and help avoid contradiction with minimum human rights thresholds. Similarly, HRIA may also be part of human rights due diligence for business—and their use is implied in the recently adopted UN principles on Business and Human Rights developed by John Ruggie.<sup>19</sup> By promoting ‘do no harm’ and possibly advancing ‘do good / do better’, HRIAs are a potentially useful tool in efforts to minimize risk and enhance opportunities in activities and interventions likely to impact human rights. The opportunities or benefits include contributing to the fulfillment of explicit human rights mandates of the UN and its agencies, as well as those of regional human rights institutions. Connected to this aim are the opportunities to help countries fulfill their human rights obligations and meet country-level demands stemming from social justice claims. HRIAs need not be part of ‘naming and shaming’ or finger-pointing, but, rather, can contribute to broader constructive dialogues surrounding policies and operations. In terms of mitigating risk, HRIAs can address and manage issues emanating from human rights obligations that arise in development, trade or business contexts *ex ante*, thereby reducing the risk of violations and harm and the associated reputational, legal and financial consequences that these bring. Human rights discourse is now so well-entrenched in communities that HRIA are a logical tool for risk management in a range of contexts.

<sup>17</sup> A review of this this database shows that out of 28 full HRIAs carried in developing countries, 26 were carried out by CSOs and two by business companies. (HRIRC not dated (b))

<sup>18</sup> In the UK the most common form of human rights-related impact assessment used to date has been Equality Impact Assessment (EIA), which came about as a result of statutory obligations on public authorities to prevent discrimination and promote equality on grounds of race, gender and disability. (Harrison and Stephenson 2010).

<sup>19</sup> Principle 17.

## 2. Essential elements of HRIAs

This section draws on existing HRIA literature to set out the essential elements of HRIAs. Rather than providing an exhaustive overview of what each author considers to be essential elements, this section highlights the principal themes that emerge from the literature.

In seeking to respond to the question of which constitutive features turn an impact assessment into *human rights* impact assessment, this chapter examines areas of convergence and difference between HRIAs and other types of impact assessments, such as EIAs and SIAs. This is an important issue because the general principles for carrying out HRIAs overlap considerably with the values and principles that underpin these types of impact assessments.

### 2.1 Normative human rights framework

HRIAs are based on the normative framework of international human rights law to which governments around the world have voluntarily committed themselves. This is considered by many authors to be the most fundamental and distinguishing element of HRIAs, clearly distinguishing them from other types of assessments (Ruggie 2007, Foresti et al 2009, Walker 2009). The very purpose of HRIAs is to evaluate the extent to which the elaboration, implementation and monitoring of the policies, projects or programs being assessed are consistent with human rights norms. The explicit comparison of the envisaged impacts of an assessment against international human rights norms is unique to this type of assessment. NomoGaia notes that an SIA can determine education levels in a Project-impacted community, “but it does not, and is not designed to, determine if the Right to Education is being met or will be impacted. It investigates neither the obligations of institutions to protect or respect rights, nor the empowerment of rights holders to seek remedies.” (NomoGaia – undated)

The human rights framework requires measuring the extent to which the policy or project complies with human rights both in terms of substance and process. HRIA should:

1. Be based on human rights law comprehensively and explicitly and elaborate upon the duty-bearers relevant human rights obligations to respect, protect and fulfill.
2. Evaluate whether the foreseen outcomes of the policy or project would have positive or negative effects on substantive human rights norms and standards. While some of these norms overlap with standards in development policy and practice,<sup>20</sup> others are specific to the human rights framework. For instance, a basic state obligation for economic, social and cultural rights is the obligation to progressively realize these rights ‘to the maximum of a state’s available resources’<sup>21</sup>, which reflects the recognition that adequate resources are a crucial condition for the realization of these rights. A HRIA would examine the extent to which the policy or project being assessed would comply with this obligation with regard to such rights as the right to education, the right to food and the right to health.<sup>22</sup> Likewise, such

<sup>20</sup> For instance, the obligation on governments to ensure the availability, accessibility good quality of health services largely overlaps with good practices in public policies.

<sup>21</sup> ICESCR.

<sup>22</sup> For suggestions of tools that HRIAs could be used to measure the extent to which a policy complies with this obligation, see Felner 2009.

analysis would need to examine the extent to which the policy or project being assessed will be adaptable to the specific needs of various segments of the population (i.e. taking into account gender sensitivity and cultural adequacy of the services).<sup>23</sup>

3. Contribute to the capacity of both the rights-holder (to claim their rights) and the duty-bearer (to fulfill their obligations)
4. Examine the extent the policy or project is (or has been) formulated, implemented and monitored in accordance with fundamental human rights principles, such as non-discrimination, participation, transparency and accountability.<sup>24</sup>
5. Involve the relevant human rights actors in the particular context, including national human rights institutions, NGOs and UN human rights experts.
6. Ensure that the process of assessment is itself human rights compliant and that it respects human rights at all stages. This element therefore requires that the HRIA itself be subject to assessment

The fact that HRIAs are based on universal norms reinforces the legitimacy of this type of assessment. The universal nature of this normative framework “is particularly helpful when assessments have an international context, as in the case of the assessment of trade agreements, as universal norms provide a level of cross-cultural and international legitimacy to the assessment framework and outcome.” (Walker 2009). Even when a HRIA does not have an international context, the international legitimacy arising out of the human rights framework can also empower the various stakeholders involved in the assessment to discuss the most contentious issues. In the field-tests of the tool developed by WHO and Harvard School of Public Health that uses human rights concepts and methods to assess relevant laws, regulations and policies related to sexual and reproductive health, conducted in several countries, reference to human rights standards helped to lift discussions out of possibly entrenched and divisive positions on topics such as sex work, abortion and adolescents’ access to information and services. (Cottingham et al 2010)

The legal nature of the human rights framework can give greater force to recommendations arising from a HRIA, as it imposes clear legal obligations on states and other duty-bearers. Consequently, “a failure to comply with those duties represents a violation of a state’s legal obligation and gives rise to enforceable claims by rights-holders.” (Gay 2008).

In accordance with the principles of national sovereignty, international human rights law affords states a margin of

discretion in selecting the policies, projects and programs necessary to achieve their goals, including those necessary for realizing their human rights obligations.<sup>25</sup> However, the extent of a state’s discretion is limited by the human rights obligations it has committed by treaty to uphold.<sup>26</sup>

Therefore, using a human rights framework for impact assessments can set limits to the kind of policies, projects or programs that could be considered legitimate. As the European Commission states in its Impact Assessment Guidelines, when a policy option being assessed has an impact on legal obligations assumed by the EU, such as international law or obligations related to fundamental rights, the IA should explain why certain policy options are necessary or not feasible. (European Commission 2009)

Walker suggests that the extent to which duty bearers will take seriously these legal obligations and the recommendations flowing from them that are analyzed in a HRIA, will depend on the context of the assessment:

In many countries, the legal implications of human rights obligations, whether as a result of national law or international law, are real and this can help give additional force to the results of an assessment. However, even where legal implications of human rights might be weak, phrasing analysis and recommendations in human rights terms can still provide greater moral force to social imperatives. The eagerness with which businesses seek to avoid the label of human rights violator is an illustration of how human rights can be used to effect. In this sense, human rights language can give greater force to social objectives as the use of terms such as ‘polluter’ gives greater force to environmental objectives. so the extent to which human rights adds legal strength to an analysis might vary from case to case and country to country. (Walker 2009)

Grounding an impact assessment in the normative framework of international human rights law also has implications on the content of HRIAs. When the focus of the assessment is a project of a business company, the fact that HRIAs are

<sup>23</sup> Under the concept of ‘acceptability’, this is considered one of the essential elements of economic, social and cultural rights. See, e.g. CESCR 1999a, para 11; CESCR 1999b, para. 6 and CESCR 2000, para 12.

<sup>24</sup> See below for more details about the application of these principles in HRIA.

<sup>25</sup> See Maastricht Guidelines. 1997. ‘Maastricht Guidelines on Violations of Economic, Social and Cultural Rights’. Maastricht, 22–26 January 1997 – Guideline 8.

<sup>26</sup> See e.g., CESCR 1999a, para. 21 and CESCR 2000, para 53.

grounded in international human rights law implies that in addition to evaluating risks and impacts on private business interests, it would identify government obligations related to that business activity. This is not the case with standard impact assessments, such as SIAs or EIAs.<sup>27</sup>

## 2.2 Public participation

Given their foundation in human rights and in HRBA, HRIAs place significant emphasis on public participation. Harrison considers that “the centrality of the consultative process is one of the key ways in which HRIAs can be differentiated from standard economic impact assessments which tend to focus on aggregate impacts and often pay insufficient attention to the impacts on vulnerable groups.” Harrison (2011)

Walker points out that in both SIA and HRIA frameworks, participation is as important to the process of undertaking the assessment as it is to assessing the extent to which individuals and groups have a say in the decisions regarding the policies, projects or programs that affect them. (Walker 2009) This means that HRIAs should both assess whether effective participatory mechanisms are in place during the whole life cycle of the intervention (from formulation to evaluation), as well as ensure that such mechanisms are integrated in the process of the HRIA itself.

To examine whether the development initiative had effective participatory mechanisms and to ensure that the HRIA itself adopts such mechanism, HRIAs should confront the obstacles that in many countries prevent effective participation processes, like rushed schedules, shortfalls in the dissemination of calls for consultations, superficial or uninformative consultations, shortcomings in the inclusivity of the consultations (not enabling an active participation in the process of diverse groups of the population, particularly of marginalized and vulnerable groups), the lack of clarity about the process of the consultation and its objectives, and shortcomings in a systematic approach to summarize and transmit the conclusions and recommendations of the participatory process. (ODI 2005) Gay considers that engagement with relevant stakeholders as part of the assessment process serves both as a means of gathering evidence about the likely impacts on the community and as an empowering experience for affected communities. (Gay 2008).

Another crucial feature of effective participation that HRIAs need to assess is the timing of the consultation process in relation to the adoption of the policy. As the Inter-American Court on Human Rights stated in the recent case of the Sarayaku indigenous community, consultations “should be held from the early stages of the formulation or planning of

the proposed measure, so that indigenous peoples can truly participate and influence the decision-making process, in accordance with relevant international standards.”<sup>28</sup> (Inter American Court on Human Rights 2012)

Although concern for public participation is common to both HRIAs and other types of impact assessments, NGOs have often found participation shortcomings in traditional impact assessments. European CSOs have criticized the consultation processes of EU Trade Sustainability Impact Assessments, arguing that the stakeholders convened have often not been sufficiently inclusive, the stakeholders have not always been provided with all the necessary information for meaningful participation and sometimes stakeholders are not aware of the consultation exercises related to these assessments and therefore do not react to the consultation drafts. (European CSOs 2006, FIDH 2008).

In addition, the participatory processes in Poverty and Social Impact Analysis (PSIAs), developed by the World Bank, have been criticized by some NGOs on similar grounds. For instance, a discussion paper on World Bank-Civil Society Engagement cites an Oxfam review that found that: (a) not all the pilot PSIAs are available for public scrutiny; (b) there is no clarity on how and by whom the topics for the new studies were selected; and (c) almost no attempts have been made to engage with a broader range of stakeholders to generate ownership of the analysis. (Herz and Ebrahim 2005) The discussion paper also suggests that there are few, if any, meaningful avenues for redress for citizens who believe that participatory processes have not been sufficient, or that the concerns that they have raised have not been adequately addressed in a project. (Herz and Ebrahim 2005)

At the same time, some HRIAs have not been able to carry out full participatory processes, either because of lack of resources or because of the specific circumstances in which the assessments were carried out, such as if a full participatory process would have put it at risk. During the process of carrying out the Marlin Mine HRIA, the assessors reached the conclusion that given the escalating conflicts around the mine, a full inclusive and comprehensive participatory process could put participants at risk. On this basis, it was agreed with the steering committee to redefine the work done as a Human Rights Assessment, rather than a Human Rights Impact Assessment, a point echoed by other practitioners in the field. Nevertheless, efforts were made to consult with the multiple stakeholders, but the assessors were not able to

<sup>27</sup> For instance, ESIAAs would typically not include any discussion of freedom of expression (Ruggie 2007).

<sup>28</sup> Our translation.

meet with and interview those organizations most opposed to the mine and the HRIA; invitations extended to these groups were rejected. (Common Ground 2010).

Similarly, in the case of a HRIA of communications technology introduced along the Gormo-Lhasa railroad in Tibet, security concerns prevented prolonged visits of the assessors with any one community or group. Furthermore, the assessors were constantly aware of the threat to the personal security of their sources and therefore exercised a good deal of restraint in pursuing sensitive lines of questioning. Unfortunately, they documented no names and did not photograph the interviewees. (Rights and Democracy 2007)

### 2.3 Equality and non-discrimination

The principle of equality is another essential element of HRIAs. The focus on equality is not unique to this type of impact assessment. PSIA “involves the analysis of the distributional impact of policy reforms on the well-being of different stakeholder groups, with a particular focus on the poor and vulnerable.” (World Bank 2003). Likewise, equality is an important issue both for social impact assessments and health impact assessments.<sup>29</sup>

In the case of HRIAs, the issue of equality is primarily considered through the lens of the right to non-discrimination and its related equality rights. HRIAs seek to identify the differential impacts of a proposed intervention and ask assessors to determine whether that intervention is likely to have a discriminatory effect on a group within a population (Gay 2008). Since policies and other types of development interventions might discriminate in varying ways, HRIAs evaluate both direct and indirect forms of discrimination.<sup>30</sup>

HRIAs often focus on identifying and analyzing indirect forms of discrimination, which appear to be neutral at first sight, making their discriminatory effects less obvious. For instance, the *HRIA of the Paladin Energy’s Kayelekera Project in Malawi*,<sup>31</sup> conducted by NomoGaia, found that while Paladin’s policies, codes and practices were not directly discriminatory against women,<sup>32</sup> the company might be deepening inequalities between men and women by failing to address entrenched inequalities in the project area: denied education and earning power, with local women lacking the skills necessary to gain employment. Thus, although Paladin hires women, it has not made specific efforts to do so, or undertaken other measures to redress systemic discrimination, such as providing women’s skills training programs. As a result, men earn 87.5 percent of Malawian salaries at the Project, and women constitute 15 percent of the Project’s Malawian workforce. (Wielga et al 2010)

Likewise, a HRIA that examined the impacts of public spending cuts that are currently underway in the city of Coventry in the United Kingdom, carried out by the Centre for Human Rights in Practice at the University of Warwick and Coventry Women’s Voices, concluded that many of the spending cuts will have a disproportionate impact on women and exacerbate overall inequality between men and women in Coventry. (Stephenson and Harrison 2011)<sup>33</sup>

In their proposal of the development of HRIAs for the formulation and evaluation of public health policies Gostin and Mann suggest that another element to be taken into account is to determine whether the policies under evaluation avoid both under-inclusiveness and over-inclusiveness. (Gostin and Mann 1994)

The fact that traditional forms of impact assessment typically include the principle of equality and seek to evaluate the disparate impacts of policies and projects on different individual and groups is often seen as a point in common with HRIAs. However, in HRIAs the issue of equality is intrinsically related to the human right of non-discrimination and related equality rights. As such, it highlights disparate impact as potentially constituting a form of (indirect) discrimination and as a human rights violation. On this point, a HRIA can draw on decades of national, regional and international jurisprudence on these rights to help analyze the source, significance and scope of disparate impact as well as measures that can be adopted to redress it, including through affirmative action. As a result, the human rights framework broadens and deepens considerably the analysis on equality. (Walker 2009). Walker elucidates further that the notion of

<sup>29</sup> For references to relevant documents, see De Beco 2009, footnote 41.

<sup>30</sup> Direct discrimination occurs when an individual is treated less favorably than another person in a similar situation for a reason related to a prohibited ground; e.g. where employment in educational or cultural institutions or membership of a trade union is based on the political opinions of applicants or employees. Direct discrimination also includes detrimental acts or omissions on the basis of prohibited grounds where there is no comparable similar situation (e.g. the case of a woman who is pregnant). Conversely, indirect discrimination refers to laws, policies or practices which appear neutral at face value, but have a disproportionate impact on the exercise of human rights as distinguished by prohibited grounds of discrimination. For instance, requiring a birth registration certificate for school enrolment may discriminate against ethnic minorities or non-nationals who do not possess, or have been denied, such certificates. (CESCR 2000).

<sup>31</sup> This project is the largest foreign investment project in Malawian history. It is also the country’s first uranium mine.

<sup>32</sup> The HRIA found, for instance, that the Paladin Project has equal opportunity policy; pays women equal salaries as men for similar work and community development team hires women and provides conditions favorable to women workers (allows children to be present).

<sup>33</sup> For more details, see annex 1.

non-discrimination in a human rights framework implies *inter alia* a requirement of the State “to go beyond merely prohibiting discrimination to ensuring that discrimination does not occur in practice. Thus, the State has to provide ‘reasonable accommodations’ to individuals to ensure that they can participate actively in society on the same level as others, ensuring that discrimination does not occur in practice.”<sup>34</sup> Similarly, it implies that “positive discrimination is sometimes necessary in order to ensure that discrimination does not occur in practice and to tackle the underlying biases in society with a view to achieving substantive equality.” (Walker 2009). Furthermore, the human rights framework requires paying particular attention to the impacts of multiple forms of discrimination (CESCR 2009, para. 17), which is sometimes termed ‘intersectionality’ as a reference to the ways in which different forms of discrimination can be mutually reinforcing and exacerbating. Some individuals or groups face discrimination on more than one of the prohibited grounds, for example women belonging to an ethnic or religious minority. Such cumulative discrimination has a unique and specific impact on individuals and merits particular consideration and remedying.

Walker illustrates the practical difference between HRIAs and other types of impact assessment on this issue with the analysis of two Trade and Sustainability Impact Assessments of the European Commission (TSIA): the EU-Mercosur TSIA and the Euro-Mediterranean Free Trade Area TSIA. Both of these assessments examined, amongst other impacts, the potential impact of the trade agreements on ‘equity,’ which were assessed in relation to income distribution and gender equality. He questions this narrow understanding of equity, arguing that a HRIA would approach the analysis quite differently:

It would employ the terms ‘non-discrimination’ and ‘equality’ upfront and recognize that these terms have specific meanings. This would lead to an analysis based on human rights jurisprudence which would consider not only equality between men and women but also non-discrimination and equality in relation to others, such as indigenous peoples, persons with disabilities, and so on. The analysis would then consider the extent to which *de jure* or *de facto* discrimination currently exists and whether the trade agreement would have any impact on that discrimination, either positively or negatively. It would analyze current biases within society leading to indirect discrimination which in turn might result in the trade agreement exacerbating discrimination and inequality or alternatively

preventing the beneficial aspects of a trade agreement from taking effect. (Walker 2009)

Walker also critically examines the conclusion reached by the TSIA of the Euro-Mediterranean Free Trade Area, on ‘gender equality’ that “significant gender impacts may occur...for agriculture, associated with a decline in traditional food production and the extension of commercial farming... increasing feminization of the workforce is likely to be an impact in many countries, but with uncertain effects on gender equality, dependent on domestic policy.” (Euro-Mediterranean TSIA, quoted in Walker 2009). He argues that this conclusion throws up as many questions as it answers, suggesting that a HRIA would:

Explain whether the ‘increasing feminization of the workforce’ might be a continuation of a pattern of unequal work for women in employment sectors targeted as ‘women’s work’, or whether the ‘increasing feminization’ might provide women with new opportunities for quality work that could help break down past patterns of inequality. It would consider whether the feminization of the workforce also included women with disabilities or women from minorities, and whether multiple forms of discrimination might occur if they were not. Further, the throw away reference to ‘domestic policy’ becomes central and in turn must be analyzed in relation to the extent that the State has laws and policies both preventing discrimination but also promoting equality, through equality laws—for example, equal pay for equal work—as well as through temporary special measures such as affirmative action schemes. Where there is discrimination, this must be justified according to reasonable and objective criteria. Where unjustified discrimination continues, then an individual should have resource to a legal remedy. (Walker 2009)

Harrison adds that using a human rights framework can also lead to a focus on the rights of particular marginalized or vulnerable groups, thus highlighting negative effects on these groups that other types of impact assessments may overlook. He illustrates this point with the child rights impact assessment conducted by UNICEF in Bosnia and Herzegovina

<sup>34</sup> ‘Reasonable accommodation’ means “necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.” (CRPD, 2006, art. 2).

which assessed the potential impact on children of proposed increases in electricity prices as opposed to impacts on the general population. This assessment reached the conclusion that as a result of increased costs of electricity for educational establishments and reduced usage of electricity in poorer households, the rights to health and education of some groups of children would be undermined. (Harrison 2011)

Walker adds that HRIAs can help protect the rights of marginalized or vulnerable people by setting limits on legitimate ‘trade-offs between individual and the common good. Economists often consider that the adoption of a new policy or project frequently generates ‘winners’ and ‘losers’, which compels policy-makers to ‘trade-off’ between these conflicting interests, compensating ‘losers’ as part of any reform initiative (Walker 2009). In contrast:

Human rights standards identify the minimum levels of civil, cultural, economic, political and social conditions for a life in dignity, below which it is unacceptable to go. Consequently, ‘trade-offs’ between ‘winners’ and ‘losers’ are not possible where the conditions of ‘losers’ go below that minimum threshold. This is particularly relevant to protect the situation of persons living in vulnerable or marginalized situations who might not always have a voice in decision-making processes and whose interests can easily be sacrificed in the interests of the majority or a more vocal minority. (Walker 2009)

## 2.4 Transparency and access to information

Transparency is another cross-cutting element of HRIAs that relates to the right to information. Access to information is crucial for a meaningful participation process, thoroughgoing consultations and effective accountability mechanisms, beyond just judicial remedies.

As the Guide to Corporate Human Rights Impact Assessment Tools remarks,

It should be clear to the stakeholders why an HRIA assessment was undertaken in one project and why other projects are not assessed. The same is valid for the components of an assessment and why certain issues are left out of the assessment. And, crucially, the engagement process can only function properly if stakeholders have adequate and timely access to all relevant information in a language that is understandable to all. Transparency is imperative throughout the HRIA process. Without the necessary information, stakeholders cannot become properly

involved in discussions, nor can they understand the position and perspective of the company. (Aim for Human Rights 2009).

Transparency relates to two different aspects of impact assessments. The first refers to the extent to which the policy or project being assessed is transparent and its content is made available to the public in sufficient detail before it is approved. With regard to some types of interventions, information may be generally available, e.g. when the intervention assessment consists of a draft law that is being discussed in Parliament. But in other types of policies or projects, the public may have scant information about its details. Harrison points out that there is generally very limited transparency in the context of bilateral negotiations related to trade agreements. He illustrates this point with his analysis of the negotiating process of the Canada-Colombia free trade agreement, in which no draft text was publicly available, and minimal efforts were made for public consultation in the process. (Harrison 2009).

A critical factor affecting the level of transparency of the policy or project being assessed is the timing at which information about that development intervention is made publicly available. Specifically, HRIAs need to examine the timing of the information disclosure about the likely impacts of a policy or project *vis-à-vis* the approval of that policy or project. For instance, in the case of the Marlin Mine in Guatemala, an assessment of the Compliance Advisor Ombudsman of the International Finance Corporation “found that much of the information disclosure and consultation took place after the Environmental and Social Impact Assessment on the project was submitted or after permitting, and that at the time, sufficient information was not available to allow stake-holders to be informed of the likely adverse impacts of the project.” (Common Ground 2010)

The second aspect of transparency concerns disclosures of information on the HRIA process itself. The transparency of the HRIA process itself—both in terms of the methodologies used for the assessment and the findings of the particular assessment—is particularly important since the explicit treatment of human rights in the process is a key criterion for political legitimacy. As a result, HRIAs can become a cause for contestation, with proponents of a policy or project on the one hand reluctant to openly admit negative human rights implications (and possibly even arguing the human rights benefits of the activity) and those opposing those policies or projects on the other hand using human rights arguments as criticism, even in cases when those arguments are quite weak. (Harrison and Stephenson 2010).

In such cases, the public availability of information about the methodology used in the assessment, the process by

which it was undertaken and the findings of the assessment become essential to monitor the accuracy, independence and legitimacy of the entire exercise. Maassarani et al make this argument compellingly with regard to HRIAs commissioned by business companies:

It may be argued that corporations, if not properly regulated, will cut corners on an HRIA by ignoring its implications or by choosing to mitigate only the easiest problems while exaggerating positive effects. This not only rewards the misbehaving corporation, but it simultaneously places the honest companies, sincerely applying the HRIA, at a competitive disadvantage. Yet, the transparent character of the HRIA and the existing high level of public scrutiny from civil society largely moderate this problem. As long as decision-makers fail to present a complete and comprehensive HRIA in a public forum, stakeholders will have ample reason to suspect inaccuracy or lack of transparency; as a result, the corporation will suffer, perhaps even more than it would have had it chosen to forego the HRIA altogether. This effect will preserve the reputation of the “honest” corporations and ensure the integrity of the HRIA regime, slowly forcing more and more corporations to follow the fold, thereby diminishing the competitive disadvantage of the HRIA. (Maassarani et al 2007)

Therefore, if the principle of transparency of HRIAs is taken seriously, the norm is making the assessment publicly available. Although exemptions to this norm may be justified—e.g. restrictions for proprietary information or commercial secrets the disclosure of which could lead to unfair competition, or security information which could imperil the life and safety of people connected with a project—exemptions should be narrowly defined and justified. In practice, the extent to which HRIAs are publicly available usually hinges on the type of HRIA at hand and the identity of the assessor. Generally, those conducted by NGOs or government agencies according to some statutory duty are made available to the public. Conversely, those that are carried out by business companies (or on their behalf by a consultancy firm) remain confidential in most cases. (Harrison and Stephenson 2010).

For instance, in 2001, BP asked two human rights experts to undertake an independent assessment of the human rights potential impacts of a project the company had in the area of Tangguh, in Indonesia. This was the first explicit human rights impact assessment commissioned by an extractive company. After the final report was produced, BP decided

to make publicly available only a summary of the report’s recommendations and conclusions, along with a written company response. The authors of the assessment presented its findings at meetings in London and Washington, but some NGOs refused to attend these meetings on the grounds that the assessment had not been published in full. (ICMM 2012)

Similarly, Xtrata, one of the world’s largest mining and metals companies, states on its website that it conducts “human rights risk assessments at all locations and [has] identified sites in Colombia, Philippines, Peru, the Dominican Republic and South Africa as posing the greatest risk.” (Xtrata, not dated). But no published assessment report was found in the same website.

Ideally, the principle of transparency in the HRIA process should not be limited only to making the assessment report publicly available. Rather, transparency should be reflected at all stages of the assessment process. The Memorandum of Understanding between Goldcorp Inc. and the Shareholder Group that set out the general terms of reference for the human rights impact assessment related to their operation in Guatemala, established that

[...] Not only a summary of the final report’s finding and recommendations will be made public, but also that the company will publicly disclose an action plan for implementing the recommendations as well as a rationale if the company’s plan does not provide for implementation of all recommendations. (Goldcorp 2008a)

## 2.5 Accountability

It is widely recognized that one of the key contributions of a human rights perspective is its focus on accountability. The importance of accountability is intrinsically related to the legal nature of the human rights framework (Sen 2000, Robinson 2005) and to its specification of rights holders and duty-bearers, empowering the former to hold the latter to account for particular entitlements. To the extent that HRIAs are based on that framework and offer clarity on the scope of human rights obligations and the extent to which duty-bearers have fulfilled these by illustrating the impacts of particular interventions on human rights, they promote accountability. HRIAs will typically assess the extent to which the policy, program or project being evaluated includes effective accountability mechanisms (beyond just access to the courts or the formal legal system) that enable redress for any case in which those interventions might impair the enjoyment of human rights.

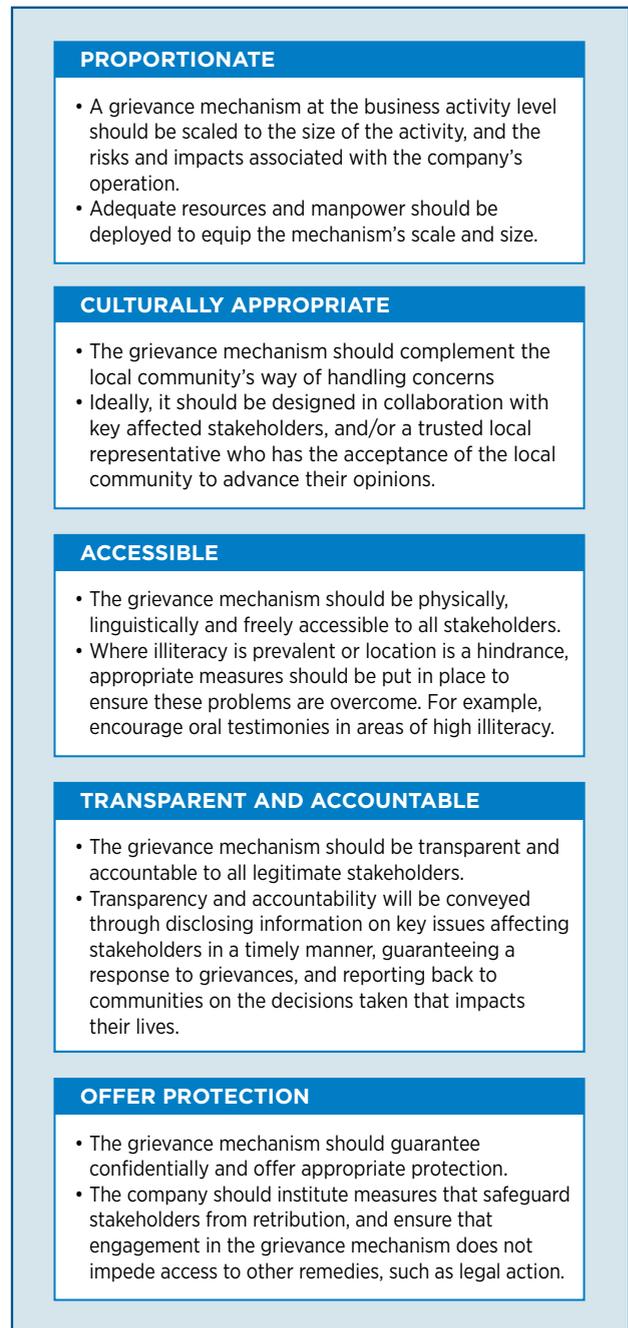
The HRIA tool developed by the International Business Leaders Forum (IBLF) and the International Finance Corporation (IFC) sets out guiding principles of an effective grievance mechanism, which could serve as a yardstick for analyzing the adequacy of the mechanisms put in place for the policy or project being assessed. (see figure 1) The HRCA developed by the Danish Institute for Human Rights enumerates a list of key questions for analyzing the existence and effectiveness of grievance mechanisms for business companies, as detailed in annex 9.

The impact assessment of the intellectual property provisions of the Dominican Republic-Central American-US Free Trade Agreement (CAFTA) on the right to health and related rights in Costa Rica provide a concrete example of such analysis of accountability mechanisms. After analyzing the normative framework of the right to health and the access to medicines in Costa Rica—and in particular the justiciability of the right to health in the context of trade—the assessment reached the conclusion that the “legal enforceability of the right to health has the potential to act as a buffer to possible negative impacts of CAFTA on access to essential medicines.” (Walker 2009). The assessment adds that

Costa Rica has four important elements which qualify as pre-conditions to human rights acting as an effective accountability framework: first, legal recognition of all human rights, including those rights more affected by trade agreements such as the right to health; second, recognized justiciability of all rights; third, a functioning and independent legal system; and, fourth an active civil society conversant in human rights. Without these four pre-conditions, the usefulness of human rights as a means of strengthening the accountability of key actors might diminish. (Walker 2009)

In upholding the principle of accountability, HRIAs identify the various types of duty-bearers and their corresponding human rights obligations or responsibilities. They should acknowledge that each duty bearer has diverse levels of responsibility for various outcomes related to the policy or project. As the Marlin Mine HRIA points out, “a company has a high degree of control over the outcome of changes in its core business, such as labour rights or contracting agreements, but less control over the actions of external actors or processes that require the participation of multiple actors.”<sup>35</sup> Accordingly, the assessors in the Marlin Mine HRIA took into account the relative influence of the company when making recommendations for changes. (Common Ground 2010).

**Figure 1: Guiding Principles of an effective grievance mechanism – HRIAM**



Source: IBLF and IFC 2011.

<sup>35</sup> See section 1.1. above.

## 2.6 Inter-sectoral approach and international policy coherence

The human rights framework considers all rights—civil, political, economic, social and cultural—as interdependent and interrelated.<sup>36</sup> This principle “recognizes the difficulty (and, in many cases, the impossibility) of realizing any one human right in isolation. For instance, it is futile to talk of the right to work without a certain minimal realization of the right to education. Similarly, the right to vote may seem of little importance to somebody with nothing to eat or in situations where people are victimized because of their skin colour, sex, language or religion.” (OHCHR, 2006).

Drawing on this human rights principle, HRIAs measure the cumulative impact of policy and projects by diverse sectors on the rights of individuals. For example, “a right to health assessment might focus specifically on the right to health but would also examine effects on a range of other rights that are inextricably linked to the right to health in the context of the issue under examination, such as the right to food, right to water, the right to an adequate standard of living, freedom from torture and the right to liberty and security of the person.” (Walker 2009).

The HRIA regarding the public spending cuts in Coventry illustrates this inter-sectoral approach. This assessment concluded that a combination of spending cuts, originating from various agencies, will have potentially devastating impacts on particularly vulnerable or disadvantaged women. The report identified cumulative impacts on a range of marginalized groups such as lone parents, Black and Minority Ethnic women and those giving and receiving care. (Stephenson and Harrison 2011)

A multi-sectoral approach is certainly not unique to HRIAs. Gay suggests that when a health impact assessment sets out to assess likely impacts on the determinants of health in order to facilitate a systematic method of impact assessment, it is inevitably giving consideration to a similar set of questions as HRIA when it assesses the impact of an intervention on a bundle of identified human rights (Gay 2008). Likewise, Walker suggests that SIA frameworks are also multidimensional in outlook, considering social impacts of policies and projects in a wide context that includes community life, culture, property, political systems, the environment, health and well-being and fears and aspirations. (Walker 2009).

Although in theory other forms of impact assessments share a multisectoral approach with HRIAs, in practice many of these impact assessments failed to do so in a consistent and comprehensive manner. For instance, Harrison and Stephenson

point out that the Coventry City Council published a series of EIAs of changes to policy as a result of their 2011/12 budget, but each of these assessments was related to the functions of particular departments. “This meant that, for instance, an adult social care impact assessment, only considered the impacts of local authority budget cuts on those receiving care and careers, rather than the potential cumulative impact of cuts on these individuals.” (Harrison and Stephenson 2011). A coalition of NGOs identified a similar shortcoming in the Sustainability impacts Assessments of the EU:

Regrettably, the current SIAs methodology has failed to provide a comprehensive assessment of the combined impacts of trade negotiations. Both affected sectors and the impacts (environmental, social and economic), have been assessed in isolation, providing only a partial understanding of what the effective outcome of the negotiations may be (NGO Statement 2005).

Many opine that since the human rights framework underscores interdependence of all human rights, it can strengthen a coherent and consistent application of a comprehensive assessment across sectors and promote international policy coherence. Indeed, the link between human rights and policy coherence as part of a broader concern with strengthened accountability has been emphasized increasingly by agencies like the UN Office of the High Commissioner for Human Rights (OHCHR): “We must foster policy coherence and systemic integration of human rights, including the right to development, across sectors, across institutions and across layers of governance. Human aspirations for well-being can be realized only when there is a strong accountability framework.”<sup>37</sup>

MacNaughton and Hunt point out that “Governments often lack adequate interdepartmental coordination mechanisms, and one department may not be aware of policies or program in another department. Consequently, one department may take action undermining the actions of another department. Human rights provide a legitimate and legally mandated common framework for all division of government.” (MacNaughton and Hunt 2011)

Cottingham et al suggest that “a right to health impact assessment is able to engage with powerful and political

<sup>36</sup> See for instance, World Conference on Human Rights 1993, art. 5

<sup>37</sup> Closing Statement by the High Commissioner for Human Rights at UN General Assembly Event to Commemorate the 25th Anniversary of the United Nations Declaration on the Right to Development (Nov. 8, 2011), available at <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=11583&LangID=E>.

vested interests to mainstream health concerns, and give them the same priority as matters such as economic prosperity and national security. It also provides all sectors with a clear statement that the right to health is interconnected with other human rights and extends to the enabling conditions required for a complete state of wellbeing.” (Cottingham et al 2010).

The potential benefits of using a human rights framework for an inter-sectoral approach are illustrated by the field tests of the tool developed by WHO and Harvard University to assess the legal and regulatory frameworks of sexual and reproductive health.<sup>38</sup> According to Cottingham et al, in all countries that carried out a field test for this tool, representatives from a variety of ministries participated in the stakeholder group, even though in most of these countries, the ministry of health had not previously collaborated with other sectors:

The involvement of ministries of justice, education, finance and religion, for instance, helped broaden understanding of the barriers to effective service delivery and create consensus for, and ownership of, proposed actions. It brought to light issues which would not normally have emerged from a typical sexual and reproductive health situation assessment. For example, in Indonesia and Mozambique it was found that, while universal access to education is guaranteed in international conventions ratified by the State and in national law, pregnant girls are still frequently expelled from school, and this is allowed in local regulations. In Indonesia, the final stakeholder meeting recommended the Ministry of Education forbid local schools to expel pregnant girls and better monitor the implementation of the law guaranteeing universal access, including plans for ensuring the continuing education of pregnant girls. Likewise, in Sri Lanka the tool highlighted custodial practices of the police department that were thought to further traumatize child victims of sexual abuse. (Cottingham et al 2010)

As such, the central importance of HRIA to promoting international policy coherence cannot be underestimated. HRIA can help policy-makers assess and understand the impacts of particular interventions on human rights and help them prevent duplication and avoid contradiction in government policy actions by promoting consistency across related subject matters and assessing the impacts of diverse areas of international policy on one another and on human rights in particular.<sup>39</sup> It can operate both vertically—ensuring that states implement treaty obligations effectively through their laws, policies, and processes—and horizontally—ensuring that state policies and interventions across sectors, departments, or ministries are consistent or compatible with one another, and that at a minimum, they do not undermine human rights. This priority is included in the UN Principles on Business and Human Rights, providing for it both vertically and horizontally. Principle 8 states that “States should ensure that governmental departments, agencies, and other state-based institutions that shape business practices are aware of and observe the State’s human rights obligations when fulfilling their respective mandates, including by providing them with relevant information, training and support.”<sup>40</sup>

<sup>38</sup> Although this tool was not presented as a form of HRIA, in terms of its purpose and methodology it could nevertheless be conceptualized as a tool for a post ante human rights impact assessment.

<sup>39</sup> [http://www.oecd.org/document/54/0,2340,en\\_2649\\_33721\\_35320054\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/54/0,2340,en_2649_33721_35320054_1_1_1_1,00.html). This idea has relevance to efforts in the UN human rights mechanisms to enhance coherence and harmonization among treaty bodies; see UN Report of the Working Group on Harmonisation of Working Methods of Treaty Bodies (Jan. 9, 2007); Report on Working Methods of the Human Rights Treaty Bodies Relating to State Party Reporting Processes: Note by the Secretariat HRI/MC/2007/4 (Jun. 1, 2007); and Report on the Implementation of Recommendations of the 5th Intercommittee Meeting and the 18th Meeting of Chair Persons, Note by the Secretariat HRI/MC/2007/6 (May 29, 2007).

<sup>40</sup> John Ruggie, Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises: Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework, A/HRC/17/31 21 (Mar. 2011).

### 3. HRIA methodologies

Like other forms of impact assessments, HRIAs should be an evidence-based exercise, which aims to contribute to a more informed policy-making process. Therefore, the effectiveness of HRIAs largely depends on the robustness of the methods it uses and the quality of the evidence gathered by those methods. (3D Gay 2008, Harrison 2009, Bakker et al 2009)

This section looks at the methods that have been set out by various HRIAs toolkits and/or used in specific HRIAs. In discussing these methods, it should be borne in mind that HRIAs are still a relatively new tool, the methods of which are still being developed and tested. Thus, despite the growing interest in HRIAs in recent years, their use is still relatively limited—as Harrison points out, there almost as many HRIA toolkits as there are actual HRIAs. (Harrison 2011).

Furthermore, HRIA has evolved “in a very piecemeal fashion” and has been utilized by diverse types of actors for different purposes. (Harrison 2009). As a result, there are not yet established and well-tested methodologies, like those that exist in other types of impact assessments that have been conducted regularly for decades, such as EIAs and SIAs.

HRIAs are often complimentary to other types of IAs and are often conducted on their heels. Whenever possible, human rights assessors build on the research conducted by these other assessments and other studies, but employ a different perspective to interpret the impacts foreseen in light of human rights standards. For example, the Dole HRIA and the *Paladin* HRIA, both conducted by NomoGaia, relied on preexisting data and analysis drawn from other Project assessments and studies. This information was then complemented by the human rights assessors with on-site research that provided the chance to independently check existing data and conclusions, as well as to engage with rights-holders that were affected by these projects (NomoGaia 2010a and NomoGaia 2010b). Likewise, the HRIA on CAFTA relied on the results of

a partial equilibrium model of the future impacts of CAFTA on access to medicines undertaken by Centro Internacional de Política Económica para el Desarrollo Sostenible and the International Centre for Trade and Sustainable Development (Walker 2009).

There is no uniform way to conduct HRIAs, but several methodological tools have been developed for conducting HRIAs. Various commentators suggest that the appropriate methodological model depends on a set of interrelated factors related to each assessment exercise, including:

- the nature of what is being assessed,
- the size of the policy, program or project
- the type of actor undertaking the assessment
- the objective of the assessment

- when the assessment is taking place (i.e. whether is *ex-ante* or *post-ante*)
- the allotted time for the assessment<sup>41</sup>

Despite these differences, there are some methodological features that are common to most proposals for carrying out HRIAs. Drawing on the literature and specific HRIAs from various fields, this section will outline these common elements.

### 3.1 Methodological steps

Ideally, HRIAs are carried out “through an iterative, dynamic and interconnected process” (IBLF AND IFC 2011) comprised of a series of stages. Although each guide to HRIAs proposes a somewhat different framework for this step-by-step process—in terms of the numbers of steps and how each one is defined—the core elements of this process are similar across the literature. In general, this step-by-step process is very similar to those used by other types of impact assessments, as their distinctive feature is that that “human rights concerns are explicitly integrated into every step of the impact assessment.” (MacNaughton and Hunt 2011)

From a review of various methodological frameworks proposed for HRIAs,<sup>42</sup> it is possible to identify the following core methodological steps for carrying out HRIAs:

#### Methodological Steps of HRIA

- i. Preparation
- ii. Screening
- iii. Scoping
- iv. Evidence gathering
- v. Consultation
- vi. Analysis
- vii. Recommendation + Conclusions
- viii. Evaluation and monitoring
- ix. Preparation of the report

#### 3.1.1. PREPARATION

This is the first stage of any HRIA, during which the assessor clarifies the relevant legal, regulatory, economic, environmental and social context of the assessment. During this stage, the outer parameters of the assessment are established.

#### 3.1.2 SCREENING

This step involves a narrowing of the range of measures and activities to be subject to assessment to determine policies, projects or interventions are most likely to have an impact on the enjoyment of human rights, which helps ensure the specific focus of the assessment. The screening process also helps to identify the exact human rights issues in play and the stakeholders that may be affected by the planned policy or project.

This preliminary step is the process that identifies which policies or projects are more likely to experience an impact on the enjoyment of human rights, thereby narrowing the focus of the assessment. This step can help determine whether to move on to conduct a full impact assessment, to narrow its focus and or to discard those policies or projects where an HRIA might not be suitable. When the focus area of the impact assessment is not clear, the importance of screening is clear because, in general, there are not enough resources to carry out assessments for every single policy or project. (De Beco 2009) The screening process also helps to identify which human rights issues and stakeholders might be affected by the planned policy or project.

The Guide to Human Rights Impact Assessment and Management (HRIAM), a tool developed by the International Business Leaders Forum and the International Finance Corporation, sets out a series of key questions during this preparatory stage (see figure 2).

Annex 2 illustrates the type of human rights issues identified during the screening stage of a HRIAs of a trade agreement.

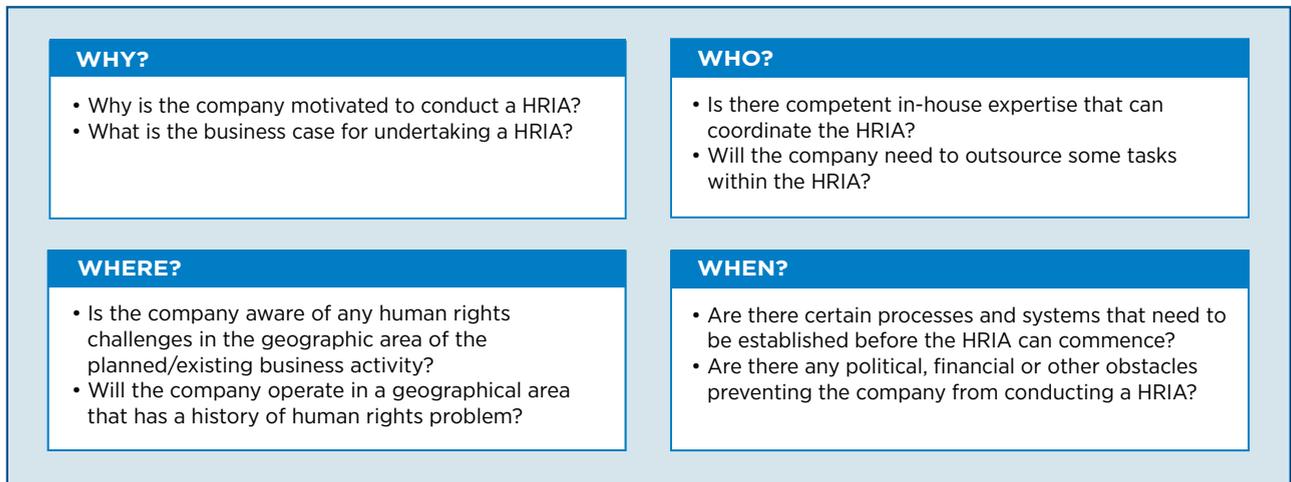
#### 3.1.3 SCOPING

**Scoping:** This step involves drafting the terms of reference (TORs) for the assessment itself, providing a road map for the process of assessment and the responsibilities of the assessor(s) (Harrison, 2011). This stage also involves outlining options and scenarios as well as identifying the relevant indicators to be used in the assessment. (Harrison 2011). At this stage, a baseline assessment of the current human rights situation is carried out “from which the potential impacts can be predicted and actual effects can be gauged.” (Maassarani

<sup>41</sup> 3D (not dated), Paton and Munro 2006, Hunt and MacNaughton 2006, Harrison 2011.

<sup>42</sup> Rights & Democracy 2007, De Beco 2009, IBLF and IFC 2011, Harrison 2011, Walker 2011.

**Figure 2: Key question for screening process – Guide to HRIAM**



Source: IBLF and IFC 2011.

et al 2007). Some authors suggest using human rights indicators to establish a baseline for human rights conditions.<sup>43</sup>

Several key steps should be included in any scoping process:

*3.1.3.1 Gather information on the legal, political and social context in which the assessment is taken place*

The context in which a policy intervention is implemented can greatly affect the human rights impacts of that intervention. Therefore, as part of the scoping exercise, it is crucial to understand the legal framework, political dynamics and cultural practices in the country where the assessment is taking place and to identify which of these factors may create opportunities or hindrances to the enjoyment of human rights.

The Danish Institute for Human Rights has developed a helpful tool for evaluating the human rights context at the country levels that could be used for HRIAs. The Country Risk Assessments (CRA) was developed to help business companies understand the human rights risk in the countries they operate and as such is particularly relevant for HRIAs focusing on business activities. However, it could also be useful for mapping out the context for other types of HRIAs. Presently, the tool identifies and rates the risks of business involvement for each right in the country. The Brazil CRA includes an analysis of each right from the Universal Declaration of Human Rights at three levels. First, the rights were investigated for areas of conflict between the prevailing national laws and international human rights law. Second, the prevailing social and cultural practices were

analyzed to identify any inherent human rights violations frequently perpetrated at the societal level. Third, each right was assigned an overall company risk rating, based on the ratings in the formal law and practice categories and the proximity to company operations. The full CRA offers a detailed in-depth description of each right. (Danish Institute for Human Rights 2006).

This year, the Danish Institute for Human Rights will launch a Human Rights and Business Country Portal which will expand its country risk assessments. Country Briefings in this Portal will include the following modules.<sup>44</sup>

- **Human Rights Profile:** Overview of country demographic and economic characteristics and general human rights conditions.
- **Priority Issues:** The most urgent human rights risks for companies, according to human rights impact and company proximity. This module includes descriptions of company connection to human rights violations, as well as due diligence recommendations for preventing and mitigating abuses.
- **Legal Analysis:** Assessment of the extent to which human rights are protected in formal law at the national level.
- **Sector Profiles:** Human rights risks in major economic sectors, including case studies of reported private-sector abuses.

<sup>43</sup> For more details on the use of human rights indicators in HRIAs, see below, section 3.2.

<sup>44</sup> Danish Institute for Human Rights, not dated.

- **Region Profiles:** Human rights conditions in subnational regions.
- **Proactive Initiatives:** Recommendations aimed at helping companies target their social investments and partnerships to maximize positive impact on human rights.

Box 4 provides an illustration of how another HRIA tool—the NomoGaia HRIA toolkit for practitioners conducting corporate HRIAs—maps out the political and social background in which the assessment will be conducted.

### 3.1.3.2 Gather information on the policy intervention that is subject to the assessment

To identify any potential human rights impacts of the policy or project being assessed, it is crucial to gather all relevant information related to that policy intervention. In the case of an HRIA on a health policy, this would entail learning about the health system in the country. In the case of an HRIA on a trade agreement, it would involve gathering information about the provisions of that agreement, the negotiating partners, and the reviews that have been made on the agreement, etc. Below, Box 5 sets out key aspects of an investment project that should be examined in an HRIAs focusing on foreign investment projects, as set out by the Rights & Democracy HRIA tool.

### 3.1.3.3 Identify typical human rights impacts of the type of intervention being assessed

To be able to assess the extent to which any policy has an impact on human rights in a concrete situation, it is necessary to review the typical such impacts these policies have. For this purpose, it is necessary to summarize—based on the existing literature—the principal ways that specific type of intervention, such as education or health policy reforms, trade agreements and extractive industry projects, typically affect human rights.

For instance, the International Federation for Human Rights discusses four key potential risk areas of trade agreements on human rights: intellectual property rights, services liberalization, foreign investments and tariff liberalization. (FIDH 2008) Walker suggests a more detailed list of such impacts (see annex 3) Similarly, UNICEF and the World Bank identified the common impacts of certain policies that can affect children’s rights in a Guidance Note

on how to integrate a Child Focus into PSIAs. (UNICEF and World Bank 2011).

### 3.1.3.4 Identify the right-holders and duty-bearers

Walker explains why the identification of rights-holders and duty-bearers is so crucial for HRIAs:

Through identifying stakeholders as rights-holders and duty bearers, the assessment provides the means of moving beyond statements on outcome—for example, increased prices for essential medicines—to the identification of who might be harmed by that outcome and who is legally responsible to remedy the situation. The identification of whose rights are affected by the policy or project and who has responsibility to remedy any problems is fundamental to ensuring that the assessment meets its goals, whether to learn from past experience, avoid future abuse or build on past success. (Walker 2009)

The groups of right-holders that might be affected by a policy intervention will vary depending on the nature of that intervention, but may include *inter-alia* indigenous peoples, women, the poor, workers, local communities and consumers.

The HerWAI tool suggests that it is also important to examine whether specific subgroups may be more affected than others. For example, it often happens that contraceptive methods are not made available to unmarried women. Other groups of women that are particularly vulnerable in relation to their health rights include girl children, rural women, lesbian women and women living with HIV/AIDS. (Aim for Human Rights 2010).

## 3.1.4 EVIDENCE GATHERING

This phase of the impact assessment methodology involves gathering evidence about the impacts of the policy intervention, whether actual or potential, depending on whether the HRIA is *ex ante* or *ex post*.

In respect to data collection methods, Walker suggests that HRIA practitioners should rely primarily on the many methodological tools that have been developed by economists and social scientists, such as statistical methods, surveys, economic modeling, participatory assessment methods, key informant interviewing guides, etc. (Walker 2011) He adds that a key factor to bear in mind is the need to combine quantitative methods—which are often the primary focus of other types of impacts assessments—with qualitative methods, particularly in regard to participatory techniques.

#### Box 4: National Context Overview for HRIA – example of NomoGaia HRIA toolkit

**Government location:** Kampala, Uganda’s largest city.

**Type of government, basics of legal structure:** Uganda is a presidential republic, in which the president is both head of state and head of government. Legislative power is vested in both the presidency and the National Assembly. The system is based on a democratic parliamentary system with universal suffrage for all citizens over 18 years of age.

**Duration of administration:** The current president, Yoweri Museveni, has been in power for 26 years and was recently reelected for an additional five-year term.

**Corruption:** Multi-party democracy exists, but corruption allegations have marred all recent elections. Corruption is seen as a problem in 79% of all business deals (poll figures, Gallup), and the independence of the anti-corruption agency is frequently called into question. Corruption at a local level is not considered a significant problem. Local leaders expect “gifts” for providing information, however.

**Presence of military/police and history of conflict (if relevant):** Until 2005, Uganda operated under emergency law. The end of martial law increased freedom of speech to a degree but did not result in significant changes to political structures, authorities or practices. The 2011 elections resulted in violence when the incumbent declared himself the winner and his political opponent, Kizza Besigye, alleged that elections were not free and fair. Demonstrations were violently quashed and Besigye was repeatedly arrested and at one point badly beaten. The expanding military presence in Kampala and surrounding Project sites is frequently commented on by residence. Despite the military’s violent response to post-election troubles, the institution is widely respected in Uganda. A longstanding conflict in northern Uganda recently ended, resulting in the closure of Internally Displaced Persons camps throughout northern and western Uganda. The demilitarization of the area is incomplete, as forces cross from DRC into Uganda with some regularity. In late 2011 the US sent 100 advisory troops to Uganda to conclusively end the violence in the area by killing Lord’s Resistance Army leader Joseph Kony. Ugandans have viewed this move as an American attempt to interfere in Ugandan politics and potentially steal Uganda’s oil.

**Education levels (gender) and literacy (national and local):** Region disaggregated education levels to differentiate Kampala from Hoima are not available, but education standards are generally considered to be better in Kampala than in more remote areas, including the Project area, where Company documents allege that no education infrastructure was present prior to exploration. Across Uganda, gender equality has become a feature of primary education, while officials have struggled to keep female enrolment rates equal with males in secondary and tertiary schooling.

**Cultural divides:** Although Uganda has worked hard to develop national cohesion, prior to and during colonial times, ethnic groups were divided into nation states. There are three major linguistic divides separating the north, east and west regions of the country. In addition, political and social allegiances to smaller “tribal” groups remain strong, and stereotypes generate mutual distrust.

Source: NomoGaia 2012.

#### BOX 5: Aspects of an investment project to research for an HRIA

This step includes the collection of available data about the company and the investment. It includes information such as contracts; records of company interaction with the both home and host states; existing environmental and social impact assessments related to the project; and company policy on social responsibility. It might also include corporate filings and information about financing from export credit agencies, banks or other multilateral agencies.

Source: Rights & Democracy 2007.

(Walker 2011)<sup>45</sup> To ensure an inclusive participatory process, it is crucial that during this phase assessors reach don't just rely on the perspectives of civil society organizations but actually reach out to marginalized and vulnerable right-holders.

Annex 4 illustrates the forms of evidence gathering that would be required for a HRIA.;

In more complex HRIAs, the process of evidence-gathering could require significant research efforts, and resources. The scope of the research and variety of methods to gather information for such HRIAs can be illustrated with the Marlin Mine HRIA:

Data collection for this assessment included desk-based study and review of over 700 secondary documents, including human rights, extractive industry best practices, the context in Guatemala, and documents specific to the Marlin Mine from Montana, Goldcorp, human rights organizations, and others. The data collection included a systematic review of the major daily newspapers published in the country from 2004 to the present, and review of previous assessments and independent and external audits. A gap analysis of Guatemala's implementation of its human rights commitments was done, based upon reports from international human rights organizations (UN, ILO) and expert sources (NGOs and academic) (Common Ground 2010).

Therefore, evidence gathering will probably be the most time-consuming part of the impact assessment process (Harrison 2011). Indeed, in the case of the HRIA on the impact of government budget cuts on women in Coventry that Harrison conducted with Stephenson (Stephenson and Harrison, 2011), collecting quantitative and qualitative evidence upon which to base the human rights analysis "required several months of intensive research including accessing local and national government statistical data, collecting analysis by other organizations, and interviewing relevant individuals (Harrison 2011). In turn, the gathering of evidence during the Marline Mine HRIA required eight months. (Common Ground 2010)

### 3.1.5 CONSULTATION

Given the emphasis on human rights principles of participation and transparency, HRIAs are expected to involve a broad degree of consultation both during the process of assessment and in relation to the conclusions and recommendations. It can be argued that the strength and legitimacy of the HRIA itself depends upon there having been a thoroughgoing

consultation process based on participatory methods that have been developed for project and policy development.

Most issues needed for an inclusive and effective participatory process are equally relevant for HRIAs as for other types of impact assessments. As such, HRIAs could draw on the experience of the development community in using participatory methods for project and policy development.<sup>46</sup>

Concurrently, there are some issues related to participatory processes that may be specific to HRIAs due to the political nature of the human rights framework.<sup>47</sup> For instance, the IBLF and IFC HRIA tools suggest that before starting a participatory process for an HRIA, assessors should take into account the possibility that raising human rights issues may challenge the *status quo* in power relations at the local or national level and how this may therefore lead to resistance. Likewise the tool points out that in some cases soliciting opinions about human rights could put individuals in danger and therefore measures should be taken to avoid such risk. (IBLF and IFC 2011).

A report from a global seminar of NGOs on community-based HRIAs suggest a series of steps that could be taken during an HRIA carried out by NGOs to ensure an effective consultation process that will adequately incorporate the perspectives of communities affected by the project. (see box 6)

As Walker suggests, the role that participatory process has on an HRIA is influenced, *inter alia*, by the timing of the assessment: "participatory methods might be more important in *ex post* HRIAs so as to identify people's lived experience of a project or policy. For *ex ante* HRIAs, participatory methods might be relevant to identifying people's fears or concerns related to the projected introduction of a policy or project or as a means of mobilizing communities to debate and engage with an upcoming change" (Walker 2011).

### 3.1.6 ANALYSIS

This step consists of implementing the TORs, and the actual assessment of the human rights impacts of the policy intervention, whether potential impacts (in case of *ex ante* assessments) or actual impacts (in case of *ex post* assessments). This stage will involve an analysis of the data gathered

<sup>45</sup> On the reasons why both quantitative and qualitative methods are essentials in an Evidence gathering will probably be the most time-consuming part of the (Harrison 2011)HRIA of a trade agreement, see Walker 2009.

<sup>46</sup> See e.g. Norton 2001 and Tikare et al 2003.

<sup>47</sup> On the challenges faced by HRIA by the political aspects of human rights, see below, section 4.2.

### Box 6: How to make sure an HRIA accurately captures the experiences of communities

The added value of a community-based HRIA is that it documents the human rights impacts of private investments from the perspective of the community, rather than from the company, government, or other viewpoint. As such, the accuracy with which it portrays the community perspective is critical.

A research team should take the following steps to ensure that the report accurately reflects a community's experiences:

- **Garner support from and engage key community members.** Create alliances with local leaders and whenever possible seek local experts to engage in the study. This not only helps forge strong relationships between the team and the community but allows for critical and continuous communication and information sharing.
- **Establish shared objectives.** The research team and the community should establish common expectations and goals for the assessment. What is the desired outcome? Is it publishing the HRIA report? Or does the community and research team want to use the process itself as a tool to raise human rights knowledge among community members and other stakeholders? Will the HRIA be used to raise public awareness or to influence national or international laws? Or is the goal to persuade the company to modify the project or its oversight of the investment? Establishing a clear set of shared goals is key.
- **Manage expectations.** The research team must understand that the act of conducting an assessment initiates change within communities and may raise expectations in terms of the potential impact of the HRIA report. To avoid disappointment and frustration, the research team should manage these expectations, taking care to set realistic and potentially achievable goals.
- **Identify the most significant human rights concerns.** A private investment can implicate a range of human rights and it may not be possible to document its effect on all of them. It is critical to present the human rights infringements that are of greatest concern to the community, rather than those of other interest groups or stakeholders. Outreach within the community or the use of an imbedded researcher are two ways to gather this information.
- **Be able to adapt human rights language to local realities.** A community may not be able to easily understand or apply the technical language of human rights to their specific context. A research team should seek ways to explain human rights terminology and ideas in ways that make sense in terms of the daily, practical realities of the community. Moreover, when research teams and communities speak different languages, the teams should provide oral and/or written translations throughout all phases of the assessment. Teams can also develop and experiment with various pedagogical techniques and media, such as visual aids or participatory exercises, tailored specifically to engage the community.
- **Foster local ownership of the assessment.** Participatory processes require more time than other types of research methods. Assessment teams should allocate adequate time and resources for community outreach activities. The team should also share the final HRIA results with the affected communities to ensure that the communities are aware of and/or take forward the recommendations outlined in the report.

Source: Rights & Democracy and Oxfam America 2010.

during stage (iv) to verify the impacts of the intervention(s) identified during scoping.

The analysis measures the likelihood of various impacts identified earlier in the assessment process and examines whether impacts might have cumulative effects. (Walker 2011)

An essential feature of this analysis that is likely to differ from other types of IAs is that it should be conducted in reference to applicable human rights norms and standards, e.g. analyzing and comparing the information collected on the potential impacts of the policy or intervention relative

to the government's legal obligations to respect, protect and fulfill human rights. (MacNaughton and Hunt 2011).

As Walker points out, this implies not merely expressing social impacts in terms of human rights impacts, but rather actually using human rights norms and standards as tools for measuring the impacts (Walker 2011) Three simple steps can be used in the analysis for this purpose: (1) look at 'what should be happening'; (2) assess 'what is actually happening', and (3) highlight the gaps between national policy commitments and the content of the governments' legal obligations on the one hand, and the realities of local communities on the other.<sup>48</sup>

This analysis should examine both the substantive aspects of the development intervention—i.e. whether the outcomes of the policy or project enhance or undermine the enjoyment of human rights—and the procedural aspects of that intervention—i.e. whether the process in which the policy or project were formulated, approved, implemented and evaluated are in accordance to all human rights principles.

The analysis commonly includes research about national laws and practices relevant to the policy or project being assessed in order to identify major concerns and gaps in protection of international human rights. In the case of *ex ante* assessments, this could mean identifying discrepancies or gaps between the international human rights obligations and for example, national laws that affect the policy being assessed (e.g. mining laws, laws regulating a health system, etc.); provisions of a trade agreement (in case of HRIA on such agreements) or contracts between governments and companies (in case of HRIAs on large development projects). In the case of *ex post* assessments, the human rights analysis can help identifying gaps between norms that are supposed to regulate the policy or project (which may or may not be in accordance with human rights norms) and the actual implementation of that policy or project. Some examples of concrete HRIAs making these types of analysis

<sup>48</sup> As outlined in Bakker et al 2009.

### Box 7: Comparing human rights obligations with what is actually happening – example of HRIAs related to health rights of women

- In Kenya, the lawyers' organization Fida-Kenya used the HeRWAI tool to conduct an analysis of the labor law provisions for maternity leave using the HeRWAI tool. On the basis of the comparison of the impact of the law and the government obligations they concluded that the provisions resulted in discrimination between groups of women, since they gave the right to maternity leave to women working in some sectors, but not in others (e.g. the army and the parliament), and also between women and men, because women had to forego their right to annual leave if they took maternity leave (Bakker et al 2009)
- In Indonesia, the use of the HRIA tool developed by WHO and Harvard School of Public Health, which uses human rights concepts and methods to assess relevant laws, regulations and policies related to sexual and reproductive health, revealed discrepancies between the population law in the country that required women to have their husband's authorization to obtain contraception and the State's national and international human norms that recognizes the rights of individuals to decide whether, when and how often to have children, without control or coercion by the government or third parties. Based on this analysis, this HRIA recommended to amend the population law (Cottingham et al 2010)
- A study to assess sexual and reproductive health in the Amazon basin of Ecuador used the Health Rights of Women Assessment Instrument (HeRWAI) to obtain a measurable comparison between what is actually happening and what should be happening according to a country's human rights obligations. To examine "what is actually happening" regarding sexual and reproductive health and rights in that area, the study analyzed data on reproductive health indicators both gathered locally with the community- based cross-sectional survey during 2006 and nationally with the most recent demographic and maternal-child health survey in Ecuador. To assess "what should be happening," the study performed a literature review of governmental and international documents, laws, and programs, including Ecuador's National Policy of sexual and reproductive health and right. (Goicolea et al 2009)

on various policies related to health rights of women are outlined in Box 7.

The HRIA on Mining operations in Mindanao, Philippines—one of the five case studies undertaken by civil society groups to test the HRIA methodology developed by Rights & Democracy—showed how the implementation of the project disregarded various legal guarantees in the country related to mining and Indigenous People’s Rights, such as that the guarantee that there should be no mining on ancestral lands without the prior consent of the indigenous people; or that agreement must be reached with indigenous communities on a royalty from the mining, which will be used for their socioeconomic wellbeing (Rights & Democracy 2007). In turn, another of the five case-studies that tested the Rights & Democracy HRIA tool—an impact assessment on water privatization in Argentina critically analyzed the concession contract provided by the government in light of international human rights law, thereby showing that some provisions of the contract constituted violations of the human rights to water. (Rights & Democracy 2007)

For this gap analysis, HRIAs can often draw from human rights reports produced by international and regional human rights mechanisms and NGOs. For instance, based on numerous reports by ILO Committee of Experts and by UN human rights mechanisms, the Marlin Mine HRIA pointed out that the Guatemalan government has not yet developed an adequate legal, regulatory or institutional framework to ensure prior consultation in the manner prescribed by ILO Convention 169 regarding the use of national resources. (Common Ground 2010).

To measure the impact of the development intervention, it is necessary to compare the enjoyment of human rights before the intervention (i.e. the human rights baseline) with the human rights conditions that are foreseen after the policy or project is implemented or, in the case of *ex post* assessments, with the condition after the development intervention was actually implemented. Some authors suggest using a set of human rights indicators for this step, but most HRIAs tools and completed HRIAs used a set of key questions instead.<sup>49</sup>

### 3.1.7 CONCLUSIONS AND RECOMMENDATIONS

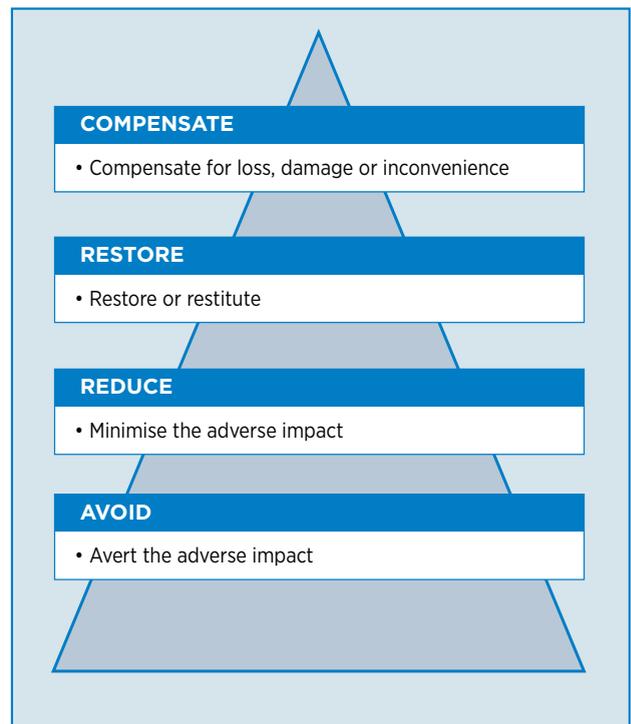
In this step, assessors develop overall conclusions regarding the impacts of the policy intervention and propose recommendations for corrective action to mitigate negative human rights impacts related to the policy intervention, and optimize positive ones.

Recommendations are directed to every type of duty bearer that has responsibility for an aspect of the policy

or intervention, attributing specific responsibilities to each (States, business enterprises, etc.). In most HRIAs, recommendations would be addressed to the state, which bears primary responsibility for the protection and fulfillment of human rights, but when conducting HRIAs related to business activities, recommendations will often be addressed to companies too. The recommendations step also entails developing appropriate actions plans to be put in place for risk mitigation and enhanced measures. As shown in figure 4, the Guide to HRIA developed by IBLF and the IFC set out a mitigation hierarchy to help address previously identified human rights risks and impacts of their business projects.

The choice of the most appropriate mitigating measure will depend on the scale and severity of the foreseen human rights risk. De Beco also suggests that the option of recommending the non-adoption of the policy intervention should be considered, particularly when the negative impacts on human rights are severe and no mitigation measures are available. (De Beco 2009).

**Figure 4: Mitigation Hierarchy - Guide to HRIAM**



Source: IBLF and IFC 2011.

<sup>49</sup> For more details on this aspect of HRIAs methodologies, see below section 3.2.

Some HRIAs include general recommendations for human rights protection specific to the policy or project assessed but that could be applicable for other policies or projects in which the duty bearers could develop in the future. For example, the HRIA of Goldcorp's Marlin Mine made a series of general recommendations on human rights due diligence to Goldcorp that would be applicable to their operations elsewhere. (see annex 5)

### 3.1.8 MONITORING AND EVALUATION

The stage of monitoring and evaluation involves subjecting the HRIA itself to assessment, to determine the extent to which it has met its objectives and is acceptable to stakeholders. This step will also involve an examination of the extent to which the duty-bearers have incorporated the recommendations of the HRIAs during implementation of the policy intervention and it enables information-gathering about the actual impacts of the policy intervention.

- Monitoring should, inter-alia, answer the following questions:<sup>50</sup>
- What mitigating measures have been adopted by the duty-bearers to mitigate any negative effect foreseen by the HRIA?
- Has any human rights risk and impact that was foreseen by the HRIA materialized? If so, who were the relevant affected stakeholders? Have the relevant duty-bearers taken measures to try to mitigate the negative effects of those risks?
- Have there been major human rights risks and impacts unforeseen by the HRIA? If so, who were the relevant affected stakeholders?
- If some substantial change of the policy intervention took place after the HRIA was produced (e.g. replication of the policy in another area of the country, major expansion of the project, etc.), have the relevant duty-bearers taken into account the recommendations of the HRIAs when undertaking those changes?
- Have there been recurring grievances related to the policy intervention? If so, who were the relevant affected stakeholders?

Evaluation takes place after the implementation of a policy. It enables right-holders and duty-bearers to learn about the actual impacts of the policy intervention. Therefore, evaluation is related to *ex post* HRIA. (De Beco 2009)

In accordance with the human rights principle of transparency, the IBLF and IFC tools suggest that another element

of the follow-up to the HRIA should be reporting back to the affected stakeholders throughout the life span of the project that was assessed, particularly on issues they were previously consulted on (IBLF and IFC 2011). This tool also suggests that to ensure the accuracy and credibility of an evaluation report on the human rights impacts that the project assessed actually had, companies should request input from affected stakeholders and solicit external verification of its findings (IBLF and IFC 2011).

This step also includes other follow-up actions related to the impact assessment, such as in-country distribution of the report, the creation of mediation mechanisms, advocacy for legislative or policy reform, and the establishment of a dialogue between the community, government and company. (Rights & Democracy 2007)

### 3.1.9 PREPARATION OF THE REPORT

Upon completion of the foregoing substantive steps, the final stage of an HRIA involves the preparation of the report that should outline the impact assessment and recommendations on mitigation and enhanced measures along with an evaluation of the process and a forward-looking plan for future monitoring and evaluation.

## 3.2 Quantitative and qualitative indicators

Several authors refer to the need to develop indicators as necessary for the development and use of HRIA tools (Bakker et al 2009, De Beco 2009, Walker 2009, Harrison 2011). Walker suggests that indicators are essential to measure impact, allowing for the comparison of the enjoyment of human rights at the baseline situation (i.e. before the introduction of the development intervention) with that after the intervention will be (or was) implemented. Furthermore, he points out that since human rights indicators capture both the extent to which people are enjoying their rights and the extent to which duty-bearers are fulfilling their obligations, they can serve to make casual connections between the policy or project assessed and the enjoyment of human rights (Walker 2009).

There seems to be agreement in the literature that in order to adequately measure impacts, human rights indicators should be both quantitative and qualitative. However, despite this agreement on the theoretical level, in practice most HRIA toolkits and concrete assessments

<sup>50</sup> Adapted from IBLF and IFC 2011.

have focused almost exclusively on the use of qualitative indicators. Harrison suggests that the lack of use of indicators in the majority of existing HRIAs may be related to the fact that the development of indicators is a relatively new area in the human rights community, as well as to the difficulty of “importing lists of indicators of particular rights wholesale into an impact assessment process [because] is likely to be overwhelming for users and also to lack the contextual specificity necessary for this kind of exercise.” (Harrison 2011)

Rather than using indicators, many HRIAs instead develop a set of key questions regarding human rights conditions. Each toolkit has developed question checklists with varying scope and focus.

The most extensive checklist to date is the Human Rights Compliance Assessment (HRCA), developed by the Danish Institute for Human Rights. This tool, designed to help companies detect potential human rights violations caused by the effect of their operations, runs on a database of over 350 questions and 1.000 corresponding human rights indicators, which were developed from over 80 human rights treaties and conventions.<sup>51</sup> The Web interface allows companies to develop a tailored assessment tool from the database by screening out questions based on country risk and features of the company operation (Danish Institute for Human Rights, not dated (c)). Annex 6 provides an illustration of the list of questions, which focus on human rights issues that business companies may encounter related to land management.

Other HRIAs developed question checklists for specific sectors. For instance, the International Council on Mining and Metals recently developed a tool designed to integrate human rights due diligence into corporate risk management processes in this business sector (ICMM 2012). This tool set out a list of relevant human rights issues and corresponding questions related to the mining sector (see annex 7).

Finally, some tools have set out question checklists for specific types of right holders that may be affected by a policy or project. For instance, on the basis of their analysis of the impact channels through which policies can affect children’s rights, UNICEF and the World Bank formulated a set of guiding questions that can be used in specific impact assessment for children, as illustrated in the box 8.<sup>52</sup>

A notable exception to the tendency of HRIA tools and case studies to rely primarily on question checklists to measure impacts is the HRIA on CAFTA which used a combination of quantitative and qualitative indicators. This impact assessment relies on the conceptual framework of human rights indicators developed by the Office of the United

Nations High Commissioner for Human Rights (OHCHR), which was originally developed in response to a request by the Chairpersons of the UN Treaty Bodies.

In this framework, the OHCHR set out three categories of human rights indicators. Based on the report in which OHCHR presented this framework, Walker describes as follows the three categories of human rights indicators:

a) *Structural indicators* – these indicators reflect the human rights institutional framework that is necessary to facilitate the realization of the human right concerned and provide a measure of ‘duty-bearers’ *commitment* to human rights. Structural indicators identify: the recognition of specific rights through ratification of international instruments; recognition of rights in national laws; and the identification of institutional mechanisms for the promotion and protection of rights.

b) *Process indicators* – these indicators measure the *effort* undertaken by ‘duty-bearers’ to respect, protect and fulfill human rights through programs, policies and other interventions. The respect for human rights in government processes has a significant bearing on the extent to which individuals do actually enjoy human rights.

c) *Outcome indicators* – these indicators capture attainments, individual and collective, that reflect the actual level of enjoyment of human rights—the *results* of the commitment and effort of ‘duty-bearers’ with regard to human rights. Thus, a process indicator might assess the existence and coverage of an immunization program, while outcome indicators would capture life expectancy or mortality rates (Walker 2009)

For the purpose of HRIA, Walker adapted this framework, developing specific indicators to measure the impacts of the intellectual property provisions of CAFTA on the rights to health and related rights in Costa Rica (see annex 8).

<sup>51</sup> The full HRCA is only available to subscribers, but the HRCA Quick Check, a condensed version of the full tool is freely available (Danish Institute for Human Rights. 2006(b)). The Quick check contains 28 main questions and has a total of 240 corresponding indicators.

<sup>52</sup> For the full set of key questions for child-focused PSIA, see UNICEF and World Bank 2011, annex 1.

**Box 8: Key Questions: If Incomes Fall, How Are Children Likely to Be Affected? – UNICEF and World Bank****FOOD**

- How likely are households to shift to less nutritious food (for example, less frequent consumption of protein, vitamins, minerals, substitution with cheap fats or carbohydrates, or inappropriate baby foods such as unsuitable powdered milk) or consume less food overall?
- Are changes in breast-feeding patterns likely, for example, if mothers need to work away from infants at a younger age? Or (positively) increased breast-feeding to substitute for purchased formula / baby food?
- Are children who receive food at school likely to receive less at home?

**CLOTHES AND SHOES**

- How likely are households to cut back on children's clothes, including school uniforms that might be required for attendance, and shoes?

**UTILITIES**

- Is there a risk of shifting to more dangerous / polluting fuels (for example, unventilated wood-burning or makeshift electricity connections) or unsafe water sources?

**ADULT GOODS**

- Are households likely to increase or decrease spending on tobacco and alcohol?

**SERVICE USE**

- What is the risk of delaying seeking medical care or purchasing cheaper, nonprescription medicines?
- What is the risk of households cutting back on school supplies (for example, books and stationery) or having some children in the family drop out of school?

**If Household Incomes Rise, How Are Children Likely to Be Affected?**

- How far is spending likely to rise on goods and services that benefit children?

Source: UNICEF and World Bank 2011.

## 4. Dilemmas and challenges of HRIAs

There are two distinct approaches for undertaking HRIAs. One approach is to undertake a stand-alone HRIA; the other is to incorporate a HRIA into other, more standard types of impacts assessments, such as ESIA or SIA. There are advantages and drawbacks to each approach, which depend in part on the timing of each impact assessment, the resources available and who is undertaking the assessments

The majority of commentators suggest that when carried out by State institutions, the preferred option is to integrate HRIAs into other more comprehensive impact assessments (Hunt and McNaughton 2006, Foresti et al 2009, De Beco 2009). By contrast, the stand-alone approach is often seen as a fallback option or an appropriate option when the focus of the HRIA is a specific human rights issue and the institutional actor carrying out the assessment has a specific mandate related to that issue (e.g. an HRIA focusing on discrimination issues carried out by an Equality Commission or one focusing on children's rights carried out by a children's ombudsman). (De Beco 2009).

### 4.1 Distinct Approaches to HRIA

The literature suggests that the integrated approach has several advantages for governments carrying out HRIAs. First, governments are more likely to be willing to integrate HRIAs into standard impact assessments that they are already undertaken rather than allocating separate resources for an independent HRIA. Second, integrating HRIAs into standards assessments facilitates drawing on established methodologies and rich experience in carrying out impact assessments. Third, integrating HRIAs into social or environmental impact assessments reinforces the mainstreaming of human rights into development policies, forcing those working in sectors of public administration that that might not ordinarily consider the human rights dimensions of their activities (e.g. those working on energy issues or trade negotiations) to think about the human rights implications of their policies or projects (Hunt and

McNaughton 2006 and De Beco 2009). Finally, an integrated approach can help reinforce the potential of HRIAs to advance policy coherence and anchor a minimum 'do no harm' principle vis-à-vis human rights across other sectors and policy spheres.

At the same time, experts warn about the risks of embedding human rights into other impact assessments. One important concern is that human rights principles might be diluted in the impact assessments into which they are integrated, doing away with some of the distinct elements of the human rights based approach, particularly its being based on the normative framework of international human rights law (De Beco 2009). Therefore, Ruggie suggested that when the process assessing human rights impacts is incorporated within other processes such as risk assessments or environmental and social impact assessments, they should explicitly include internationally recognized human rights as a reference point. (Ruggie 2011)

In practice, it appears that the majority of HRIAs conducted by government agencies have adopted the stand-alone approach, but this may be due to the fact that HRIAs are still a new phenomenon and as a result, they are often carried out in the wake of more established forms of impact assessments and primarily by specialized agencies whose mandates are specific human rights issues such as women's rights or the rights of persons with disabilities.

For NGOs, stand-alone HRIAs may be the preferred option, since such groups may lack the resources sufficient to carry out comprehensive impact assessments that would properly cover both human rights issues and other social, economic and/or environmental issues. Furthermore, the groups carrying out HRIAs will often be driven by a human rights-focused mission.

With regard to HRIAs conducted by business companies, the Guide to integrate human rights due diligence into corporate risk management processes produced by the International Council on Mining and Metals suggests that the preferred option will depend partly on the nature and severity of the potential human rights impacts as well as on the stage of a project or operation. In general however, the Guide suggests that integrating human rights into ESIA's would be most appropriate for proposed new projects, since ESIA's will likely be required in any case and, if human rights are sufficiently incorporated into the ESIA, this will yield the most effective approach. On the other hand, stand-alone HRIAs may be more appropriate for existing operations since other types of impact assessments are likely to have already been conducted. This approach may also be appropriate for proposed new projects or acquisitions where there exists a range of potentially problematic human rights issues, such as projects taken place in conflict-ridden areas or in countries with weak governance. (ICMM 2012)

## 4.2 Political challenges to HRIAs

Human rights are inherently political in the sense that they are used as a language to weigh conflicting claims in the public arena and have become a dominant criterion for legitimacy in political and social debates. Human rights are deeply connected with values of empowerment and participation, which also introduce a political dimension. This powerful aspect of the human rights framework can be a double-edged sword for HRIAs. On one hand, this normative framework can reinforce the legitimacy of an impact assessment due to its international acceptance, its legal status and the powerful symbolic value of human rights as a dominant moral and political discourse of our times. On the other hand, the

political nature of the human rights framework poses some risks for the effectiveness of HRIAs as a policy and advocacy tool. One significant risk is that government or business companies carrying out an HRIA may be tempted to manipulate its findings and misuse the human rights rhetoric to validate a policy or project they are trying to promote. Alternatively, opponents to those policies or projects may manipulate the assessment to obtain negative findings regardless of the actual human rights impact of that development intervention (Walker, 2011). HRIAs may also be used more to "name and shame" rather than work progressively to improve human rights enjoyment through gradual engagement and in this way, may result in alienation of stakeholders.

The risk of misusing the human rights rhetoric to promote political or economic interests is not unique to the practice of HRIAs. Nevertheless, in the specific case of HRIAs the risk may be exacerbated by being combined with an empirical analysis of complex issues. Such circumstances increase the risk of information being manipulated to justify or dismiss a development intervention, regardless of its actual merits in human rights terms. For instance, in July 2006, a group of Malawian non-government organizations filed a law suit with the Malawian Court against the Paladin Energy's Kayelekera Project in Malawi. The complaint included uranium-in-water issues, which according to the HRIA on this project undertaken by NomoGaia appear to be baseless and incapable of being supported in fact. (Wielga et al 2010).

The risks that a specific HRIA may be politicized will vary according to the political and social context in which the assessment takes place. In a context where human rights violations are pervasive or where the public debate about the policy or project being assessed is highly polarized, it may be more difficult to avoid the politicization of the HRIA process. On the other hand, it may be easier to avoid the misuse of an HRIA in a context in which there is a relatively strong human rights culture with robust national human rights institutions and an active human rights community.<sup>53</sup>

Another risk of using the human rights framework in an impact assessment is that in politically sensitive contexts, the rights rhetoric could impose limits to the scope and quality of consultations with stakeholders, as illustrated by the HRIA of corporate investments in Tibet.<sup>54</sup> Furthermore, as Walker points out, also in reference to this HRIA in Tibet, in such politically difficult situations, it might actually be impossible

<sup>53</sup> Walker illustrates these two types of situations by contrasting the difficulties encountered in the HRIA undertaken by Rights and Democracy in Tibet with the HRIA on CAFTA which he himself conducted (Walker 2009)

to use the human rights language during the assessment, and this actually may defeat the purpose of undertaking an HRIA, making the assessment very similar to a social impact assessment (Walker 2009).

Furthermore, as a normative framework that stresses the principle of equality and empowers right-holders to demand their rights and requires duty-bearers to be accountable for their rights obligations, the human rights framework is not politically neutral. As Walker points out, HRIAs may empower traditionally excluded groups while challenging the arbitrary power of civil servants or question certain business activities as forms of human rights abuses (Walker 2009). This, in turn, could lead to the exclusion of certain groups of stakeholders from participation in the HRIA process by those who might not wish these groups to be empowered.

To help prevent the manipulation of HRIAs, it is crucial to base the assessment on a robust methodology grounded in empirical evidence and thorough analysis compromised of human rights legal standards. Protecting the integrity of HRIAs requires that their findings and methodological process are easily available for public scrutiny and debate.

### 4.3 Technical and practical challenges to HRIAs

As with other impact assessments, undertaking HRIAs of good quality can be an onerous endeavor in terms of time, financial resources and types of expertise required (Walker 2009).. These challenges may also influence the determination of important practical questions such as who should undertake a HRIA, who should pay for a HRIA, which in turn may impact the credibility of its recommendations. There are also a range of technical questions related to the purpose and parameters of a HRIA which require careful consideration including what scale or type of HRIA is necessary or appropriate, what object should be assessed or evaluated and what methodologies are needed. It is clear that more work is needed to build capacity on HRIAs as well as enhance the quality of HRIAs with the help of independent experts to identify best practices, reveal poor practices and challenge the validity of superficial assessments. Much of this depends on the existence of an explicit and effective policy of transparency regarding both the methods used and the findings of the assessment.

To ensure that the human rights normative framework is appropriately used as the basis for the impact analysis, it is crucial to have a human rights expert in the assessment team. Other types of expertise required will greatly depend on the subject matter of the assessment. For instance, the

use of the HRIA tool developed by the WHO and Harvard University to assess sexual and reproductive health policies “requires a strong national team with the requisite skills and knowledge of both human rights (with an emphasis on women’s human rights) and public health” (Cottingham et al 2010). Other HRIAs require more specific types of expertise, as illustrated by the field case studies of the Rights and Democracy tool, carried out by CSOs in various countries:

For example, the Tibet study required technical assistance to understand the nature of the communications technology in question and its relation to surveillance practices in China. In Argentina, particular expertise was needed to better understand the implications of the contract between the [water] company and the government. In the Philippines, an expert in bilateral investment treaties might have contributed a better understanding of the implications of the Canada-Philippines Investment Protection Agreement. In both the DRC and the Philippines, independent verification of water quality and ground pollution was not possible because proper water sampling was not foreseen in the project work plan or budget... The use of technical experts should therefore be integrated into the research work plan and budget” (Rights and Democracy 2007).

Given the technical complexities involved in conducting HRIAs, a major challenge is the relatively large amount of time required to carry out the impact assessment with the appropriate methodological rigor. For instance, in the case of HerWAI, a full assessment took several months (Bakker et al 2009) while the Marline Mine HRIA was implemented over an 18-month period (Common Ground 2010). The time issue becomes particularly critical when HRIAs are *ex-ante* and are undertaken in the context of policy reforms or project development with rapid implementation.

As Harrison suggests, there is an inherent tension between rigor and usability in the practice of HRIAs. While on one hand, simplistic assessments with little use of evidence and unsupportable conclusion will be unlikely to promote human rights protection, on the other hand, the more robust and detailed the methodologies used in the assessment, the less likely such assessments will be utilized. (Harrison 2011).

Although these technical challenges are also common when conducting other types of impact assessments such as SIAs and EIAs, the human rights framework at the heart

<sup>54</sup> See section 2.2. above.

of HRIAs adds some additional challenges. For instance, with regard to the skills required, assessors need to combine the technical expertise on the subject matter of the impact assessment (e.g. trade issues, mining, public health, etc.) with a thorough understanding of the human rights framework (Walker 2011). Without such understanding, there is the risk that HRIAs may focus on some insignificant impacts while ignoring potentially serious human rights problems, as Harrison actually found with regard to several UK equality impact assessments (Harrison 2011). In addition, the need for integrating participatory methods for data collection, in order to capture the perceptions of individuals about how the development initiative would impact their enjoyment of rights, requires additional professional skills (Walker 2011). Likewise, the emphasis on participatory process could limit the manners in which financial resources and the time required to conduct an assessment could be reduced (Walker 2009).

Walker suggests that one way of addressing some of these challenges is to develop methodologies for different levels of use. For example, when a more thorough assessment that combines several data collection methods is not feasible due to time, financial or human resource constraints, it is possible to undertake a quick assessment that relies primarily on secondary materials. Although less reliable than detailed assessments, quick assessments can still warn about human rights problems that would otherwise be overlooked (Walker 2011).

#### 4.4 Causality and attribution

A fundamental challenge attendant to HRIA, like several other types of assessment, is that of causality and attribution. That

is, it may be difficult to establish with certainty, the causal links between a particular policy, project or intervention and a specific outcome or impact on human rights. This is because there may be a range of factors influencing a particular outcome or impact on a right or set of rights, the causal links may be indirect and even remote and there may be a dearth of data to support the connections. As such, it may be challenging to attribute responsibility for outcomes to particular actors or duty-bearers. This is an especially serious challenge in light of the emphasis on accountability and responsibility within HRIAs.

#### 4.5 Confidentiality and disclosure

A key principle of a human rights approach and of a HRIA is the principle of transparency. As highlighted in the practice of HRIAs discussed above, the principle of transparency may present its own set of challenges for actors reluctant to publicize sensitive information or damaging findings uncovered through a HRIA. There may be instances in which a HRIA should in principle be disclosed but where it contains proprietary, confidential or sensitive information which militates against such disclosure. There may even be cases where the disclosure of such information might present a safety risk for individuals. As such, therefore, there are cases in which the objectives that favor disclosure and those that support confidentiality come into tension raising a host of practical and political challenges for HRIA which do not admit of clear resolution in all cases.

## 5. Conclusions

The practice of HRIAs is still quite new and it is therefore too early to determine the extent to which their use will make a lasting contribution to the operationalization of human rights in fields like development, trade or business. Moreover, while an increasing number of HRIAs now exist in concrete situations, no study has yet been carried out to assess the extent to which these HRIAs actually had an influence on the policies, programs or projects they assessed.<sup>55</sup>

Nevertheless, as this Study shows, HRIAs have several unique features that can contribute to the assessment of policies or projects in a way that adds value and is complementary to other types of impact assessments—such as EIAs, SIAs or PSIAs—either when integrated into other types of impact assessments or when undertaken as a stand-alone product,

Although other types of impact assessments are often underpinned by human right values and principles, making explicit links with the normative and legal framework of human rights can reinforce existing good practice on elements such as participation and equality, ensuring that these concerns are applied in a more consistent and comprehensive manner, and lending moral and legal legitimacy to the overall assessment exercise. In addition, using a human rights framework for assessing the impacts of trade, business or development interventions can help focus on other aspects that often do not receive sufficient attention in standard impact assessments, such as issues of transparency, accountability or cultural adaptability. Given the interdependence of human rights, HRIAs build upon a cross-sectoral analytical framework and therefore can help measure the cumulative impact of policy and projects by diverse sectors on the rights of individuals, thereby potentially promoting international policy coherence and inculcating a minimum standard of ‘do no harm’ across sectors.

At the same time, given the challenges inherent in the use of this tool in concrete situations, it is necessary to bolster the practice of HRIAs in various aspects in order to realize the full potential of HRIA as an evidence-based tool for advocacy and policy-making.

First, as De Beco points out, HRIAs are a learning-by-doing tool (De Beco 2009). Therefore, frequent production of HRIAs in a variety of development fields and the eventual institutionalization of HRIAs as a standard tool for impact assessment should be encouraged as a key strategy to improve this instrument.

<sup>55</sup> However, evidence related to some concrete HRIAs suggests that some recommendations made by HRIAs were actually adopted. See for instance the follow-up monitoring reports conducted by NomoGaia to their various HRIA case studies they carried out (NomoGaia not dated (c)). Likewise, a concrete impact of an HRIA is reported by Bakker et al: in Kenya, the lawyers’ organization Fida-Kenya conducted an HRIA of the labour law provisions for maternity leave. On the basis of the comparison of the impact of the law and the government obligations, they concluded that the provisions resulted in discrimination between groups of women, since they gave the right to maternity leave to women working in some sectors, but not in others (e.g. the army and the parliament), and also between women and men, because women had to forego their right to annual leave if they took maternity leave. After a lengthy lobbying process – during which Fida joined hands with the labour unions, the law was changed according to their recommendations. (Bakker et al 2009).

Second, there are various types of support that could be useful to help the capacities of those carrying out HRIAs. Harrison and Stephenson suggest, for instance, the need to design context-specific forms of guidance which would be “contain as many examples of practical application as possible so that assessors can see how human rights principles are used in practice and the type of evidence that can justifiably support any conclusion reached.” (Harrison and Stephenson 2011). Furthermore, they suggest that to complement written guidance there is a need for extensive and on-going training. In this regard, Maassarani et al suggest organizing expert HRIA training teams for corporations and governments wishing to undertake HRIAs (Maassarani et al 2007).

Third, Harrison and Stephenson suggest that quality control of HRIAs by independent experts is necessary to

identify good practices which could help new HRIAs as well as to reveal poor practice and challenge the validity of superficial assessments (Harrison and Stephenson 2011). Connected is the requirement that HRIAs themselves be subject to assessment, and that they be human rights compliant.

Fourth, as noted above, the production of HRIAs is often surrounded by a high degree of confidentiality particularly in those undertaken by business companies. This lack of transparency hinders both the possibility of quality control of HRIAs by independent experts and the opportunity to learn from the experiences of others conducting HRIAs. As far as possible, therefore, actors conducting HRIAs should be encouraged to maintain a policy of transparency regarding the methodology and findings of the assessment.

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## Annexes

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## Annex 1. Analysis of Indirect discrimination in HRIAs – the case of Coventry, UK

The report examines eight broad areas where spending cuts are likely to have an impact on women.

The report concludes that many of the spending cuts will have a disproportionate impact on women. This will exacerbate overall inequality between men and women in Coventry.

**Employment:** Women are likely to suffer disproportionately from job cuts and public sector pay freezes since they form the majority of public sector workers. Together with increased child care costs, this may lead to lower rates of employment for women and an increase in the pay gap.

**Housing:** Single women are the main recipients of housing benefit. In Coventry. Cut to Local Housing Allowance (LHA) for private rented accommodation will have a disproportionate impact on women since women are the main recipients. This will lead to increased pressure on women's finances, which together with changes to other benefits and tax credits, will increase the income gap between women and men.

**Incomes and Poverty:** Although the increase in Child Tax Credit and the personal tax allowance will benefit many women, taken together the benefit and tax changes in the 2010 budget will cost women in Coventry £29,631,53212.

The cost to men will be less than half of this.<sup>13</sup> This will further increase inequality between women and men in Coventry.

**Education:** Cuts to the schools budget have resulted in a cut to services provided for special needs and mental health support in schools. This will affect some of the most vulnerable children in Coventry<sup>14</sup>. It may disproportionately impact on women who tend to be the primary careers of children.

**Violence against women:** Women experiencing violence and abuse in Coventry will be affected by a number of cuts to funding.

**Health, Social Care and Other Support Services** Women in Coventry will be disproportionately affected by any cuts in social care and support services leading to greater inequality between men and women. The full impact of the health cuts and move to GP commissioning is not yet clear. But there are concerns about services which are more used by women (e.g. mental health) and about funding for services addressing violence against women.

**Legal Advice Services:** Cuts on state-funded legal advice services will disproportionately affect women, who use these services more often than men. For instance, 62.2% of applications for civil Legal Aid are made by women, with higher percentages in areas like education and family law.

Source: Stephenson and Harrison 2011

## Annex 2. Human Rights issues identified during screening stage – HRIA on trade agreement

Dominican Republic-Central American-US Free Trade Agreement (CAFTA) on the rights to health and related rights in Costa Rica (Walker 2009, ch. 3)

The following table was developed by Walker for the impact assessment of the intellectual property provisions the

### Screening: CAFTA

CAFTA provisions	Human rights issue	Significance	Comment on the basis of secondary materials
Agricultural trade (chapter 3 National Treatment and Market Access; chapter 4 – Rules of Origin; chapter 6 – Sanitary and Phytosanitary Measures)	<p>1. Protection of the right to an adequate standard of living and right to take part in cultural life for small farmers and people in rural communities</p> <p>2. Right to adequate food for Costa Ricans</p>	+1 /-1	<p>The diversified nature and structure of Costa Rican agriculture with the growing dominance of larger producers places Costa Ricans in a relatively good position to absorb shocks from agricultural trade reform. <i>Exports</i> should benefit from a consolidation of US preferential treatment under the Caribbean Basin Initiative although, with the exception of some additional benefits in sugar, this maintains the status quo. Food safety standards might increase the burden on exporters but dominance of larger producers in the export sector should be able to absorb this. Costa Ricans should benefit from cheaper <i>imports</i> of food which in many cases do not compete with Costa Rican producers. A special agricultural safeguard should protect against high levels of food imports. Subsistence farmers producing for local consumption should not be affected directly by changes in international trade. This explains the significance criteria of (+1): Potential problems arise for <i>small farmers</i>, particularly in traditional areas of rice, maize and beans. They will have to face imports of cheaper US subsidized products (at artificially low prices because of very high US subsidies) and lower levels of government support. This will likely affect their standard of living and traditional life styles and they might not have the resources to adapt without assistance. It might increase the strains on government capacity to compensate them for loss of livelihoods. In terms of significance, agriculture is of declining importance to the Costa Rican economy and much production is in the hands of larger producers. However, smaller producers, although less significant in number than in some other countries, could come under strain suggesting negative impacts on a limited section of the population might be possible. This explains the significance criteria of (-1).</p>

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**Screening: CAFTA** (continued)

CAFTA provisions	Human rights issue	Significance	Comment on the basis of secondary materials
Labour (CAFTA generally and chapter 16 – labour)	<p>1. Impact of CAFTA on employment</p> <p>2. Protection of workers' rights in trade-related industries</p>	0	Impact on <i>employment</i> is likely to be mixed but not significant (therefore significance criteria of 0). The sectors more likely to be affected are: agriculture, textiles, tourism, high technology and the public sector, particularly telecommunications and insurance. In agriculture, there could be job losses and gains depending on policies to move into non-traditional agricultural production and areas not competing with US production; in textiles, competition from China outweighs any potential benefits from CAFTA; employment gains could result from investment in tourism services although other areas of FDI have not resulted in significant employment gains; increases in high technology exports might lead to employment gains although stronger intellectual property protection could lead to losses in the generic pharmaceutical industry. Opening of telecommunications and insurance sectors could lead to job losses. Consequently, there are likely to be gains and losses in employment. In relation to <i>labour standards</i> , workers' rights in export industries and in export processing zones tend to be respected and are even higher than national averages. There is concern that the chapter on labour in CAFTA fails to recognize some workers' rights (such as non-discrimination), lacks sufficient enforcement, and is focused on trade impacts rather than on impacts of trade on labour standards. Costa Rica has effective protection of labour standards and inclusion of a chapter on labour should not have any negative impact on national standards or their protection.
Intellectual property protection (chapter 15)	<p>1. Impact of test data protection, patent restoration and 'linkage' on access to medicines</p> <p>2. Impact of UPOV on biodiversity and food and public health</p> <p>3. Impact of copyright protection on access to education materials</p>	-2	While Costa Rica already provides patent protection over pharmaceutical products, strengthened protection of test data as well as restoration of patents due to administrative delays and administrative requirements on the Ministry of Health in relation to protecting patents could effectively lengthen the life of patents, strain government capacity and lead to price rises for essential medicines. The requirement to ratify UPOV 91 (Convention on Plant Variety Protection of 1991) has raised concerns that protection of the creators of plant varieties does not adequately take into account the imperative of ensuring prior informed consent and equitable sharing of benefits for the use of traditional knowledge over plants. This can affect indigenous communities, and has raised concerns over the impact of plant variety protection over access by farmers to new crop varieties. The Chapter limits the prerogative of educational institutions to circumvent without authority technological measures that create access to educational materials to only access for reasons of purchase—thus access to such materials (without authority) for educative purposes is not permitted. This could restrict access to educational materials and affect quality of education. Human rights bodies and civil society groups have placed significant focus on the potential impact of intellectual property protection with little evidence of benefits flowing to Costa Rica. There are potentially all round negative implications flowing from the IP chapter justifying a significance criteria of (-2).

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### Screening: CAFTA *(continued)*

CAFTA provisions	Human rights issue	Significance	Comment on the basis of secondary materials
Investment (chapter 10)	<p>1. No recognition of human rights responsibilities of investors;</p> <p>2. Potential constraint on government regulatory capacity to promote public health due to expropriation provisions and performance requirements;</p> <p>3. Procedural aspects of investor-to state dispute settlement.</p> <p>4. Potential to increase available resources for realization of ESCR</p>	-1 / +1	Chapter 10 tends to strengthen both the definition of investor rights as well as their justiciability without defining investor obligations towards human rights. The investor-to-state dispute settlement procedure marks a tendency to pass over domestic courts raising questions about the rule of law. Possible impact on public health regulations where these might force changes on investors (eg to improve environmental protection after an investment has been made) is unclear although it has raised concern previously under NAFTA. This justifies a significance criteria of (-1). On a positive note, procedures appear to allow <i>amicus</i> briefs from civil society in investor-to-state disputes. To the extent that the Chapter increases investment, this assists the government in its stated plan to achieve development and poverty reduction through economic growth and investment. Investment has tended to have a positive impact on economic growth in Costa Rica which could have flow-on positive impacts for human rights if managed correctly. This justifies a significance criteria of (+1).
Insurance (chapter 12), Telecommunications (chapter 13)	<p>1. Competition in the sectors might detract from the current principle of universality.</p> <p>2. Competition might reduce current unprofitable pro-poor tariff schemes</p>	-1	The liberalization of the insurance sector has the potential to affect some forms of social security although the social security services of the Caja Costarricense de Seguridad Social (CCSS)—which provides social security services in relation to health care—are excluded. Liberalization of insurance and telecommunications potentially threaten the universality of services which are based on the principle of social solidarity. Current universal coverage might be threatened, particularly where services are provided for below profit tariffs, and a two-tiered system of service provision might result. This justifies a significance criteria of (-1). However, private sector competition in telecommunications might also lead to more competitive pricing and better services. This justifies a significance criteria of (+1)

Source: adapted from Walker 2009.

### Annex 3. Trade Sectors more relevant to human rights – Walker

#### Trade sectors more relevant to human rights

Trade sector	Issues relevant to HRIAs
Goods generally (e.g. GATT)	Reduction in discrimination in trade and improved market access could improve economic growth and employment in import and export industries, in turn providing financial resources for promotion of human rights, particularly economic, social and cultural rights (ESCRs). Similarly, special and differential treatment for developing countries could help increase trade in goods from poorer countries, potentially having positive impacts on human rights if accompanied by appropriate measures. Exceptions include protection of public morals and human life and health, which could potentially cover protection of human rights such as the right to life and health.
Agricultural trade (e.g. WTO Agreement on Agriculture)	Increased market access can promote the availability and accessibility of food (right to food); special and differential treatment can promote rural development but high barriers to trade in some wealthy countries can exacerbate poverty, threaten rural livelihoods (right to an adequate standard of living); food aid can provide food but damage sustainability of food production in the longer term (right to food).
Technical standards (e.g. WTO Agreement on Technical Barriers to Trade)	Agreements on technical standards include regulation of standards that might affect human health and safety (right to health); such agreements might also regulate standards relevant to human rights such as codes of conduct for business promoting corporate social responsibility codes (corporate duty to respect), human rights codes for business, social labels for goods and services promoting fair trade (corporate duty to respect); the regulation of standards also contributes to transparency in government regulation and therefore good governance (potentially positively affecting civil and political rights).
Health and safety measures (e.g. the WTO Agreement on Sanitary and Phytosanitary Measures)	Agreements regulating health and safety measures relating to trade can affect food safety as well as affect human life and health from plant or animal-carried diseases (potentially affecting right to food, right to health).
Trade in services (e.g. GATS)	As with trade in goods, reduction of discrimination and increased market access in services can create economic growth and employment with flow-on effects for progressive realization of ESCR in light of appropriate policies. GATS promotes market access and non-discrimination in 12 service sectors including educational services, health-related and social services, environmental services, communication services, recreational, cultural and sporting services which in turn can affect access to essential services (potentially affecting policies related to human rights such as universal access to essential services eg right to health, right to education, cultural rights).

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**Trade sectors more relevant to human rights** *(continued)*

Trade sector	Issues relevant to HRIAs
Intellectual property protection (e.g. the Agreement on Trade-Related Aspects of Intellectual Property Rights)	Regulation of the grant and use of patents on pharmaceuticals can affect access to essential medicines (right to health), regulation of plant varieties and patents related to traditional knowledge can affect the cultural heritage and traditional knowledge of indigenous peoples and local communities (cultural rights, right to an adequate standard of living), patenting of plant varieties and seeds can affect food security (the right to food); copyright over educational materials can affect access to educational materials (right to education).
Government Procurement (e.g. the Agreement on Government Procurement)	Government procurement can be used to favour businesses run by individuals living in disadvantaged or marginalized communities or situations, but trade regulation of government procurement could treat such special measures as trade-discriminatory if adequate protections are not included in such agreements (affecting human rights principles of non-discrimination and equality).
Investment liberalization (e.g. Chapter 11 of NAFTA)	Investment agreements can increase investment in basic infrastructure and services which, accompanied by appropriate regulations, could affect progressive realization of ESCR; unsustainable investment or investment without proper national frameworks to protect human rights could have a negative impact on human rights (eg lowering of workers' rights or investment in polluting industries could affect the right to health); strengthened investor rights should be balanced with efforts to promote corporate social responsibility (corporate duty to respect human rights).

Source: Walker 2009.

## Annex 4. Methodological steps for evidence gathering in a HRIA – the case of the Canada-Colombia Free Trade Agreement

Harrison (2009) explored some of the key issues that need to be considered for carrying out an HRIA of the Canada-Colombia Free Trade Agreement (FTA). One of the issues he explores was the provisions of this Agreement that required agricultural liberalization in Colombia that might prevent semi-subsistence farmers and farm workers to sell produce as a result of increased competition from foreign exports. This, in turn, would prevent them to buy essential goods and services, thereby impairing their enjoyment of various human rights (e.g. right to food, housing, education, etc.). To assess that extent that this risk may occur as a result of this FTA, Harrison suggests that the HRIA should undertake the following methodological steps related to the stage of evidence-gathering:<sup>1</sup>

1. Map the baseline human rights situation in Colombia including relevant human rights law and the identification of key stakeholders who are poor, vulnerable or otherwise disadvantaged and whose human rights are most likely to be endangered by the provisions in question (e.g. semi-subsistence farmers, farm workers and associated communities).
2. Identify agricultural products from Canada that would be likely to compete with the products of Colombian producers in the Colombian market.
3. Assess the level of tariff reductions and reductions in other barriers to trade specified in the FTA that apply to the identified agricultural goods and develop an understanding of any safeguards that might protect domestic producers from foreign competition.
4. Undertake modeling studies and other economic forms of analysis in order to predict likely impacts of FTA on prices and sales of Colombian products.
5. Create a series of indicators utilized to measure whether human rights violations have occurred and the extent of such human rights violations (e.g. in respect of the right to food: “the involuntary reduction of the meals in terms of quantity or a deterioration of the food quality due to a forced reduction in variety of food, for example through a reduction of food ingredients such as vegetables”<sup>11</sup>).
6. Analyze a range of other countries who have already implemented trade measures of a similar type/extent to determine extent of impact on affected farming communities in those countries.

Source: Harrison 2009.

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<sup>1</sup> To analyze this issue, Harrison sets out other methodological steps that belong to other stages in the HRIA, but here are reproduced only those relevant to the evidence-gathering stage as an illustration of this stage.

## Annex 5. General Recommendations by HRIA on human rights due diligence – the case of Human Rights Assessment of Goldcorp’s Marlin Mine

### Final Recommendations for Goldcorp

- **PREPARE AND CONSULT UPON A RESPONSE TO THE ASSESSMENT.** Prepare a detailed response and action plan with clear objectives and timelines to address the findings and recommendations of the assessment with a view to implementing a system of ongoing due diligence for human rights at the Marlin Mine. Consult with stakeholders about the action plan prior to its implementation.

### Policy

- **DEVELOP A FORMAL, COMPREHENSIVE HUMAN RIGHTS POLICY FOR GOLDCORP** and implement it at the Marlin Mine. Have the Goldcorp Board of Directors formally adopt the policy and have it or a committee of Directors oversee its implementation.
  - The policy should cover the full range of internationally-recognized human rights and support implementation of Goldcorp’s commitments to the Global Compact and the ICMM.
  - The policy should provide specific guidance about each of the issue areas identified in the assessment, including ongoing consultation and access to remedy. In particular, the policy should provide guidance on compliance with ILO 169 and other indigenous peoples rights instruments.
  - Consider adopting a human rights-based approach to social investment activities.
  - Other Goldcorp policies should be reviewed to integrate or cross-reference the human rights policy commitments.

### Impact Assessment

- **UNDERTAKE A FOLLOW-UP ASSESSMENT.** Undertake a follow-up human rights impact assessment of the Marlin Mine on a periodic basis (e.g. every three years) to analyse progress made and challenges faced in improving the mine’s human rights performance.
- **ADDRESS INFORMATION GAPS.** Undertake the additional focused assessments or reviews identified in the assessment to address gaps in information and risks (e.g. labour rights and contractors).
- **UNDERTAKE HUMAN RIGHTS ASSESSMENTS FOR NEW PROJECTS and ACQUISITIONS.** Apply HRIAs throughout Goldcorp’s global operations, particularly when developing new projects or acquiring new concessions and operations. Follow developments in the field of HRIAs to understand how these can be integrated into or complementary to other assessment processes.

### Integration

- **EXPAND HUMAN RIGHTS TRAINING TO ALL MARLIN MINE EMPLOYEES.** Begin with managers, supervisors and employees with responsibilities for consultation and engagement with the communities. Adapt and expand the content of current human rights training as required to provide specific and practical guidance for human rights compliance. Ensure that training programs are evaluated for effectiveness and periodically updated.
- **PROVIDE CULTURAL TRAINING.** As part of broader efforts to respect indigenous peoples rights and ensure effective implementation of policies against discrimination and harassment in the workplace, provide cultural training to managers and foreign employees.

*(continued on next page)*

**Final Recommendations for Goldcorp** *(continued)*

- **REVIEW RESPONSIBILITIES AND INCENTIVES** for human rights AT THE MINE. Review management systems at Montana, as well as the key performance indicators and economic incentives for managers and employees at the Marlin Mine, to ensure responsibilities are clearly delineated and incentives are properly aligned to support human rights performance, and that legitimate cost-cutting targets do not result in gaps in due diligence for human rights.
- **SUPPORT INTEGRATION EFFORTS WITH APPROPRIATE EXPERTISE.** With due consideration for building and supporting local capacity, ensure that appropriate expertise and experience with international good practice standards are engaged for external audits and reviews, including for the Sierra Madre Foundation.

**Tracking Performance**

- **REPORT TO THE BOARD.** Install a senior Goldcorp manager, or independent party with a mandate from the Board of Directors, at the Marlin Mine to assist with and report on the implementation of Goldcorp's response to the assessment and all new human rights policies or commitments.
- **ENHANCE EXTERNAL AUDITS AND INDEPENDENT REVIEWS.** Maintain the current practice of undertaking periodic external audits and reviews of the Voluntary Principles on Security and Human Rights at the Marlin Mine. Establish independent auditing of the mine's environmental management system. Ensure that all prior commitments for baseline studies and ongoing monitoring are implemented.
- **ENHANCE PUBLIC REPORTING PRACTICES.** Enhance reporting on Goldcorp's sustainability performance in accordance with the Global Reporting Initiative, including the 2010 Mining and Metals Sector Supplement. Provide independent assurance for future sustainability reports. Continue to provide Annual Monitoring Reports for the Marlin Mine. Ensure that the information included in the AMRs is coherent with GRI reporting at the corporate level. Provide independent assurance for future AMRs.

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Source: Common Ground 2010

## Annex 6

### Check list questions – land management

Following is a list of questions set out by the Danish Institute for Human Rights.

#### **A. Before purchasing land, does the company consult with all affected parties, including both legal and customary owners, in order to seek their prior informed consent?**

YES	NO	F / A	N / A	NO INFO
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##### **Relates to the right to own property, the right to adequate housing, and the right to food**

In some developing countries, some of the land is not subject to land titles. Also national systems of land registration often co-exist with traditional/customary systems of legal ownership. Indigenous or local peoples may lack documentation to prove ownership, and/ or other actors may have illegal and competing documentation of ownership to the same property, but they still own the land or have usage rights to property under colonial or post-colonial treaties, or traditional indigenous laws. In some cases, the state itself may be the illegal owner to property which rightfully belongs to indigenous peoples pursuant to colonial or post-colonial treaties. Indigenous or local peoples may also be pressured to sell their property interests to companies by methods that deprive them of their human rights. For example, if poachers are hired to kill animals on which the people rely for their subsistence, the people may be forced to leave their property or sell it.

Another problem is that certain vulnerable groups, such as single women, elderly women, or wives, are often deprived of their property rights, and relatives or other acquaintances sometimes sell their property without permission and the customary law does not recognise or allow enforcement of their rights. Although state law or customary law may prescribe otherwise, women have the right to administer property and hold contracts under international law and husbands and wives have equal rights with respect to marital property.

Without proper investigation into land rights prior to purchase, the company might unknowingly receive a transfer of property from a purported owner only after the title has been improperly transferred from the true owner. The company should thus be aware that some sellers may not be the true owner of the land under international or indigenous peoples' property rights, or according to treaties between indigenous peoples and the state, which were ratified during colonial or post-colonial periods. In all land transactions, the company must ensure to investigate land ownership properly and consult with all affected groups before purchasing. When dealing with indigenous peoples, it is important to emphasise that this group enjoys special protection under international law due to their historical relation to the lands and territories they use or occupy. In such cases, international law requires their free and informed consent before any relocation can be undertaken.

*For more information about how to deal with indigenous peoples, please refer to the complete version of the Human Rights Compliance Assessment.*

*(continued on next page)*

### A. Before purchasing land, does the company consult with all affected parties, including both legal and customary owners, in order to seek their prior informed consent? *(continued)*

YES	NO	F / A	N / A	NO INFO
<b>Suggested Indicators:</b>				
YES	NO	F / A	N / A	NO INFO
1. The company has a method in place to verify all existing claims and titles to land, under state law (including colonial and post-colonial treaties) and the law and customs of indigenous peoples.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
2. The company is committed to clarifying and settling all existing claims and conflicts of land title in compliance with international human rights law or state law, whichever is more protective of the rights of the claimants.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
3. Company guidelines ensure that no coercive measures are taken to affect land use by local people, in order to obtain transfer of their property interests.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
4. Company guidelines include consultations with all affected parties (including women and wives) prior to acquiring their property through a third party, and if indigenous peoples are involved, it requires their free and informed consent.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
5. NGO's and indigenous peoples representatives confirm that the company is respectful of the land rights of local and indigenous people whenever it leases or purchases land.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

The above question is based on general principles contained in the following: Universal Declaration of Human Rights (1948), Articles 17 and 25; Convention on the Elimination on All Forms of Discrimination against Women (1979), Article 15 (2) and 16 (h); ILO Indigenous and Tribal Peoples Convention (C169, 1989, Article 14

### B. Does the company ensure that it does not participate in or benefit from improper forced relocations, and adequately compensates inhabitants in voluntary relocations?

YES	NO	F / A	N / A	NO INFO
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**Relates to the right to an adequate standard of living, the right to adequate housing, the right to property, and the right to freedom of movement**

Forced relocation must only be conducted by the government and only in accordance with domestic law and international human rights protections. It should be emphasized that forced relocation of non-consenting inhabitants is only allowed in limited circumstances for a public purpose when necessary to promote national security, economic development or to protect the health of the population. Thus, forced relocation must not be used for private sector developments that do not have some public purpose. Once removed, those who were displaced (whether willingly or not) must be provided with adequate compensation and not be rendered homeless. The company must ensure that it is not complicit in forced relocations that do not fulfill the requirements set forth above.

In the case of voluntary relocations, the company should always seek to engage in a dialogue with the current inhabitants of the land before any property is rented/purchased to ensure that the inhabitants are willing to move and are adequately compensated with substitute land and housing of equal and suitable quality. This practice should be undertaken even if the land transaction is conducted with a middleman (such as a formal title-holder to the land) or a government.

*(continued on next page)*

## B. Does the company ensure that it does not participate in or benefit from improper forced relocations, and adequately compensates inhabitants in voluntary relocations? *(continued)*

YES	NO	F / A	N / A	NO INFO
<b>Suggested Indicators:</b>				
YES	NO	F / A	N / A	NO INFO
1. The company has a procedure for ensuring that it is not complicit in any forced relocations, unless the relocation is done in conformity with international law and all alternative solutions have first been explored.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
2. When purchasing or renting property from governments or large-scale land owners, the company investigates the occupation of the land to ensure that no forced relocations have been performed, unless these have been done in conformity with international law.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
3. The company explores all alternative measures in consultation with the affected parties in order to mitigate any negative affects of a proper government relocation.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
4. The company ensures that adequate compensation (housing, land, money, etc.) is provided to all affected parties in case of relocation.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
5. Affected parties and relevant NGOs confirm that the company has done all it can to avoid forced relocations and if relocation has taken place, all affected parties have been consulted and received adequate compensation in accordance with international law.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

The above question is based on general principles contained in the following: Universal Declaration of Human Rights (1948), Articles 13, 17 and 25; International Covenant on Civil and Political Rights (1966), Article 12 (1); ILO Indigenous and Tribal Peoples Convention (C169, 1989), Articles 15 (2), 16 and 17

## C. Does the company honour the land, passage, and usage rights of local or indigenous peoples on company-controlled land?

YES	NO	F / A	N / A	NO INFO
<b>Relates to the right to own property, the right to freedom of movement, and the right to food</b>				

Local or indigenous people may have customary rights to enter onto or use land and natural resources, even when a state has conceded control of a large expanse of that land to a private company. People who resided on the land prior to the company's investment may have full property or residence rights on portions of the land. Nomadic peoples may have the right to pass through the land periodically or seasonally. Their rights may also be linked to certain natural resources, such as an oasis or water spring, vast herds of migratory animals, or plants that grow naturally and can be harvested only at a particular time of year. The company must make every effort to respect these entry rights and train its employees and security guards to respect the same. The company should not establish dangerous operations in areas where local or indigenous people have access rights to the land. If the company already has dangerous operations on land where local or indigenous people have access rights, the company must dialogue in good faith with the community to resolve the conflict.

*(continued on next page)*

### C. Does the company honour the land, passage, and usage rights of local or indigenous peoples on company-controlled land? *(continued)*

	YES	NO	F / A	N / A	NO INFO
<b>Suggested Indicators:</b>	<b>YES</b>	<b>NO</b>	<b>F / A</b>	<b>N / A</b>	<b>NO INFO</b>
1. If operating in areas where indigenous peoples have right to access company-controlled land, the company has guidelines concerning the access and usage rights.	<input type="checkbox"/>				
2. The company investigates the rights of all communities with respect to access and usage rights and dialogues with all affected parties to find mutually acceptable solutions to land usage.	<input type="checkbox"/>				
3. Company security guards are educated about the rights of local or indigenous peoples to enter or use land on company controlled property.	<input type="checkbox"/>				
4. Company employees and security personnel are trained to interact appropriately with indigenous and local rights holders, allowing safe and unimpeded use of the land and its resources without harassment or intimidation.	<input type="checkbox"/>				
5. NGO's and community representatives confirm that the company respects the access and usage rights of indigenous and local people to company-controlled land.	<input type="checkbox"/>				

The above question is based on general principles contained in the following: Universal Declaration of Human Rights (1948), Articles 13, 17 and 25; ILO Indigenous and Tribal Peoples Convention (C169, 1989), Article 14

### D. Does the company consult with the local inhabitants and take measures to address and mitigate any disruptive effects that its operations may have on company land, the local community, and the natural resources in the area?

	YES	NO	F / A	N / A	NO INFO
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**Relates to the right to an adequate standard of living, the right to housing, the right to food and the right to health**

The company must remain alert and mitigate any negative effects its operations may have on company land and the surrounding areas in order to ensure the health of the local inhabitants, as well as their access to clean water and land that is suitable for the production of food. This includes respecting the needs of the people with whom it shares public services (such as water and electricity). If public resources are scarce in an area, the energy consuming operations of a company may result in a shortage of public resources for local residents. Other disruptions that might force individuals to relocate include activities producing substantial air, water or land pollution affecting wildlife and farming; loud and disturbing noises; disruptions to natural land use patterns, etc. During the course of its operations, the company should monitor its pollution output and regularly control its work processes in order to prevent harmful pollutants and other detrimental effects from damaging the land and neighbouring residential areas. When leaving company land, it must also take all measures to ensure that the land is made suitable for future habitation and farming.

*(continued on next page)*

**D. Does the company consult with the local inhabitants and take measures to address and mitigate any disruptive effects that its operations may have on company land, the local community, and the natural resources in the area?** *(continued)*

	YES	NO	F / A	N / A	NO INFO
<b>Suggested Indicators:</b>	<b>YES</b>	<b>NO</b>	<b>F / A</b>	<b>N / A</b>	<b>NO INFO</b>
1. The company has a policy on land management covering environmental protection.	<input type="checkbox"/>				
2. The company continually monitors its pollution output and maintains the highest level of environmental safety standards related to its particular industry sector.	<input type="checkbox"/>				
3. Before initiating new operations, or when changing or extending operations, the company discusses its plans and activities with all affected parties and relevant experts to measure the impact and to determine how to avoid or mitigate any harmful effects.	<input type="checkbox"/>				
4. If community resources are scarce, the company develops a schedule defining the amount, location and timing of resources needed for its activities, so that the local authorities know when to expect rising demand and have sufficient time to prepare.	<input type="checkbox"/>				
5. The company continually monitors its use of local resources, and if necessary, it arranges for alternative resources from outside to make sure that its activities do not deprive local inhabitants of basic services such as water or electricity.	<input type="checkbox"/>				
6. When leaving land, the company has an action plan in place to ensure that there are no harmful and disruptive effects left on the land.	<input type="checkbox"/>				
7. Relevant NGOs and local inhabitants confirm that the company consults with them concerning all disruptive activities and addresses any concerns raised by them.	<input type="checkbox"/>				

The above question is based on general principles contained in the following: Universal Declaration of Human Rights (1948), Article 25; International Covenant on Economic, Social and Cultural Rights (1966), Article 11 (1); ILO Social Policy (Basic Aims and Standards) Convention (C117, 1962), Articles 1, 2 and 4 (c); ILO Indigenous and Tribal Peoples Convention (C169, 1989), Articles 14 and 15

Source: adapted from Danish Institute for Human Rights. 2006(b)

## Annex 7

### List of Human Right questions related to the mining sector

The table below, developed by the International Council on Mining and Metals provides a list of questions which may assist mining companies to ensure that human rights are adequately addressed.

#### Potential human rights issues related to the mining sector<sup>a</sup>

Issue area	Examples of key questions <sup>b</sup>
Artisanal and small scale mining	<ul style="list-style-type: none"> <li>• How will disputes between the operation and artisanal miners be managed, especially if they are operating illegally in the mining concession area?</li> <li>• Is there a risk that the operation may undermine the rights of artisanal miners that have been allocated legal concessions?</li> <li>• What measures are being taken to prevent potential human rights abuses of artisanal miners by security forces?</li> </ul>
Child rights and child labour	<ul style="list-style-type: none"> <li>• Is it likely that consultation and engagement will not adequately identify potential risks to children, e.g. by virtue of their exclusion from the process or the inability of parents to reflect their concerns?</li> <li>• Are children especially vulnerable to the impacts of development, e.g. are households in the area of operation headed by children as a result of factors such as HIV/AIDS?</li> <li>• Where land acquisition takes place, is there a risk of children being disadvantaged, for example through disinheritance, lack of access to education for relocated children, etc.</li> <li>• Is there a risk of harmful child labour taking place within the supply chain?</li> </ul>
Conflict	<ul style="list-style-type: none"> <li>• Is there a risk of, or presence of, civil conflict in the region or host country, and how does this currently affect rights?</li> <li>• Does the risk of conflict affect the security environment in a manner that might infringe upon the rights of local communities?</li> <li>• What is the track record of either public or private security providers in terms of human rights and are they adequately trained in this area?</li> <li>• Is there a risk of tension leading to violence as a result of the distribution of resource revenues, employment opportunities or supply contracts within the country/region becoming violent?</li> <li>• Is there evidence of gender-based sexual or physical violence?</li> <li>• Is there a risk of resource revenues being used to fund conflict?</li> </ul>
Employment	<ul style="list-style-type: none"> <li>• Is there any evidence of discrimination in the workplace and are measures in place that support a diverse workforce?</li> <li>• Are processes and other measures to ensure safe working conditions sufficiently robust?</li> <li>• Are recruitment processes fair and transparent, reducing the likelihood of conflict over vacancies?</li> <li>• Are sufficient processes in place to ensure no use of forced, compulsory or child labour (either directly or in supply or processing chains)?</li> <li>• Is freedom of association and the effective recognition of the right to collective bargaining upheld by the operation?</li> </ul>

(continued on next page)

## Potential human rights issues related to the mining sector<sup>a</sup> (continued)

Issue area	Examples of key questions <sup>b</sup>
Gender	<ul style="list-style-type: none"> <li>• Is domestic abuse or sexual assault prevalent?</li> <li>• Are sufficient processes in place to prevent sexual harassment and discrimination in the workforce and also in community programs?</li> <li>• What efforts are being made to increase the participation of women in the workforce and also in community programs?</li> <li>• What efforts are being taken to address risks that may affect women to a greater extent than men, such as loss of water resources?</li> <li>• How are gender considerations being incorporated into social baselines, impact and risk assessments?</li> <li>• Are gender-sensitive methodologies used to plan and implement community initiatives?<sup>c</sup></li> </ul>
Indigenous peoples and other community issues	<ul style="list-style-type: none"> <li>• Does the operation concerned implement all the commitments in the ICMM Position Statement on Mining and Indigenous Peoples (including to gain a full understanding of the perspectives of indigenous peoples, to consult with them, and to seek broad community support for new projects)?</li> <li>• Are there other especially vulnerable groups among local communities, and if so, are their rights currently respected? Could the project in some way infringe on their enjoyment of rights?</li> <li>• Are the cultural and religious rights and the cultural property of local communities respected?</li> </ul>
Macroeconomic and local economic issues	<ul style="list-style-type: none"> <li>• Is there capacity at the national and sub-national levels for the effective management of mineral revenues?</li> <li>• Are there provisions for transparently accounting for mineral revenues in-country, such as the Extractive Industries Transparency Initiative, and has this resulted in such revenues being effectively managed and accounted for?</li> <li>• Is there discontent at how resource revenues are being managed or at the respective shares of governments, local communities and private investors?</li> <li>• What are the positive impacts of the operation on economic rights (including, for example, the livelihoods of employees, and access to public services such as education resulting from mineral revenues)?</li> <li>• Do local communities generally consider themselves to be better or worse off as a result of the operation—and if worse, what are the reasons for their perceptions?</li> <li>• Is the project likely to have adverse local economic consequences, such as inflation of housing or food prices?</li> <li>• Are procedures to prevent bribery and corruption by employees sufficiently robust?</li> </ul>
Relations with business partners	<ul style="list-style-type: none"> <li>• Is there any evidence that business partners—whether equity partners, contractors, suppliers or major customers—are failing to respect human rights (including across any of the dimensions above)?</li> <li>• What is the risk that the company could somehow be involved in any such human rights abuses?</li> <li>• What is the risk that the companies' reputation will be tarred by association with the human rights record or performance of any of its business partners?</li> </ul>

(continued on next page)

### Potential human rights issues related to the mining sector<sup>a</sup> (continued)

Issue area	Examples of key questions <sup>b</sup>
Relations with host government/state agencies	<ul style="list-style-type: none"> <li>• What is the general record of the host government/key state agencies on human rights and enforcement of the rule of law?</li> <li>• What is the risk that the government or state agencies will undermine the ability of the company to respect human rights (including across any of the dimensions above)?</li> <li>• What is the risk that the company's reputation will be tarred by association with the government based on the latter's human rights record?</li> </ul>
Resettlement	<ul style="list-style-type: none"> <li>• If there has been, or there are any plans for, involuntary resettlement of local communities, has this been (or will it be) carefully and responsibly managed?</li> <li>• For example has there been (or will there be) appropriate consultation with and compensation for resettled people? How have the livelihoods of resettled people been affected? If any resettlement was undertaken by previous operators of the project, were these responsibly managed?</li> </ul>
Security	<ul style="list-style-type: none"> <li>• Has the provision of security to the operation required the use of force by either contracted private security or the police or military, or is there a risk that it might?</li> <li>• Is there any risk of (or evidence of past) human rights abuses against local communities by security forces, whether these be directly employed by the company, contractors or state security forces? (See the requirements on "Risk Assessment" which form one of the three main aspects of the Voluntary Principles on Security and Human Rights<sup>d</sup>)</li> <li>• Are human rights included as part of the current training of the police or military?</li> </ul>
Water and ecosystem services	<ul style="list-style-type: none"> <li>• Who are the current users of water or other ecosystem services within the vicinity of the operation/project?</li> <li>• What is the current status of water supplies to the various users (for example, in terms of quality and quantity)? Is water scarcity an issue?</li> <li>• How might the development of a project (or how does an operation) affect either the quality or quantity of water or availability of ecosystem services?</li> <li>• Is the company engaged with the communities or other groups on their concerns regarding water quality or quantity or other ecosystem services?</li> </ul>

Source: Walker 2009.

<sup>a</sup> These issues are listed in alphabetical order and no hierarchy is implied or intended.

<sup>b</sup> Some of these questions go beyond the corporate responsibility to respect human rights, but are important in better understanding the potential of mining to contribute to social and economic development or become a source of discontent.

<sup>c</sup> For further information about integrating gender considerations into project and program development and implementation, see Rio Tinto (2009) *Why Gender Matters*. [www.riotinto.com/documents/ReportsPublications/Rio\\_Tinto\\_gender\\_guide.pdf](http://www.riotinto.com/documents/ReportsPublications/Rio_Tinto_gender_guide.pdf)

<sup>d</sup> See [www.voluntaryprinciples.org/principles/risk\\_assessment](http://www.voluntaryprinciples.org/principles/risk_assessment)

## Annex 8

### Human Rights Indicators related to access to medicines

The following list of indicators was set out by Walker to help identify future changes in access to medicines as a result of the intellectual property provisions of the Dominican Republic-Central American-US Free Trade Agreement (CAFTA).

#### Human rights indicators

Right to health – Article 12(2)(c) ICESCR – the prevention treatment and control of diseases	
Structural	<ul style="list-style-type: none"> <li>• International human rights treaties, relevant to the right to enjoyment of the highest attainable standard of physical and mental health (right to health), ratified by the State (S1)</li> <li>• Date of entry into force and coverage of the right to health in the Constitution or other forms of superior law (S2)</li> <li>• Date of entry into force and coverage of domestic laws for implementing the right to health (S3)</li> <li>• Time frame and coverage of national policy on access to medicines (S4)</li> <li>• Legal protections against discrimination (S5)</li> <li>• Number of active civil society organizations involved in the promotion and protection of the right to health in the context of CAFTA (S6)</li> <li>• Existence of structures for the use of parallel importing of essential medicines and compulsory licencing of essential medicines (S7)</li> <li>• Existence of grievance mechanisms in relation to the right to health and access to medicines (S8)</li> <li>• ICC rating of the National Human Rights Institution (S9)</li> </ul>
Process	<ul style="list-style-type: none"> <li>• Proportion of received complaints on the right to health investigated and adjudicated by the courts, national human rights institution, human rights ombudsperson, or other mechanisms, and the proportion of these responded to effectively by the government (P1)</li> <li>• Per capita government expenditure on access to essential medicines (P2)</li> <li>• Proportion of CCSS budget devoted to provision of essential medicines (P3)</li> <li>• Proportion of people covered by health insurance (break down public/private insurance) (P4)</li> <li>• Share of public expenditure on essential medicines in relation to private expenditure (P5)</li> <li>• Availability of additional funds to increase the CCSS budget (define the source) (P6)</li> <li>• Proportion of CCSS budget spent on medicines from innovator pharmaceutical companies (P7)</li> <li>• Proportion of essential medicines sourced through the compulsory licencing mechanism to ensure affordability (P8)</li> <li>• Identification of individuals who are vulnerable to changes in the access to medicines regime (P9)</li> </ul>
Outcome	<ul style="list-style-type: none"> <li>• Incidence of persons foregoing essential medicines (O1)</li> </ul>

Source: Walker 2009.

## Annex 9

### Indicators on grievance mechanisms for business

Danish Institute for Human Rights – HRCA Quick Check

#### Does the company have mechanisms for hearing, processing, and settling the grievances of the local community?

YES	NO	F / A	N / A	NO INFO
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##### Relates to the right to liberty and security and the right to health

Anyone affected by the company's activities must have access to a grievance mechanism where they can report any concerns about the company's activities, without discrimination or fear of repercussion. In order to facilitate dialogue with the local community, the company must establish and maintain an effective grievance process whereby members of the local community can lodge company-related complaints. Complaints might range from dissatisfaction with company operations resulting in noise or pollution of the air or water, to claims of intimidation or abuse by company security guards. The company must properly examine all grievances pursuant to its pre-established grievance procedure. The grievance procedure should be designed in collaboration with representatives from the local community to reflect their needs and interests and to create ownership and trust in this mechanism. Any individual or organisation filing a grievance must receive notification of the company's findings regarding the particular complaint and whether corrective action will be taken. If the individual or organisation disagrees with the decision, he or she should have recourse to some reasonable form of dispute resolution process to settle the claim with the company.

Suggested Indicators:	YES	NO	F / A	N / A	NO INFO
1. The company has a policy prescribing the requirements of a fair hearing.	<input type="checkbox"/>				
2. Company policy requirements are followed in relation to all grievances.	<input type="checkbox"/>				
3. The company has a neutral mechanism responsible for hearing, processing, and settling disputes. That mechanism has representation from members of both the company and the local community.	<input type="checkbox"/>				
4. Members of the local community are informed about the company grievance process and are able to anonymously submit grievances if they prefer to do so.	<input type="checkbox"/>				
5. Local NGOs or other representatives are allowed to participate and represent community members in any hearing held with respect to a grievance.	<input type="checkbox"/>				
6. Records show that the company systematically and objectively reviews any complaints filed and implements corrective action if necessary.	<input type="checkbox"/>				
7. Community members and local NGOs confirm that they have access to a grievance mechanism which addresses any concerns raised in a fair and transparent manner.	<input type="checkbox"/>				

[The above question is based on general principles contained in the following: Universal Declaration of Human Rights (1948), Article 25; International Covenant on Economic, Social and Cultural Rights (1966), Article 12 (b); ILO Tripartite Declaration of principles concerning Multinational Enterprises and Social Policy (1977), Articles 57 and 58].

Source: Danish Institute for Human Rights not dated (c).

Nordic Trust Fund (NTF) is a knowledge and learning initiative to help the World Bank develop a more informed view on human rights. It is designed to improve existing Bank involvement on human rights in the overall context of the Bank's core mission of promoting economic growth and poverty reduction. The NTF is managed by a secretariat in the Operations Policy and Country Services vice-presidency (OPCS). Financial and staff support for the NTF is provided by Denmark, Finland, Iceland, Norway, and Sweden, with additional funding provided by Germany.



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