

# Human Rights Impact Assessment in the Extractive Industries: taking a Human Rights-Based Approach

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## ABSTRACT

With increased attention being given to the accountability of businesses for their human rights impacts, human rights impact assessment (HRIA) has gained traction as one tool available to assess and address the impacts of extractive industries projects on the human rights enjoyment of workers and communities. The United Nations Guiding Principles on Business and Human Rights (UNGPs) have been a key driving factor for the growing focus on HRIA. However, as HRIA is relatively new in the extractive industries, for example compared to the more established practices of environmental or social impact assessment, current HRIA practice varies considerably and there are few examples of methodologies and assessments in the public domain. This hinders the development of a common understanding amongst extractive industries stakeholders as to what 'good practice' HRIA can and should entail. Relatedly, the extent to which such assessments in fact facilitate processes and outcomes that effectively address the adverse human rights impacts of extractive industries projects remains largely unknown. In this paper, we propose that the human rights-based approach might provide useful parameters to guide the development, implementation and evaluation of HRIA methodologies and practice going forward. In particular, the focus that the human rights-based approach places on (i) the application of international human rights standards, (ii) human rights principles to guide processes, and (iii) accountability and transparency, could provide useful parameters, with the view to establishing HRIA practice that meaningfully contributes to preventing and addressing the adverse human rights impacts of extractive industries projects.

## INTRODUCTION

Extractive industries projects can have a wide variety of both negative and positive impacts on the human rights enjoyment of workers and communities. The ways in which extractive industries projects anticipate and manage such impacts, in particular adverse impacts, has been the subject of growing attention, not least because of the United Nations Guiding Principles on Business and Human Rights (UNGPs). Whilst the assessment of environmental and social impacts of extractive industries projects has been common practice for some time, and is frequently a legislative requirement, the practice of assessing human rights impacts is relatively new. According to the UNGPs, business enterprises have an obligation to ‘respect’ human rights, including through the process of human rights due diligence; a process by which to identify, prevent, mitigate and account for how a business addresses the adverse human rights impacts with which it is involved (United Nations Human Rights Council, 2011). The assessment of human rights impacts is considered to be a critical step in this process. Notably, the UNGPs do not specify the precise method through which human rights impacts should be assessed. Correspondingly, a range of different approaches are currently being adopted by business enterprises, and there are significant differences in terms of their focus, depth of analysis and stakeholder engagement. Under the title of ‘human rights impact assessment’ (HRIA) it is currently possible to find anything from a two-week desk-top research exercise to multi-month investigative processes. Furthermore, there are very few examples of HRIAs in the public domain. This variation in practice and lack of transparency around HRIA challenges the assumption that HRIA enhances the accountability of businesses to effectively identify and address their adverse human rights impacts. It also raises the question of what types of parameters should guide reflection on current HRIA approaches and future developments, with the view to generating good practice that leads to substantive human rights outcomes for rights-holders.

In this paper, we propose that the human rights-based approach (HRBA) might provide a useful framework to guide the development of HRIA methodologies and practice going forward. The HRBA is based on three core components: (i) application of international human rights standards, (ii) human rights principles, including for process, and (iii) focus on accountability through analysis of rights-holders and their ability to claim rights and the corresponding duties and capacities of duty-bearers to meet their human rights obligations (Office of the United Nations High Commissioner for Human Rights, 2006; United Nations Development Group, 2003). The application of these constituent components of the HRBA has been noted as critical in both academic literature and practical guidance on HRIA, either directly or indirectly.

The paper draws on the authors’ experience in working with HRIA, including in the extractive industries. This work has included research into current HRIA methodologies and practice, development of industry guidance on human rights in impact assessment, as well as undertaking HRIAs for extractive industries companies (and other industries). In short, from our work with HRIA to date, we have observed that whilst there is currently significant focus on HRIA amongst extractive industries stakeholders, there is a lack of a common understanding about what ‘good practice’ assessments should entail, and evaluation of whether HRIA in fact contributes to enhancing the accountability of extractive industries projects to effectively address their human rights impacts

remains limited. Given that the HRBA has been noted as critical for HRIA, and that it focuses on both the process and outcomes of interventions, we are interested in exploring how the HRBA parameters could provide a basis upon which to develop, implement and evaluate HRIA methodologies and practice going forward.

## **HUMAN RIGHTS IMPACTS AND THE MINING INDUSTRY**

It is well documented that extractive industries projects can have a range of positive and negative impacts on the human rights enjoyment of workers and communities. For example, the employment opportunities and revenues generated by extractive industries projects can potentially contribute to improvements in people's rights to work and to an adequate standard of living. On the other hand, poor health and safety standards or environmental pollution caused by projects may impact adversely on the right to health or the right to water and sanitation.

As part of addressing such adverse impacts, mining companies are increasingly making commitments to the implementation of human rights due diligence, including to the assessment of human rights impacts. This includes commitments at the company-level (*e.g.* BHP Billiton, Rio Tinto), as well as at an industry-level (*e.g.* frameworks and guidance by the International Council on Mining and Metals). There are also several examples of HRIAs from the extractive industries (*e.g.* Human Rights Assessment of the Marlin Mine conducted by On Common Ground, HRIA of the proposed Nuiguyo gold mine in Indonesia conducted by Nomogaia, and HRIA of the Bisha Mine in Eritrea conducted by LKL International Consulting).

These commitments to an increased focus on human rights impacts can be situated in a context where there is increasing pressure on the mining industry to account for addressing their human rights impacts, including through community and civil society expectations, industry acceptance and alignment with the corporate responsibility to respect human rights as outlined in the UNGPs, the integration of human rights in frameworks governing project finance (*e.g.* International Finance Corporation Performance Standards, European Investment Bank Environmental and Social Principles and Standards), as well as recent legal developments challenging the accountability of mining companies for addressing their human rights impacts.

## **THE UNITED NATIONS GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS AND HUMAN RIGHTS IMPACT ASSESSMENT**

The UNGPs articulate the expectation that businesses should respect human rights by using a process of due diligence, in which the assessment of human rights impacts is a critical step. Notably, the UNGPs do not specify the precise method through which human rights impacts should be assessed, recognizing that a range of approaches might be appropriate, as long as the focus on human rights is comprehensive. Whilst the UNGPs provide some basic parameters for assessing human rights impacts, they do not provide an elaborated methodology for doing so. Correspondingly, a range of different approaches are currently being adopted by business enterprises, including 'stand-alone'

human rights impact assessments, approaches that seek to integrate human rights into other assessment processes such as environmental or social impact assessments, and other. For the purposes of this paper we will refer to these approaches collectively as HRIA.

Compared to EIA and SIA, the field of HRIA is relatively new. HRIA has been defined as ‘an instrument for examining policies, legislation, programs and projects and identifying and measuring their effects on human rights’ (World Bank and Nordic Trust Fund, 2013). Within emerging HRIA practice, several strands have been identified, including in the areas of: development; the right to health; children’s rights; business activities; international trade and investment; sector-wide impact assessments; community-led impact assessments; and impact assessments conducted for public authorities. Within and between these strands, the focus is diverse in terms of the rights-holders and duty-bearers involved, the level of detail in the methodology and analysis, and the precise purpose and intent of the assessments. In this paper we focus on HRIA of business activities, specifically HRIA commissioned by and/or conducted for private sector extractive industries projects. In this context, the primary objectives of HRIA tend to include: to effectively identify and address adverse human rights impacts; to contribute to human rights risk management; and to demonstrate respect for human rights. The potential value of HRIA in terms of providing a platform for dialogue between companies and communities, as well as to facilitate human rights learning and capacity building within both the company and communities, have also been noted.

We consider that HRIA has the potential to provide an evidence-based approach for identifying and addressing the adverse human rights impacts of extractive industries projects. However, despite the commitments made to implement human rights due diligence, by both individual companies as well as at the industry-level, actual public domain examples of HRIA in the extractive industries sector remain limited and we observe a lack of a common understanding amongst extractive industries stakeholders as to what ‘good practice’ HRIA should entail. Arguably, if HRIA is to establish itself as a robust and evidence-based practice that enhances the ability and accountability of companies to effectively address their human rights impacts, there is therefore a need to consider emerging HRIA approaches in more detail, including considering what types of parameters might guide the further development, implementation and evaluation of HRIA methodologies and practice. In this context, we propose that the HRBA might provide a useful framework through which to undertake such analysis and future methodology development.

## **THE ROLE OF A HUMAN RIGHTS-BASED APPROACH IN HRIA**

Despite the diversity, and at times divergence, in current HRIA approaches, it is possible to deduce several recurring aspects in the academic literature and practical guidance on HRIA. A core reference framework is the HRBA. The HRBA originates from the field of international development cooperation but has since been applied in other disciplines. The United Nations Stamford Common Understanding articulates the HRBA in terms of three core components: (1) application of international human rights standards; (2) human rights principles, including for processes – universality and inalienability, indivisibility, interdependence and interrelatedness, equality and

non-discrimination, participation and inclusion, accountability and the rule of law; and (3) analysis of the roles and capacities of rights-holders and duty-bearers (Office of the United Nations High Commissioner for Human Rights, 2006; United Nations Development Group, 2003). The HRBA highlights the importance of both process and outcomes, based on the understanding that the process applied in development projects or interventions can be as important as the outcomes.

It is worth noting that the UNGPs clearly reflect several of these HRBA components. For example, Guiding Principle 18, on the assessment of human rights impacts, notes the importance of: including all internationally recognized human rights as a reference point; meaningful consultation with potentially affected stakeholders; paying particular attention to vulnerable groups and different risks faced by women and men; drawing on relevant internal and external human rights expertise; and undertaking impact assessments at regular intervals (United Nations Human Rights Council, 2011). Therefore, whilst the UNGPs do not explicitly refer to the HRBA, it may nevertheless be concluded that such an approach should be taken when assessing the human rights impacts of business activities.

## **REFLECTING ON HRIA THROUGH A HUMAN RIGHTS-BASED APPROACH LENS**

In this section we discuss the three core components of the HRBA and reflect on current HRIA practice in light of each of these. The observations we make with regard to current practice are based on our own experiences of working with HRIA in the business and human rights context, including extractive industries, and do not purport to constitute a comprehensive empirical analysis.

### **Application of international human rights standards**

The first component of the HRBA is the application of international human rights standards and principles. International human rights standards have been developed by the international community and elaborated in authoritative sources. As such, human rights have the potential to present a 'secure and precise normative foundation' for impact assessment (Harrison, 2013).

The UNGPs expect a comprehensive consideration of human rights in impact assessment; at minimum, including the rights expressed in the International Bill of Human Rights (comprised of the United Nations Declaration of Human Rights and the two implementing covenants, the Covenant on Civil and Political Rights and the Covenant on Economic, Social and Cultural Rights) and the International Labour Organization's Declaration on Fundamental Principles and Rights at Work, with consideration of additional standards as necessary in a particular context.

Using international human rights standards as a benchmark for assessment can facilitate the comprehensive coverage of human rights issues. For example, it can help to ensure the inclusion of topics that are frequently not captured in environmental and social impact assessments (*e.g.* labor and security), as well as strengthening the focus on topics which may be captured but where enhanced analysis would be beneficial (*e.g.* gender).

Furthermore, human rights standards bring a specific lens to the analysis of impacts. Human rights have substantive content which is articulated in international conventions and treaties, jurisprudence

from international or domestic courts, and findings from expert bodies. The substantive content of human rights can guide the assessment team on what information should be gathered as part of the impact assessment. For example, the legal framework analysis should include explicit consideration of international human rights standards – civil and political rights as well as economic, social and cultural rights, including analysis of the degree to which such international standards are reflected in domestic laws and practice to translate into people’s actual enjoyment of human rights (or lack thereof).

Essentially, using international human rights standards as the benchmark for assessment can provide authority of the assessment as these are standards that are derived by international agreement and enshrined in international and domestic laws.

However, in current HRIA practice the application of the substantive content of human rights standards, such as through the use of human rights indicators, is limited. Rather than using quantitative and qualitative human rights indicators, at the moment many HRIA methodologies use a set of questions and/or checklists and make broad associations between a particular finding and a related human right. Furthermore, it is not always clear from the methodology if and how the full scope of human rights has been considered in the assessment. In theory, economic, social and cultural rights, as well as civil and political rights, should be taken into consideration, but in practice this may not always be the case. Lastly, if certain human rights are excluded from the scope of the assessment, the reason for this exclusion is not always mentioned.

### **Adopting a human rights-based process**

The second component of the HRBA is around process. This is in recognition that often the process of an intervention will be as important as the outcomes. A HRBA process should be compatible with international human rights in the sense that the process itself respects and upholds these rights; including by paying particular attention to participation and inclusion, and equality and non-discrimination (for the purposes of this paper we have selected these two aspects for discussion, noting that the HRBA includes attention to additional human rights principles, as outlined above).

***Participation and inclusion:*** Participation and inclusion are key principles in the HRBA. In an impact assessment context, this requires paying particular attention to the spaces for consultation and engagement provided, thinking about when engagement occurs, as well as understanding and acknowledging power-dynamics between different stakeholders in the project context.

Firstly, it is important to acknowledge that ‘participation’ may not be synonymous with ‘consultation’. From a HRBA perspective, a deeper engagement is expected. For example, that rights-holders might be involved in: determining which methodologies are applied and used in the assessment; the development of the terms of reference; the scoping phase; as well as monitoring and follow-up. That is, participation must be an integral component of the HRIA throughout the process, rather than at isolated points in time.



Furthermore, participation in a HRIA needs to be an iterative process, whereby rights-holders can actually shape and influence the HRIA process and outcomes; rather than responding to information provided by the company, the use of which the company then determines in isolation. The focus should be on co-creation of knowledge, process and understanding.

Consideration of participation also requires reflection about the underlying power-dynamics at play. This raises questions not only about dynamics within communities and between the company and communities, but goes to central questions such as: to what extent can or should HRIAs that are commissioned by and/or conducted for extractive industries projects facilitate capacity building of rights-holders to know and claim their rights? Human rights due diligence according to the UNGPs is primarily a process intended for companies to better manage their human rights risks and impacts. Whilst it is acknowledged that this must extend to consideration of 'risk to rights-holders' and not only 'risk to business', the extent to which such a company-management focused framework can be aligned with participation to create rights-holder empowerment needs to be further investigated.

In practice, we have observed several shortcomings with regard to rights-holders participation in HRIAs, many of which have also been raised by civil society organizations. For example, frequently stakeholders, and in particular rights-holders, are not provided with sufficient information regarding the impact assessment, its objectives and the process, to be able to meaningfully engage in the assessment process. In other cases, affected rights-holders are not informed about the HRIA process in a manner or language that is understandable to them, with the effect that they are not able to share their views in the HRIA. Other challenges to ensuring meaningful participation of rights-holders in HRIA include lack of time and financial or logistical constraints from the company side. Lastly, too often consultation and engagement with rights-holders in impact assessment remains a one-way process, whereby the HRIA team commissioned by the company asks questions and obtains information from rights-holders at one point in time, and after that there is very little or no feedback to rights-holders about how their views have been incorporated in the HRIA; nor is information about mitigation measures and future plans about the project shared with stakeholders in an ongoing manner.

Furthermore, whilst HRIAs conducted for extractive industries projects often build the capacity of the assessment team and staff of the company on human rights issues and the HRIA process, this usually does not apply to potentially affected rights-holders. A HRIA process could be used to build the capacity of rights-holders to better understand their rights and the conditions of the project, allowing them to address negative impacts and negotiate improved conditions with the company. This approach of capacity-building of rights-holders through HRIA is considered to be one of the most important aspects of community-led HRIAs. However, to date this has not been a key focus in HRIAs conducted for private sector extractive industries projects. Reasons for this could be related to the fact that currently such assessments are often primarily focused on finding management solutions for the company, or an apprehension on the part of the company that once rights-holders are empowered, they may oppose the project.

***Equality and non-discrimination:*** Non-discrimination is both a human right as well as a key HRBA principle. In a HRIA context, accounting for non-discrimination includes recognizing the different types of direct and indirect discrimination, identifying which individuals in the given context are subject to discrimination, vulnerability or marginalization, and taking steps to address discrimination. This would mean, for example, paying attention to understanding structural discrimination in communities, including through disaggregate stakeholder analysis.

A gender perspective is necessary, including by identifying how women and men might experience impacts differently, paying attention to the specific impacts experienced by women and girls, and identifying any disproportional distribution of impacts and benefits.

The specific rights of certain rights-holder groups, such as indigenous peoples, people with disability and children, should also be taken into consideration in HRIA; given that these groups may enjoy particular protections and can experience negative impacts more severely than others, therefore requiring specific or different methods of engagement and mitigation measures.

Examples exist of gender impact assessments in the extractives industries sector, focusing on the specific impacts of a project on women and girls. However, in current HRIA practice disaggregated data by, for example, gender, race, religion, age, or labor status, remains limited. Whilst women-only interviews and focus group discussions may be held as part of the HRIA, a systematic approach to disaggregated data collection is often lacking, due to time or resource constraints, or lack of expertise in the HRIA team on gender and non-discrimination.

### **Emphasis on accountability and transparency**

The last component to be discussed is that of accountability. This component is based on the emphasis in international human rights law and the HRBA of recognizing and enabling rights-holders' entitlements and capacity to know and claim their rights, and the corresponding obligations of duty-bearers to uphold these rights, including through providing remedies in the case of any human rights breaches. HRIAs should therefore identify the different rights-holders who are or may be impacted by the project, as well as the relevant duty-bearers who have obligations to address any human rights impacts, including through the availability of remedy and grievance mechanisms.

In terms of the accountability of the company, a HRIA process should involve the clear identification of who within the company is responsible and accountable for the HRIA process itself, as well as the development, implementation and monitoring of a HRIA action or mitigation plan that includes sufficient allocation of human and financial resources for each action. Currently, whilst sufficient funds may be allocated for conducting a HRIA, there is often little or no budget assigned for the follow-up and monitoring of the HRIA action plan.

Another key aspect to consider in terms of ensuring accountability is that of transparency, both with respect to the process of the HRIA itself, as well as with regard to the findings of the assessment. This should include reporting on HRIA findings to interested stakeholders, in particular those consulted during the assessment, so that rights-holders can hold the company accountable for the implementation of actions to address the identified impacts. In practice, reporting publicly on HRIA



processes and findings is currently extremely weak; there is no information on how many HRIAs have been conducted by companies in the extractive industries sector (and other sectors), but anecdotally and based on publicly communicated company commitments, it would appear that a larger number of assessments have been conducted than those reports that have actually made it into the public domain. It is encouraging that many extractive industries companies appear to be taking their corporate responsibility to respect seriously, including through firm commitments to assess their human rights impacts. However, the absence of public reporting on HRIA processes and findings arguably significantly hinders the learning, reflection and scrutiny that is necessary to establish a more robust HRIA practice in the extractive industries sector going forward. As long as HRIA reports and the methodologies applied are not shared, the quality of HRIAs cannot advance and their validity as an accountability tool is highly questionable.

A last, but nevertheless critically important, point of discussion regarding HRIA and accountability is that of access to remedy. In HRIAs, mechanisms should be in place for rights-holders who have participated in the process, so that they can raise concerns related to the assessment process itself, for example lack of ability to participate because insufficient information was shared or information was not available in their language. Rights-holders should also be able to raise concerns regarding impact mitigation. To date, whilst many extractive industries companies are developing and implementing project-level grievance mechanisms, much less consideration has been paid to how such grievance mechanisms might usefully relate to HRIA.

## CONCLUSION

We have proposed that the components of a human rights-based approach (HRBA) might provide a useful framework for reflecting on current human rights impact assessment (HRIA) approaches, and to guide the future development of HRIA methodologies and practice.

Reflecting on current HRIA practice through a HRBA lens reveals several areas for improvements. Arguably, if HRIA is to establish itself as a robust and evidence-based tool that contributes to enhancing the ability and accountability of extractive industries projects to effectively address their human rights impacts, these will need to be addressed in HRIA approaches going forward. We suggest that the HRBA can provide a useful framing for such future developments. In particular, the focus that the HRBA places on the application of international human rights standards, human rights principles to guide processes (*e.g.* participation and non-discrimination), and its emphasis on accountability and transparency, could provide useful parameters, with the view to establishing HRIA practice that meaningfully contributes to preventing and addressing the adverse human rights impacts of extractive industries projects.

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