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HUMAN RIGHTS AND IMPACT ASSESSMENT

CONCEPTUAL AND PRACTICAL
CONSIDERATIONS IN THE
PRIVATE SECTOR CONTEXT

NORA GÖTZMANN

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**HUMAN RIGHTS AND IMPACT ASSESSMENT
CONCEPTUAL AND PRACTICAL CONSIDERATIONS IN THE PRIVATE SECTOR CONTEXT**

Author: Nora Götzmann, Advisor, Danish Institute for Human Rights

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Denmark's National Human Rights Institution
Wilders Plads 8K
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Phone 3269 8888
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INTRODUCTION

1 INTRODUCTION

This paper discusses some of the conceptual and practical considerations encountered by human rights and impact assessment practitioners in the emerging field of human rights impact assessment.

The paper focuses on impact assessments commissioned by and conducted for private sector projects, and is based on a literature review and my work experience.¹ Whilst the points made may have relevance to a range of industry sectors (in particular large footprint sectors such as mining, oil and gas, forestry, or infrastructure) observations from my own experience are based on the extractive industries.² Working with the assessment of human rights impacts of extractive industries private sector projects has often raised more questions for me to date than it has provided answers or real solutions for rights-holders in terms of effectively preventing and addressing human rights impacts. As such, the aim of this paper is not to provide conclusive answers or authoritative guidance, but to share thoughts, experiences and ideas with others in the business and human rights community, with the view of engaging in dialogue and improving our understanding of human rights impacts and impact assessment practice.

With increased attention being given to the accountability of businesses for their human rights impacts over the last few years, human rights impact assessment has gained traction as one tool available to the private sector, non-government organisations (NGOs), governments and other stakeholders, to assess and evaluate the impacts of business activities on the human rights enjoyment of workers and host-communities.³

¹ In particular I am drawing on the 2011-2013 collaboration between the Danish Institute for Human Rights (DIHR) and The global oil and gas industry association for environmental and social issues (IPIECA) resulting in the development of a guidance document on human rights and impact assessment: DIHR and IPIECA (2013), *Integrating human rights into environmental, social and health impact assessments: A practical guide for the oil and gas industry* (hereafter *Human rights in ESHIA*).

² For the purposes of this paper I define extractive industries as activities and projects in the oil and gas and mining sectors, recognising that usually a broader definition of extractive industries is used, which also includes sectors such as forestry. 'Private sector projects' in the extractive industries then, refers to exploration, operations and expansion activities and projects in the oil and gas and mining sectors operated by a privately owned company (although much of what is discussed is as relevant for State-owned companies and/or joint ventures involving State-owned companies).

³ 'Host-community' is the term commonly used to describe people and communities living around an extractive industries project, for example a mine site or an oil and gas plant. 'Workers' includes both direct employees as well as contracted workers, often workers are members of the host-community.

The United Nations Guiding Principles on Business and Human Rights (UN Guiding Principles) have been one key driver for this increased focus on the assessment of human rights impacts.⁴ The UN Guiding Principles, which were unanimously endorsed by the UN Human Rights Council in 2011, articulate the expectation that businesses should respect human rights by using a process of due diligence. That is, 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.⁵ The assessment of human rights impacts is a critical step in this process. Notably, the UN Guiding Principles do not require businesses to conduct ‘human rights impact assessments’, but indicate that a range of approaches may be appropriate for assessing human rights impacts.⁶ Whilst the UN Guiding Principles set out the expectation that businesses assess their human rights impacts, they do not specify precisely how this should be done, or what essential features might be required for such an assessment to ensure that it is consistent with international human rights standards and principles.⁷

However, drawing on the UN Guiding Principles in combination with the emerging literature and practice in the area of human rights impact assessment, as well as guidance and experiences from the areas of social impact assessment and the human rights-based approach, a number of aspects can be identified as key for the assessment of human rights impacts. For the purposes of this paper I have grouped these as follows, into five ‘key criteria’:⁸

⁴ John Ruggie (21 March 2011), *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, United Nations Human Rights Council (A/HRC/17/31) (hereafter UN Guiding Principles). See also, John Ruggie (5 February 2007), *Human rights impact assessments – resolving key methodological questions*, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, United Nations Human Rights Council (A/HRC/4/74) (hereafter *Resolving methodological questions*).

⁵ UN Guiding Principles 15 and 17.

⁶ ‘Human rights impact assessment’ or ‘stand-alone human rights impact assessment’ are the terms commonly used to refer to impact assessments that have an exclusive focus on human rights, whereas the term ‘integrated assessment’ is often used to refer to an assessment where human rights are integrated into other types of assessments, such as environmental or social impact assessments.

⁷ UN Guiding Principle 18 does, however, set some broad parameters for the assessment of human rights impacts, including noting that processes a business applies for assessing human rights impacts should: “(a) Draw on internal and/or independent external human rights expertise; (b) Involve meaningful consultation with potentially affected groups and other relevant stakeholders, as appropriate to the size of the business enterprise and the nature and context of the operation.” UN Guiding Principle 18 commentary notes further, that the process should “pay special attention to any particular human rights impacts on individuals from groups or populations that may be at heightened risk of vulnerability or marginalisation, and bear in mind the different risks that may be faced by women and men.” There are also some notes regarding the timing of the assessment of human rights impacts (at regular intervals because human rights situations are dynamic) and regarding consultation with ‘potentially affected stakeholders’ (directly where possible, seek reasonable alternatives where not). Whilst these points give some direction, they fall short of the elaboration necessary for the operationalisation of human rights impact assessment. Arguably, this is only logical given that the UN Guiding Principles provide overarching guidance on a whole set of business and human rights issues, rather than purporting to constitute a detailed methodological approach for how each of these should be addressed, leaving this for further elaboration and analysis.

⁸ These criteria have been previously elaborated in: DIHR/IPIECA (2013), *Human rights in ESHIA*, pp. 21-23; Nora Götzmann and Claire Methven O’Brien (2013), *Business and Human Rights: A Guidebook for National Human Rights Institutions*, International Coordinating Committee of National Human Rights Institutions and Danish Institute for Human Rights, pp. 43-44. The criteria are based on a literature review including sources on human rights impact assessment, stakeholder engagement, social impact assessment and the human rights-based approach, including the following key sources: Desiree Abrahams and Yann Wyss (2010), *Guide to Human Rights Impact Assessment and Management (HRIAM)*, International Business Leaders Forum, International Finance Corporation and UN Global Compact (hereafter *HRIAM*); James Harrison (2013), ‘Establishing a meaningful human rights due diligence process for corporations: learning from

1. Applying international human rights standards – as the benchmark for the assessment, to guide impact identification, evaluation of severity, mitigation and remedy;
2. Addressing the full scope of impacts – including both actual and potential impacts that are caused by the business, impacts that the business contributes to and impacts directly linked through operations, products and services;
3. Adopting a human rights-based process – emphasising the principles of participation and inclusion, equality and non-discrimination, and accountability and transparency;
4. Ensuring accountability – identifying rights-holders and duty-bearers, assigning responsibilities and adequate resources for impact assessment, including a focus on access to remedy, and making adequate provisions for reporting; and
5. Evaluating impact severity and addressing impacts – making sure that evaluation of impact severity is guided by human rights considerations and that all identified human rights impacts are effectively addressed.

This paper will address each of these five criteria in turn, outlining some of the conceptual and practical considerations related to each. It is not intended to provide definitive solutions but rather, to provide food for thought for those working in the area of business and human rights, in particular practitioners engaged in the developing practice of assessing human rights impacts of private sector projects, with the view of challenging and improving our practice.

experience of human rights impact assessment', *Impact Assessment and Project Appraisal*, 31:2, pp. 107-117; James Harrison (2010), *Measuring human rights: Reflections on the practice of human rights impact assessment and lessons for the future*, Legal Studies Research Paper No. 2010-26, University of Warwick School of Law (hereafter *Reflections on HRIA*); Christina Hill (2009), *Women, communities and mining: The gender impacts of mining and the role of gender impact assessment*, Oxfam Australia: Melbourne; MacNaughton, Gillian and Paul Hunt (2011), 'A Human Rights-based Approach to Social Impact Assessment', in *New Directions in Social Impact Assessment*, F. Vanclay and A. M. Esteves (eds.), Edward Elgar: Cheltenham, pp. 355-368 (hereafter *HRBA to SIA*); Norwegian Agency for Development Cooperation (2001), *Handbook in Human Rights Assessment: State Obligations, Awareness and Empowerment*, NORAD: Oslo; Office of the United Nations High Commissioner for Human Rights (2006), *Frequently asked questions on a human rights-based approach to development cooperation*, United Nations: New York and Geneva (hereafter *FAQs about HRBA*); Office of the United Nations High Commissioner for Human Rights (2012), *The Corporate Responsibility to Respect Human Rights: An Interpretive Guide*, United Nations: New York and Geneva (hereafter *UNGPs Interpretive Guide*); Rights and Democracy (2008), *Getting it Right: A step-by-step guide to assess the impact of foreign investments on human rights*, Rights and Democracy: Montreal; UN Guiding Principles; World Bank and Nordic Trust Fund (commissioned by) (2013), *Human Rights Impact Assessments: A Review of the Literature, Differences with other forms of Assessments and Relevance for Development*, World Bank and Nordic Trust Fund (hereafter *HRIA Literature Review*). Whilst some aspects captured in these five criteria may be said to constitute 'new' or 'additional' factors which are not commonly reflected in existing impact assessment methodologies and processes such as environmental or social impact assessments (e.g. using human rights standards as a benchmark for the assessment, detailed attention to impacts linked through business relationships and legacy issues, recognition of rights-holders and duty-bearers in stakeholder identification and analysis, and access to remedy), others may be reflected to greater or lesser degrees in existing methodologies but receive heightened attention from a human rights perspective (e.g. participation and non-discrimination, focus on the differential experience of impacts by women and men, and accountability and transparency of the impact assessment process and findings).

CHAPTER 2

2 THE ASSESSMENT OF HUMAN RIGHTS IMPACTS AS AN EMERGING PRACTICE

2.1 HUMAN RIGHTS IMPACT ASSESSMENT LITERATURE AND PRACTICE

Environmental impact assessments,⁹ and to a lesser but nevertheless significant degree social impact assessments,¹⁰ are now a standard part of due diligence in the development and implementation of private sector extractive industries projects. Frequently, extractive industries companies assess environmental and social impacts using a combined Environmental and Social Impact Assessment (ESHIA). In most jurisdictions, environmental impact assessments are required by law, as part of the project approval process. In some jurisdictions environmental impact assessments include social dimensions, either directly or indirectly, although regulatory requirements for the explicit inclusion of social impacts, or conducting a social impact assessment, remain limited.¹¹ Extractive industries companies commonly undertake environmental and social impact assessments for a range of reasons, such as regulatory requirements, as part of company standards, and to meet and answer to social expectations. As such, it is now generally acknowledged that environmental and social impact assessments do not simply perform the role of ensuring regulatory approval, but are key corporate risk and impact management tools. In the social impact assessment context, it has also been emphasised that ‘impact assessment’ is not merely the exercise of conducting one single assessment resulting in an impact assessment statement, but rather, that social impact assessment is an ongoing process for the identification and assessment of social impacts, as well as the development of strategies for the ongoing monitoring and management of those impacts.¹² Interestingly, guiding principles for social impact assessment – such as the International Principles for Social Impact Assessment of the

⁹ The International Association for Impact Assessment (IAIA) defines environmental impact assessment as: “The process of identifying, predicting, evaluating and mitigating the biophysical, social, and other relevant effects of development proposals prior to major decisions being taken and commitments made.” International Association for Impact Assessment (2009), *What is impact assessment*.

¹⁰ “Social impact assessment includes the processes of analysis, monitoring and managing the intended and unintended social consequences, both positive and negative, of planned interventions (policies, programs, plans, projects) and any social change processes invoked by those interventions. Its primary purpose is to bring about a more sustainable and equitable biophysical and human environment.” Frank Vanclay (2003), *Social Impact Assessment: International Principles*, International Association for Impact Assessment (hereafter IAIA SIA Principles).

¹¹ Frank Vanclay (2014), ‘Developments in Social Impact Assessment: An introduction to a collection of seminal research papers’, in *Developments in Social Impact Assessment*, F. Vanclay (ed.), Edward Elgar: Cheltenham, pp. xv-xxxix.

¹² See e.g., IAIA SIA Principles, p. 2: “SIA should not be understood only as the task of predicting social impacts in an impact assessment process.”; Frank Vanclay and Ana Maria Esteves (2011), ‘Current Issues and Trends in Social Impact Assessment’, in *New Directions in Social Impact Assessment*, F. Vanclay and A. M. Esteves (eds.), Edward Elgar: Cheltenham, p. 3 (hereafter *Current issues in SIA*): “In this current understanding SIA is much more than the act of predicting impacts in a regulatory context (the old traditional view); it is the process of managing the social aspects of development.”

International Association for Impact Assessment – contain explicit reference to respecting human rights.¹³ Recent social impact assessment literature also evidences an increased focus on human rights, both in terms of impact assessment content as well as the process to be applied when undertaking a social impact assessment.¹⁴ This seems to indicate that there are notable synergies between social impact assessment and human rights interests which warrant further exploration in our practice going forward. Indeed, current debates about what type of impact assessment approach is most suitable for capturing human rights impacts often focus on the synergies between social impact assessment and human rights impact assessment methodologies, pointing to their mutually reinforcing objectives and the benefits of integrating human rights into social impact assessment, rather than creating duplicative processes.¹⁵

Compared to environmental and social impact assessment, the field of human rights impact assessment is relatively new.¹⁶ Within this emerging practice, several ‘strands’ or ‘categories’ of human rights impact assessment methodologies have been identified, including human rights impact assessments in the field of development; on health and human rights; child rights impact assessments; impact assessments for private sector projects; on international trade and investment; and impact assessments conducted for public authorities.¹⁷ Within and between these strands practice is diverse in terms of the rights-holders and duty-bearers involved, the level of detail in the methodology and analysis, and the purpose and intent of the impact assessments.¹⁸ For example, it has been suggested that in the area of human rights impact assessments conducted for government programmes, the focus tends to be on high-level policy analysis to establish whether a certain human rights focused intervention is meeting its objectives in terms of improving the realisation of the particular human right(s); such as an analysis of whether a government equal opportunities programme is effective in generating more employment opportunities for target groups such as women or ethnic minorities.¹⁹ In the private sector space, on the other hand, the focus to date has primarily been on identifying, usually through ex-ante assessments, the adverse impacts of projects on workers and communities, with many examples coming from the extractive industries. Taking this as a comparison, it should be noted that there are several differences in terms of: the subject of analysis (i.e. the first is a government-led programme with the

¹³ IAIA SIA Principles, pp. 5-7.

¹⁴ See e.g., MacNaughton/Hunt (2011), *HRBA to SIA*.

¹⁵ See e.g., DIHR/IPIECA (2013), *Human rights in ESHIA*, p. 4. However, it is also worth noting that integrating human rights into other impact assessment processes may pose certain constraints. For example, a focus on human rights may be marginalised if it is integrated into a regulatory environmental and social impact assessment which has extensive requirements regarding environmental issues but not those related to social and human rights impacts. Integrated assessments may also lack the human rights expertise necessary to effectively identify and address human rights impacts, or be subject to tight deadlines or restrictive regulatory requirements (e.g. in the area of consultation). What types of circumstances best lend themselves to an integrated and which to a stand-alone assessment will warrant further exploration. For the purposes of this paper I will not discuss this issue further, focusing instead on a discussion of the core criteria that should be applied in an impact assessment process to ensure that human rights are adequately covered and a human rights-based approach is applied.

¹⁶ See e.g., WB/Nordic Trust Fund (2013), *HRIA Literature Review*, pp. ix-x, defining a human rights impact assessment as “an instrument for examining policies, legislation, programs and projects to identify and measure their effects on human rights” and noting that the practice of human rights impact assessment has developed out of other types of impact assessments, such as environmental and social impact assessments.

¹⁷ See e.g., Harrison (2010), *Reflections on HRIA*.

¹⁸ Ibid.

¹⁹ Ibid.

specific objective to address non-discrimination, the second is a private sector project with the objective of generating profit); and the role and responsibilities of the respective duty-bearers (i.e. governments have the duties to respect, protect and fulfil human rights, whereas companies only have a responsibility to respect²⁰). Such differences are likely to have implications in practice in terms of the focus of analysis, the ways in which obligations and responsibilities can be attributed, and the way that impact severity is evaluated (e.g. in the case of the government programme the intent would be to measure a positive change in terms of human rights outcomes, in the case of the private sector project the focus would be on evaluating the severity of adverse impacts). The intent and purpose of different strands of human rights impact assessments are also diverse, for example, there are indications that community-based human rights impact assessments pay particular attention to empowering rights-holders to participate and utilise the impact assessment findings to claim their rights and for advocacy purposes, whereas in the area of human rights impact assessments of government policy, the purpose may be to generate buy-in for a particular policy decision. In terms of the sophistication of methodology and depth of analysis, current practice appears to include within the category of ‘human rights impact assessment’ anything ranging from a short desk-top review to multi-month investigative processes involving numerous stakeholders and topics of analysis. This clearly represents a problem from a practitioner as well as an organisational or rights-holder perspective. If methodologies are so diverse, how can those conducting human rights impact assessments and other stakeholders be clear on exactly what it takes to undertake a ‘proper’ human rights impact assessment? Relatedly, how can extractive industries companies know what they should commission and how can workers and communities determine their expectations in terms of the quality of assessments, including their own involvement in shaping and leading or participating in such assessments? Does the space of human rights and impact assessment in the private sector context inherently preclude moving towards more rights-based methodologies in which impacted rights-holders play a real and meaningful role in impact assessment? Answering such questions will be critical in our practice going forward, to ensure that the human rights impact assessment methodologies being developed and implemented are robust and serve to identify and address human rights impacts effectively.

None of the current human rights impact assessment methodologies are well established or developed, nor, arguably, do they receive sufficient scrutiny to move our practice forward. Fundamental hindrances include the lack of publicly available human rights impact assessments and assessment methodologies, as well as a lack of fora where different stakeholders involved can come together to discuss, develop, review, critique and improve practice. I strongly hold the view that has been articulated by

²⁰ The Office of the United Nations High Commissioner for Human Rights defines the duties to protect, respect and fulfil as follows: “The obligation to respect means that States must refrain from interfering with or curtailing the enjoyment of human rights. The obligation to protect requires States to protect individuals and groups against human rights abuses. The obligation to fulfil means that States must take positive action to facilitate the enjoyment of basic human rights.” OHCHR website at: <http://www.ohchr.org/en/professionalinterest/pages/internationallaw.aspx>

some, that until there is more transparency regarding the methodologies being developed and the assessments undertaken we cannot effectively improve practice.²¹

2.2 KEY CRITERIA FOR THE ASSESSMENT OF HUMAN RIGHTS IMPACTS OF PRIVATE SECTOR PROJECTS

Despite the diversity, and at times divergence, in current practice, there appear to be several ‘core criteria’ or ‘essential elements’ that have been identified as key for the assessment of human rights impacts. These core criteria reflect what is unique about human rights impact assessment, the ‘added value’ of human rights impact assessment, as well as emphasising certain aspects which may to a lesser or greater degree be reflected in other impact assessment methodologies but which warrant heightened attention from a human rights perspective. In short, these core criteria can be said to constitute a human rights-based approach as they place particular emphasis on: application of international human rights standards; the principles of participation and inclusion, non-discrimination and equality, and transparency and accountability; and the recognition of rights-holders and duty-bearers.²²

The importance of adopting a human rights-based approach in the context of human rights impact assessment has been noted in relation to a broad range of human rights impact assessment strands.²³ With regard to the private sector specifically, the UN Guiding Principles clearly reflect several aspects of a human rights-based approach. For example, UN Guiding Principle 18 on the assessment of human rights impacts notes the importance of: drawing on relevant expertise; meaningful consultation with potentially affected stakeholders; paying particular attention to vulnerable groups and different

²¹ However, it must of course be acknowledged that there are vast disparities between different strands of human rights impact assessment in terms of transparency. Whereas community-based impact assessment methodologies and processes appear to be more transparent (see, for example, the human rights impact assessment methodologies developed and impact assessments undertaken by Oxfam America or Rights and Democracy), human rights impact assessment methodologies and assessments undertaken for private sector extractive industries projects by and large remain confidential.

²² For an elaboration of the human rights-based approach see e.g., Action Aid International, Amnesty International EU Office, International Human Rights Network and Terre des Hommes International Federation (2008), *Human Rights-Based Approaches and European Union Development Aid Policies* (hereafter *HRBA and EU*); Jakob Kirkemann Boesen and Tomas Martin (2007), *Applying a Rights-based Approach: An Inspirational Guide for Civil Society*, Danish Institute for Human Rights: Copenhagen (hereafter *HRBA Guide*); OHCHR (2006), *FAQs about HRBA*; United Nations Development Group (2003), *The Human Rights Based Approach to Development Cooperation: Towards a Common Understanding Among UN Agencies* (hereafter *Stamford Common Understanding*). OHCHR (2006) defines a human rights-based approach as “a conceptual framework for the process of human development that is normatively based on international human rights standards and operationally directed to promoting and protecting human rights. It seeks to analyse inequalities which lie at the heart of development problems and redress discriminatory practices and unjust distributions of power that impede development progress.” The precise formulation of the human rights-based approach varies but the underlying aims and principles are common, focusing on use of international human rights standards and principles to guide the process and outcome of programmes and activities. For the purposes of this paper I have adopted the formulation of the human rights-based approach as set out in the *Stamford Common Understanding*, which is based on three core aspects: (1) application of international human rights standards; (2) the human rights-based principles of universality and inalienability; indivisibility; interdependence and interrelatedness; equality and non-discrimination; participation and inclusion; accountability and the rule of law (which includes a focus on empowering rights-holders to claim their rights, remedy and transparency); and (3) rights-holder and duty-bearer analysis.

²³ For examples of how the human rights-based approach components have been articulated in human rights impact assessment literature see especially, WB/Nordic Trust Fund (2013), *HRIA Literature Review*, pp. 11-20; Harrison (2010), *Reflections on HRIA*, pp. 5-6.

risks faced by women and men; including all internationally recognised human rights as a reference point; and undertaking impact assessments at regular intervals.²⁴ These aspects can be mapped against the human rights-based approach which emphasises application of international human rights standards, as well as the process principles of participation, non-discrimination and accountability. Whilst it may not be articulated explicitly as a ‘human rights-based approach’, guidance for extractive industries on the assessment of human rights impacts similarly highlights the application of human rights-based approach components.²⁵

In addition, several further aspects are outlined in the UN Guiding Principles that are relevant for human rights impact assessment, namely: that both *actual* impacts and *potential* impacts are considered;²⁶ that the scope of the assessment should cover adverse human rights impacts that the business enterprise may cause or contribute to through its own activities as well as impacts which may be directly linked to its operations, products or services by its business relationships; that all human rights impacts are addressed and that prioritisation of impacts is only relevant for the purpose of determining which mitigation measures to implement first in the event that not all impacts can be addressed simultaneously; and that human rights impacts are evaluated according to their severity.²⁷

Based on the above, for the purposes of this paper I have grouped the human rights-based approach components with the aspects of the UN Guiding Principles that articulate expectations with regard to the assessment of human rights impacts into five ‘key criteria’.²⁸ This grouping is provided as an organising framework to enable discussion about some of the conceptual and practical considerations for assessment of human rights impacts in the private sector context, in practice the criteria are overlapping. The remainder of the paper will deal with each of the five key criteria in turn:

1. Applying international human rights standards – as the benchmark for the assessment, to guide impact identification, evaluation of severity, mitigation and remedy;
2. Addressing the full scope of impacts – including both actual and potential impacts that are caused by the business, impacts that the business contributes to and impacts directly linked through operations, products and services;
3. Adopting a human rights-based process – emphasising the principles of participation and inclusion, equality and non-discrimination and accountability and transparency;
4. Ensuring accountability – identifying rights-holders and duty-bearers, assigning responsibilities and adequate resources for impact assessment, including a focus on access to remedy, and making adequate provisions for reporting; and

²⁴ UN Guiding Principle 18 and commentary.

²⁵ See e.g., Abrahams/Wyss (2010), *HRIAM*; DIHR/IPIECA (2013), *Human rights in ESHIA*.

²⁶ The Office of the United Nations High Commissioner for Human Rights defines an ‘actual impact’ as “an adverse impact that has already occurred or is occurring” and a ‘potential impact’ as “an adverse impact that may occur but has not yet done so.” OHCHR (2012), *UNGPs Interpretive Guide*, pp. 10, 13.

²⁷ See UN Guiding Principles 17-24. See also, OHCHR (2012), *UNGPs Interpretive Guide*.

²⁸ See note 8, above.

5. Evaluating impact severity and addressing impacts – making sure that evaluation of impact severity is guided by human rights considerations and that all identified human rights impacts are effectively addressed.

I will not discuss whether it is preferable to undertake a stand-alone human rights impact assessment or favour an approach where human rights are integrated into existing assessments such as ESHIAs, suggesting that the above criteria are relevant in either case. My starting premise is that the five key criteria need to be applied for an impact assessment to be consistent with a human rights-based approach and to meet the expectations of the UN Guiding Principles, and that those involved in human rights impact assessment therefore need to look carefully at how they might be effectively implemented in practice.

As indicated in the introduction, my focus in this paper is on impact assessments commissioned by, and conducted for, private sector projects. I will refer to these as ‘company-based’ human rights impact assessment processes to distinguish them from other emerging strands of human rights impact assessment, although I may refer to these other practices where relevant.²⁹

²⁹ I would also suggest that a detailed analysis of the methodologies in these other strands, in particular community-based human rights impact assessment methodologies, could provide a useful framework for analysis and critique of company-based human rights impact assessment methodologies.

CHAPTER 3

3 FIVE KEY CRITERIA FOR THE ASSESSMENT OF HUMAN RIGHTS IMPACTS

3.1 APPLYING INTERNATIONAL HUMAN RIGHTS STANDARDS

The impact assessment needs to be based on international human rights standards. Human rights constitute a set of standards and principles that have been developed by the international community. This establishes an objective benchmark for impact identification, evaluation of impact severity, mitigation and remedy.³⁰

Human rights are internationally agreed-upon standards, and as such establish an objective standard for impact identification, evaluation of impact severity, mitigation and remedy. The application of international human rights standards is also a core component of the human rights-based approach. Whilst environmental and social impact assessments may address human rights related topics (e.g. resettlement, in-migration, socio-economic factors, gender etc.), a range of benchmarks are applied in the evaluation and analysis of these topics. Utilising international human rights standards as a benchmark and framework for analysis provides consistency in terms of the topics addressed, as well as certainty with regard to the adequacy of the standards that are applied for their analysis. This is not to say that human rights standards alone will be sufficient (many human rights impacts are complex and their analysis would benefit from use of both international human rights standards as well as other frameworks that have been elaborated, such as standards developed by technical bodies etc.), but that using international human rights standards as a core benchmark and framework for analysis needs to be the foundation for human rights impact assessment.

The use of international human rights standards also ensures that the coverage of human rights issues is comprehensive. For example, analysis has indicated that certain human rights topics are likely to be left out or under-considered in current environmental and social impact assessment practice, for example labour and security issues.³¹ Applying international human rights standards does not necessarily mean that all topics need to be addressed to the same level of detail. As with any impact assessment, the focus should be on those human rights that are most salient in the given context. However, it does require the initial consideration of all human rights, and a considered explanation regarding the subsequent exclusion of any particular human

³⁰ See note 8, above.

³¹ See e.g., DIHR/IPIECA (2013), *Human rights in ESHIA*, p. 4; Ruggie (2007), *Resolving methodological questions*.

rights topics.³² In practice, this approach lends itself to the inclusion of topics not captured in most environmental and social impact assessments (e.g. labour and security), as well as strengthening the focus on topics which may be captured but where enhanced analysis would be beneficial (e.g. gender). In particular, an understanding of the human rights principles of indivisibility and inter-relatedness³³ can draw our increased attention to those issues which continue to be marginalised, as well as assist our analysis and understanding of these issues from the perspectives and experiences of impacted rights-holders.

Aside from the consideration of what human rights standards might bring to impact assessment in terms of thematic focus, perhaps equally importantly is what they bring in terms of a lens to the analysis, including associated implications for legal framework analysis, baseline data collection and assessment of impact severity. Human rights have substantive content that is articulated in a range of sources such as UN treaties and conventions, the reports of special rapporteurs and jurisprudence. For example, for those economic, social and cultural rights articulated in the formulation of AAAQ (availability, accessibility, acceptability and quality³⁴) bringing a human rights lens to an impact assessment topic would require us to systematically investigate the questions of availability, accessibility, acceptability and quality in accordance with how this has been defined in human rights law and jurisprudence. Similarly, civil and political rights also have elaborated content. The substantive content of human rights will have implications for what kind of information is collected as part of the impact assessment and subsequent analysis. For example, the legal framework analysis for the impact assessment would include explicit consideration of international human rights standards, including analysis of the degree to which such international standards are reflected in domestic laws and practice to translate into actual enjoyment of human rights (or lack thereof). The substantive content of human rights will also be directly relevant to the assessment of impact severity (see further at 3.5, below).

3.2 ADDRESSING THE FULL SCOPE OF IMPACTS

*The scope of the impact assessment should include the actual and potential human rights impacts caused or contributed to by a company, including cumulative impacts, as well as impacts directly linked to a project through business relationships such as with contractors, suppliers, joint-venture partners, government and non-government entities.*³⁵

In terms of the scope of impacts to be included to ensure that human rights are adequately considered in a manner that is consistent with the UN Guiding Principles,

³² The UN Guiding Principles clearly require consideration of all human rights. Guiding Principle 12 articulates this as at minimum referring to the rights expressed in the International Bill of Human Rights and the International Labour Organisation's Declaration on Fundamental Principles and Rights at Work, with the consideration of additional standards as necessary in a particular context.

³³ For an elaboration of these human rights principles see e.g., OHCHR (2006), *FAQs about HRBA*, p. 36.

³⁴ The AAAQ framework can be used to measure the implementation of economic and social and cultural rights. It has prominently been applied in the context of the right to water and the right to health.

³⁵ See note 8, above.

three issues warrant our attention. Firstly, the inclusion of both *actual* and *potential* impacts; secondly, the inclusion of impacts that are *directly linked through business operations, products or services*; and thirdly, the focus on *adverse* impacts, as opposed to a focus on both adverse impacts and benefits.³⁶

3.2.1 ACTUAL AND POTENTIAL IMPACTS

The UN Guiding Principles articulate clearly the requirement that both *actual* and *potential* impacts need to be included when assessing human rights impacts. A key consideration is the timing of the impact assessment itself, including whether it is an ex-ante or ex-post assessment. To date, company-based human rights impact assessments in the extractive industries have tended to be almost exclusively ex-post, addressing what has happened in the past, rather than thinking about future plans.

In the case of ex-post assessments, the inclusion of actual impacts is perhaps obvious. Essentially, the call for the assessment of actual human rights impacts implies that existing operations are not exempt from the expectation to assess their human rights impacts, meaning that existing operations must put in place processes to effectively assess and address their human rights impacts, including impacts that have already occurred in the project to date.

In the case of ex-ante assessments, ‘actual impacts’ are more likely to be described in operational terms as ‘legacy issues’ or ‘incidents’. The point remains the same, it will not be sufficient to accept legacy issues as being baseline data, but rather, it will be necessary to identify these as actual impacts for which a response needs to be developed. Extractive industries projects of major companies are at times cognizant of such legacy issues (this can apply to both those legacy impacts which pre-date a project but are directly linked to establishing the project and/or project impacts associated with previous operators in the case of acquisition) and do sometimes identify and address them through risk and impact management processes. However, because environmental and social impact assessment practice tends to be ex-ante and focused on predicting potential impacts, it is not a matter of course that legacy issues are identified as *impacts* that the project has a responsibility to address. Another reason for insufficient attention to actual impacts can be that companies are hesitant to identify impacts associated with third parties over whom they have no ‘control’, for example, government led resettlement processes prior to establishing operations, or the adverse impacts of previous operators. In this regard, the UN Guiding Principles require a fundamental shift in impact assessment thinking and practice, from considering impacts in terms of company ‘control’, to focus instead on the impact ‘severity’, project ‘linkage’ to such impacts, and project ‘leverage’ in terms of how change can be effected in a third party causing the impact (see further at 3.2.2, immediately below).

³⁶ See UN Guiding Principles 11 and 13.

3.2.2 IMPACTS THROUGH BUSINESS RELATIONSHIPS

The UN Guiding Principles place significant emphasis on the inclusion of impacts that a business contributes to and that are directly linked to a company through business relationships (i.e. impacts directly linked to a company's operations, products or services).³⁷ Furthermore, such impacts may or may not amount to complicity, depending on the impact and jurisdiction in question.³⁸

In some environmental and social impact assessment practice, impacts to which the business contributes and directly linked impacts might be considered. For example, contractor management tends to be a common feature, with impact mitigation plans including measures for addressing social and human rights impacts associated with contractors through contractual clauses outlining specific standards to be applied, or involving contractor management in health and safety training to encourage best practice. However, it is worth noting that the inclusion of impacts associated through business relationships often tends to focus on those impacts that are linked through contractual relationships, and rarely extends to considerations beyond contractual relationships or into the host-government domain (e.g. conduct of government security forces stationed to protect assets or government spending of revenues).

For companies and impact assessment practitioners alike, the inclusion of impacts directly linked through business relationships, products or services poses challenges. For example, how can human rights impact assessments meaningfully include impacts to which the company is linked, how can implementable mitigation measures be defined for such impacts? Companies raise concerns regarding such questions based on a number of factors. Concerns may relate to the assumption of responsibility, including legal responsibility, for impacts over which the company has no direct control, i.e. reluctance to identify impacts associated with a third party where the company may not have the ability to then also mitigate such impacts or effect change in the conduct of the third party in question to address the impact (corporate legal teams are often particularly concerned about this). For example, if government security forces are stationed around a company asset without the company's request and these security forces use excessive force or otherwise adversely impact on the human rights of workers or communities around the project, from a UN Guiding Principles perspective, this would be considered to be an impact linked through business relationships that the company should identify in the impact assessment and address. From a company perspective, the company may argue that it cannot impose responsibility for mitigation measures on government duty-bearers. Furthermore, challenges can extend to political considerations, such as where attempts or practices of a company to influence government actors can be interpreted as, or considered to be, influence in democratic decision-making. However, with the requirements of the UN Guiding Principles human rights impact assessment practice has to include and address directly linked impacts and

³⁷ See UN Guiding Principles 11, 17 and 19. For examples of the different types of impacts see e.g., OHCHR (2012), *UNGPs Interpretive Guide*, pp. 16-17.

³⁸ Whilst the term 'complicity' can have both legal and non-legal meanings, in a legal context, civil or criminal sanction will generally only result where specific factors of causation or contribution, knowledge, and proximity, can be established. For a detailed elaboration of complicity in both civil and criminal law contexts see, International Commission of Jurists (2008) *Corporate Complicity and Legal Accountability: Report of the ICJ Expert Legal Panel on Corporate Complicity in International Crimes*, Volumes 1-3, International Commission of Jurists: Geneva.

find solutions to these challenges. Therefore, looking forward, it is important that these complexities are discussed and challenged from a range of angles, with emphasis on the reality of particular project and country contexts.

There is also some guidance in the UN Guiding Principles and other literature and practice on how we can move forward with regard to such questions. For example, regarding the issue of assumption of responsibility for impacts linked through business relationships it is important to recognise the distinction that is made in the UN Guiding Principles between control, linkage and leverage. The UN Guiding Principles establish that control and contractual relationships are not the primary determining factors for whether an impact should be included in the scope of an assessment, instead, the determining criteria should be whether the company contributes to the impact or whether the impact is directly linked to the business' operations, products or services. The primary shift that this requires is that those involved in undertaking human rights impact assessment move from previous understandings and prioritisation of impacts according to a 'sphere of influence' analysis, to consideration of impacts based on the severity of their human rights consequences.³⁹ In short, according to a sphere of influence analysis those impacts for which the business has the most direct control would be those that are deemed most relevant for the business to address (e.g. impacts on employees, environmental damage on company lands caused by operations), whereas more 'removed' impacts imply a lower level of company responsibility (e.g. impacts on downstream communities due to water pollution in rivers caused by the company). Instead, a UN Guiding Principles analysis would take all three impacts (employees, pollution on company land, impact on downstream communities), evaluate the severity of the human rights consequences of each, and based on this, determine any necessary prioritisation of impact mitigation measures. The clear inclusion of directly linked impacts and assessment of their severity irrespective of company control over these impacts is a critical feature of human rights impact assessment (for further discussion on the evaluation of severity and the prioritisation of impact mitigation measures see 3.5, below).

3.2.3 IMPACTS AND BENEFITS

A third key issue which is often raised with regard to the scope of impacts to be included when assessing human rights impacts is that of impacts versus opportunities and benefits.

In elaboration of human rights due diligence the UN Guiding Principles focus explicitly on capturing and addressing the 'adverse' human rights impacts of business activities, rather than on capturing opportunities for positive contribution towards human rights realisation, or generating and maximising project benefits for impacted workers and communities.⁴⁰ This is consistent with the formulation of the corporate responsibility to

³⁹ See, John Ruggie (15 May 2008), *Clarifying the Concepts of "Sphere of influence" and "Complicity"*, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, United Nations Human Rights Council (A/HRC/8/16).

⁴⁰ Although the UN Guiding Principles do acknowledge that companies can and do make significant contributions in this regard.

respect as one of ‘respect’, as opposed to the State duties to protect and to fulfil human rights.

The UN Guiding Principles state clearly that it is not acceptable for businesses to offset adverse impacts through positive contributions to human rights elsewhere.⁴¹ The reasons for this are not explicitly elaborated in the UN Guiding Principles but by implication clear. All too often it has been the case that company operations cause adverse impacts on the environment and communities, and rather than effectively avoiding, mitigating and remedying these, focus the attention of the general public (including government regulators granting project permits) on social benefit schemes and community development projects being implemented, jobs being created and so forth, as strategies for legitimising the presence of the project. The UN Guiding Principles move clearly away from this, emphasising that first and foremost companies are obliged to identify and address any adverse human rights impacts associated with their activities, with any positive contributions being separately considered.

Making a clear distinction between human rights due diligence (avoiding, mitigating and remedying adverse impacts) and that of positive contribution (through, for example, employment creation, skills transfer or strategic social investment) is important for a number of reasons.

Firstly, including both adverse impacts and positive contributions facilitates a space for the implicit offsetting of adverse impacts. A classic example would be where a company showcases local employment and job creation opportunities as implicitly offsetting adverse impacts caused by the operation, for example issues associated with in-migration and boomtown effects.

Secondly, a human rights perspective places a significant emphasis on accountability, including the ability of rights-holders to claim rights and respective duty-bearers to uphold their duties and responsibilities with regard to human rights. This includes recognising the complementary yet differentiated duties and responsibilities of government and non-government duty-bearers. Essentially, a human rights analysis asks for caution regarding any provisions that may give rise to a company assuming government responsibilities as human rights duty-bearers. Whilst companies may work with government actors to build government capacities to meet human rights duties it is important that company actions supportive of human rights are distinguished from the responsibility to respect human rights and effectively support, rather than undermine, State human rights duties.

In practical terms, one might ask whether this exclusive focus on adverse impacts is a lost opportunity. In contrast to human rights due diligence requirements under the UN Guiding Principles, social impact assessments, for example, clearly include both negative impacts as well as focusing on strategies to maximise opportunities and benefits for local communities.⁴² Frequently, extractive industries projects occur in environments where government actors may lack the political will or capacity to meet and implement

⁴¹ UN Guiding Principle 11 commentary.

⁴² See e.g., Vanclay/Esteves (2011), *Current issues in SIA*, p. 5: “The underlying philosophy of the current paradigm of SIA seeks to maximize the positive outcomes while minimizing harm, which it does by being an ongoing process of managing the social issues of development.”

their human rights duties. Companies on the other hand, may have the resources and capacities to provide financial, technical and skills assistance to foster environments in which workers and communities are better able to enjoy and exercise their human rights. Going forward, perhaps this is one area where human rights impact assessment can draw on key learning from the social impact assessment space, to investigate and evaluate to what extent it may be desirable to also include attention to the realisation of human rights benefits from extractive industries projects in human rights impact assessment, with the proviso that benefits must not undermine State duties to protect, respect and fulfil human rights.

Finally, whilst a human rights analysis would focus on adverse impacts, rather than maximising opportunities to make positive contribution to human rights realisation, there are clear linkages and opportunities for impact assessment practice to inform company contributions to fostering an environment in which workers and communities are better able to exercise and enjoy their rights. One linkage is that any social investment projects of the company fall under the due diligence umbrella. That is, social investment projects are a part of company operations subject to human rights impact analysis, and as such, need to be assessed according to whether they meet human rights standards and apply a human rights-based approach in how they are designed, implemented, monitored and evaluated.

3.3 ADOPTING A HUMAN RIGHTS-BASED PROCESS

*The impact assessment, including associated engagement and consultation activities, should apply human rights-based approach principles, emphasising participation and inclusion; non-discrimination and equality; and transparency and accountability. This promotes attention to process, not just outcome, and seeks to ensure that impacted rights-holders are meaningfully involved. Inclusive engagement in a manner that is gender sensitive and takes into account the needs of vulnerable individuals and groups should be a key component throughout the impact assessment process, providing capacity building and assistance as needed to promote meaningful participation.*⁴³

The application of a human rights-based approach is the touchstone of human rights impact assessment.⁴⁴ This includes application of human rights-based approach principles to guide the impact assessment process, including a focus on participation and inclusion; equality and non-discrimination; and transparency and accountability. The human rights-based approach originates from development theory and practice, and is premised on recognising individuals as agents in their own development, rather than as being merely subjects or beneficiaries of a development intervention or programme. A human rights-based approach also places significant emphasis on process, based on the understanding that the process applied in development projects or interventions is just as important as the outcomes.⁴⁵ Whilst the human rights-based approach has originated

⁴³ See note 8, above.

⁴⁴ See note 23, above.

⁴⁵ See e.g., Action Aid et al (2008), *HRBA and EU*, p. 48: "By definition HRBA is as concerned with *the process* of development as it is with *the outcome*" (original emphasis).

from development theory and practice, it has since been applied in a number of other domains, and is explicitly identified in the majority of human rights impact assessment literature as being key for the assessment of human rights impacts.⁴⁶ Essentially, adopting a human rights-based approach to an impact assessment process demands a ‘work-together’ approach, whereby the workers and communities impacted by project activities are not positioned as ‘impacted communities’ or ‘project beneficiaries’ but as active participants in shaping both the process and outcomes of the impact assessment.

Given that the vast majority of human right impact assessment literature notes the importance of a human rights-based approach, and identifies this as the critical factor to successfully assessing human rights impacts, it is surprising how little further elaboration there is in terms of what this might mean for impact assessment processes and practice. For example, what does a human rights-based approach mean for engagement and consultation? Are there implications for stakeholder mapping and analysis, and if so what are they? Can a human rights-based approach be effectively implemented in company-based impact assessments, or does adopting a human rights-based approach expose inherent problematics in company-based impact assessments in terms of how authority, voice and agency are distributed between company, government and communities stakeholders?

The following sections will explore some initial thoughts on what the human rights-based approach principles of participation and inclusion, equality and non-discrimination, and accountability and transparency, might mean in a company-based human rights impact assessment context (for further discussion regarding accountability in particular see also section 3.5, below).

3.3.1 PARTICIPATION AND INCLUSION

Participation and inclusion are key principles in a human rights-based approach.⁴⁷ In an impact assessment context, working towards implementing these principles may require us to question current approaches, for example, relating to spaces for consultation and engagement, as well as in terms of understanding and acknowledging power-dynamics in company-based human rights impact assessment contexts.

With regard to consultation, it must be noted that in a human rights-based approach ‘participation’ is not synonymous with ‘consultation’. In most environmental and social impact assessments consultation occurs at specific points in the impact assessment process and is the primary method for gathering feedback and input from impacted workers and communities (as well as other stakeholders) on aspects such as project design and alternatives, preliminary findings of the impact assessment, and verification of mitigation measures. Consultation may occur in a range of formats such as interviews, surveys, community meetings, and so forth. In regulatory impact assessment processes the points in time for consultation are usually predetermined and their format prescribed. Commonly, this also includes a period upon completion of an impact

⁴⁶ See note 8, above.

⁴⁷ See e.g., Action Aid et al (2008), *HRBA and EU*; Kirkemann Boesen/Martin (2007), *HRBA Guide*; OHCHR (2006), *FAQs about HRBA*.

assessment where the impact assessment is published by the regulator and open to comments from the general public.

The limitations associated with consultation in company-based impact assessment processes have been pointed out by numerous scholars and practitioners. For example, some have pointed to problems associated with particular formats of consultation, others have noted limitations with regard to the points in time at which consultation occurs, noting that consultation often occurs when critical decisions have already been made and that consultation periods are often too short for communities and other stakeholders to provide meaningful input.⁴⁸ Most fundamentally, it has been pointed out that consultation in company-based assessments frequently remains company and regulator driven, meaning that communities respond to information provided to them rather than the consultation providing opportunities for co-creation of processes, knowledge and information, and collaborative impact-related decision-making.⁴⁹

In contrast to consultation, participation from a human rights-based approach perspective “goes well beyond mere consultation or a technical add-on to project design. Rather, participation should be viewed as fostering critical consciousness and decision-making as the basis for active citizenship.”⁵⁰ Applying this understanding in an impact assessment context would seem to imply that participation in impact assessment processes needs to enable rights-holders to meaningfully partake in shaping and influencing impact assessment processes, findings and decisions, rather than merely responding to information provided by the company in pre-circumscribed fora. That is, a human rights-based approach places the emphasis firmly on participation opportunities for rights-holders that can shape, influence and change decision-making. The focus is on co-creation of knowledge, processes and understanding. In practice, this might mean paying greater attention to the involvement of rights-holders in the actual design of impact assessment processes, for example, in scoping, development of terms of reference for impact assessments, and design, implementation and monitoring of impact mitigation measures.

Consideration of the principle of participation also requires us to analyse and be clear about the scope for participation and community decision-making in impact assessment, including the underlying power-dynamics at play. This is a fundamental aspect that is arguably completely, or almost completely, absent from current discussions about company-based human rights impact assessment. This is problematic from a human rights perspective and has important implications for the spaces for participation and inclusion that may be part of company-based impact assessments. Whilst recognition of the often vast disparities in power between companies and communities is implicitly invoked and referenced in several aspects of discussion on human rights impact assessment (such as participation, access to information and so forth), it is not

⁴⁸ See e.g., Janette Harz-Karp and Jenny Pope (2011), ‘Enhancing Effectiveness through Deliberative Democracy’, in *New Directions in Social Impact Assessment*, F. Vanclay and A. M. Esteves (eds.), Edward Elgar: Cheltenham, p. 254 (hereafter *Deliberative Democracy*); Vanclay/Esteves (2011), *Current issues in SIA*, p. 14.

⁴⁹ Harz-Karp and Pope, for example, note that because consultation occurs late in the decision-making process often decisions have already been taken so that effectively the “perspectives of the potentially impacted community are thus constrained to be within narrowly defined consultation processes in which many issues of concern are excluded from formal consideration.” Harz-Karp/Pope (2011), *Deliberative Democracy*, pp. 254-255.

⁵⁰ OHCHR (2006), *FAQs about HRBA*, p. 26.

identified, discussed or problematised in any way that might usefully inform our practice going forward. What do power-dynamics between and within companies, communities and State-actors mean for the very concept and practice of company-based human rights impact assessments? Can a company-based impact assessment facilitate the building of rights-holder capacity to know and claim their human rights in a meaningful way? Company-based impact assessments primarily serve two purposes, regulatory approval and risk-management. Can such purposes be aligned with, or expanded to include, rights-holder empowerment, or are these spaces simply too far removed from each other or inherently conflictual in ways that preclude the development of meaningful company-based human rights impact assessments?

On the one hand, such concerns may be side-lined as conceptual deliberations that are of little use to our application and implementation of impact assessment practice. Company-based human rights impact assessments are being developed and implemented, therefore we had better focus on making them as good as possible. On the other hand, surely such fundamental considerations have something to say about how spaces of (im)possibility occur in practice, and whether we might need to change course as a result. Recognition of power and challenges to attribution and distribution of power is a fundamental component of a human rights-based approach. Human rights due diligence as elaborated in the UN Guiding Principles is a management tool designed for companies, it is not a tool designed for rights-holders or rights-holder representatives. As such, it is arguable that company-based impact assessment processes per se preclude the adoption of fully participatory approaches that facilitate community empowerment as this would be envisaged from a human rights perspective (or that this may be the case so long as company-based impact assessment practice remains as closely bound by project approval and risk-management considerations as it currently is).

Others may see things more optimistically and suggest that there are opportunities in company-based impact assessment processes for recognising and reconfiguring power relations and creating meaningful participation opportunities in impact assessments, including, for example, by adopting or merging community-based human rights impact assessment methodologies and practices with those of the corporate sector. As mentioned in the introduction, there is a distinct literature and practice in the space of community-based human rights impact assessment. However, it appears that to date there has been limited experience in investigating the desirability of, and possibilities for, bringing together community-based and company-based human rights impact assessment approaches. Going forward, this seems to be an obvious and important space for further investigation. At the very least, we need to deepen our understanding of the dimensions and relations of power in company-based impact assessment practice, including analysis of the implications that particular power dimensions and relations in a given project context have for participation and inclusion of impacted workers and communities.

3.3.2 EQUALITY AND NON-DISCRIMINATION

Non-discrimination is a human right as well as a key principle in the human rights-based approach.⁵¹ It is also worth noting that three of the nine core human rights conventions address particular rights-holder groups (children, women, persons with disability), in recognition of ongoing and systemic discrimination.⁵² When adopting a human rights-based approach, attention is placed on recognising different types of discrimination, identifying which individuals in a particular social setting are subject to discrimination, and taking steps to address discrimination to afford all people equal opportunities.

In a human rights impact assessment context, paying particular attention to equality and non-discrimination might require us to pay greater attention to understanding structural discrimination in communities and societies; disaggregated stakeholder analysis, including identification and analysis of how impacts are experienced differently by particular individuals (e.g. women and men, adults and children, indigenous and non-indigenous community members); as well as being more cognizant of the disproportional distribution of impacts and benefits (i.e. certain individuals and groups in communities being more likely to bear the burden of the majority of the adverse impacts, whereas others are more likely to be able to enjoy disproportionate access to project benefits).

At the most basic level, the principle of non-discrimination requires us to always have an understanding of ‘communities’, and abandon any ideas or conceptions about ‘the impacted community’ as a homogenous entity. Whilst this point may seem basic and obvious stated as such, it remains the case that many company-based impact assessments present findings in terms of aggregate social welfare, rather than delving deeper to identify how specific individuals and/or groups in communities experience project-related impacts. In contrast, human rights frameworks place particular emphasis on understanding human rights impacts as experienced by particular individuals, including analysing how impacts are distributed disproportionately between individuals within groups and communities. As such, in an impact assessment context, a clear focus on non-discrimination can help to strengthen disaggregate analysis to allow a more nuanced understanding of how project impacts affect particular individuals.

One aspect is to clearly identify, understand and apply the human rights attributed to particular groups of rights-holders, including women, children, persons with disability and Indigenous Peoples.

For example, with regard to gender, the UN Guiding Principles call for specific attention to the differential experience of impacts by women and men, including in impact assessment.⁵³ Furthermore, the UN Guiding Principles note the role of sex-disaggregated

⁵¹ See e.g., Universal Declaration of Human Rights (1948), Article 2; Convention on Civil and Political Rights (1966), Article 2; Convention on Economic, Social and Cultural Rights (1966), Article 2; Action Aid et al (2008), *HRBA and EU*; OHCHR (2006), *FAQs about HRBA*.

⁵² Convention on the Rights of the Child (1988); Convention on the Elimination of All Forms of Discrimination against Women (1979); Convention on the Rights of Persons with Disabilities (2006). In addition to these core human rights conventions there are also non-binding human rights declarations that focus on particular rights-holder groups, for example, the United Nations Declaration on the Rights of Indigenous Peoples (2007).

⁵³ UN Guiding Principle 18. The UN Working Group on Business and Human Rights is also required to integrate a gender perspective in implementing its mandate: UN Human Rights Council Resolution (6 July 2012), *Human rights and transnational corporations and other business enterprises* (A/HRC/RES/17/4).

data as relevant for informing our analysis.⁵⁴ However, many company-based impact assessments fall short of thorough gender analysis. Whilst impact assessments may include the collection of sex-disaggregated data and include certain impacts which have particular implications for women (e.g. increases in underage prostitution due to influx of contractor workforces), thorough analysis of how project activities impact on the specific rights of women and girls remains basically absent. That is, analysis which would include the consideration of the roles of women and men in family, work and social structures in the communities; intersectionality analysis which would allow an understanding of differences between women in communities based on a range of factors such as age, race and sexual orientation;⁵⁵ and effectively linking this knowledge and analysis to the identification of impacts and the impacts identified. Furthermore, gender analysis from a non-discrimination and women's rights perspective would allow an elevation of impacts on women and girls, and design and implementation of mitigation measures based on the rights of the women and girls impacted (e.g. increases in underage prostitution due to influx of contract workers would not merely be construed as a health issue for the women and contracted workers which is managed by keeping contracted workers in secure camps and running a sexual health education programme, but also recognised as an impact on women's right to physical integrity, and the right to freedom from the worst forms of child labour).

In addition to effectively integrating the human rights of specific rights-holders into impact assessment, applying the principle of non-discrimination requires contextual analysis to identify those who may be vulnerable or marginalised in a particular project context.

The issue of vulnerability and vulnerable groups has gained increased attention in recent developments in the area of impact assessment and due diligence. There appears to be a clear trend in terms of moving away from predetermined 'vulnerable groups' to more sophisticated understandings of vulnerability based on analysis of contextual circumstances.⁵⁶ This moves us away from understandings of Indigenous Peoples, women, children and the elderly as individuals or groups who are vulnerable per se, and incidentally, moves us away from seeing groups of Indigenous Peoples, women, children or the elderly as homogenous entities within communities. Both of these factors are important from a human rights perspective which emphasises an understanding of people as active subjects. Going forward, it will be important to see to what extent such more sophisticated analyses are actually implemented and applied in company-based impact assessment practice, and whether it has the desired effect of generating a better understanding of the impacts on individuals who may be vulnerable or marginalised in a

⁵⁴ UN Guiding Principle 20.

⁵⁵ 'Intersectionality' is an approach that contends that the place of marginalisation and discrimination that an individual occupies is a particular experience/space, rather than an aggregate composite of the constituent elements giving rise to discrimination (e.g. of colour plus a woman). See especially, Kimberle Crenshaw (1991), 'Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color', *Stanford Law Review*, 43:6, pp. 1241-1299.

⁵⁶ See e.g., European Investment Bank Social Standard 7 on the Rights and Interests of Vulnerable Groups (2013): "Vulnerability is not inherent and does not occur in a vacuum. Women for instance are not inherently more vulnerable than men; but discrimination, entrenched social roles and attitudes, poverty and lack of access to decision-making can weaken their resilience and render them vulnerable to adverse project impacts. Vulnerability is thus context-specific and is to be understood through the interplay of three factors: (1) exposure to risk and adverse impacts; (2) sensitivity to those risks and impacts; and (3) adaptive capacity." I have noticed a shift away from predetermined 'vulnerable groups' in a number of company impact assessment guidance notes as well.

given project context, and effectively mitigating such impacts. Methodologies and practice from the development space are likely to provide useful further insights and learning that could be adapted and applied in the area of company-based impact assessments.

3.3.3 TRANSPARENCY AND ACCOUNTABILITY

Transparency throughout the impact assessment process, as well as in relation to impact assessment findings, mitigation and monitoring plans, is critical from a human rights perspective. Accountability is a core principle of the human rights-based approach, and reference to the importance of access to information in an impact assessment context can be identified in a number of international human rights instruments.⁵⁷ In a human rights-based approach the purpose of transparency is to enable rights-holders and duty-bearers to access and understand relevant information for decision-making, in order that they may be meaningfully involved in decision-making that affects them.⁵⁸ As such, transparency ties directly to accountability.

Currently, there appear to be significant opportunities for enhancing transparency in impact assessment processes and associated implementation and monitoring of impact management measures. For a start, the points at which information disclosure and exchange between companies and communities take place in the impact assessment process often remain limited, and provisions that are made for those rights-holders who may be particularly vulnerable or marginalised remain inadequate. Ensuring that the information provided in an impact assessment process is accurate, timely, sufficient and comprehensible to rights-holders also remains a challenge. Arguably, the current avenues for information disclosure and exchange often remain one-sided in the sense that company and regulation determine at which points in the impact assessment process information is disclosed and provided to rights-holders and other stakeholders, including in what formats and fora. Rights-holders frequently remain in the role of absorbing the information provided and responding to the information, rather than being actively involved in determining what information is relevant, taking part in generating information and knowledge that is deemed relevant and important by impacted workers and communities, and based on the exchange about such information then being actively involved in determinations of go-ahead decisions, project design alternatives, and the implementation and monitoring of impact mitigation measures. As such, unless there is a change in our perspectives and practices regarding the actual purpose of information disclosure and transparency of impact assessment processes and findings our practice will continue to fall short of meeting the purpose of transparency and information disclosure, which is for people to have a voice in what type of projects occur in their communities, and where projects happen to be enabled to meaningfully partake in and influence these.

As such, significant opportunities exist for the improvement of information transparency and exchange in impact assessment processes, for instance in areas such as involvement

⁵⁷ See e.g., Aarhus Convention on Access to Information, Public Participation and Access to Justice in Environmental Matters (1998); Declaration on Environment and Development (1992), commonly referred to as the 'Rio Declaration'.

⁵⁸ See e.g., Action Aid et al (2008), *HRBA and EU*, p. 68; OHCHR (2006), *FAQs about HRBA*, p. 16, 27.

of rights-holders in the design of impact assessment methodology, transparency around the terms of reference and methodologies deployed for impact assessment, ensuring that information is provided in formats and fora accessible to diverse rights-holders, as well as community involvement in impact mitigation measures implementation and monitoring. Some companies and communities have taken significant steps in these directions and can provide useful starting points for others to learn from and further improve practice in this area.

3.4 ENSURING ACCOUNTABILITY

The impact assessment should recognise impacted individuals as rights-holders, as well as consider the differentiated but complementary duties and responsibilities of government and non-government duty-bearers for addressing identified impacts. For company responsibilities, this would include assigning to relevant staff members actions to avoid, mitigate and remedy identified impacts. The impact assessment and its associated communications should be transparent and provide for effective ways for rights-holders to hold the duty-bearers to account for how impacts are identified, prevented, mitigated and remedied.⁵⁹

Accountability and transparency are core components of the human rights-based approach and have also been identified as critical for the assessment of human rights impacts.⁶⁰ Three considerations warrant particular attention: the recognition of impacted individuals as rights-holders and the corresponding acknowledgment of companies as duty-bearers (including the differentiation between the duties of State-actors and responsibilities of private sector actors); access to remedy; and transparency regarding impact assessment outcomes and reporting.

3.4.1 RIGHTS-HOLDERS AND DUTY-BEARERS

From a human rights-based approach perspective, any discussion of accountability in impact assessment must involve an analysis and application of the concepts of rights-holders and duty-bearers. This includes understanding stakeholders who are commonly described as ‘impacted communities’, ‘project affected people’, or the like, as ‘rights-holders’, recognising their entitlements and role as active agents in processes and decision-making, rather than as (passive) individuals who are ‘affected by’ or ‘impacted by’ the project. It also involves the correlated understanding of the differentiated (though complementary) duties of State duty-bearers and responsibilities of companies with regard to human rights impacts.

Introducing the concepts of rights-holders and duty-bearers into stakeholder analysis has the potential for us to better recognise people’s entitlements, as well as pay greater attention to particularly vulnerable or marginalised workers and communities. For

⁵⁹ See note 8, above.

⁶⁰ See e.g., Harrison (2010), *Reflections on HRIA*, p. 6; OHCHR (2006), *FAQs about HRBA*, p. 17; WB/Nordic Trust Fund (2013), *HRIA Literature Review*, pp. 16-17.

example, in conventional stakeholder analysis it remains the case that stakeholders are identified on the basis of ‘those who are impacted by a project or can potentially influence the project’.⁶¹ Stakeholders included can be affected communities, local business organisations, NGOs, local government agencies and others. In practice, this has the potential to place equal (or more) emphasis on addressing the impacts and interests experienced by say, vocal and powerful individuals, local organisations or State-agencies, than on the impacts experienced by workers and communities. In particular, those rights-holders who are vulnerable or marginalised, who do not have a ‘voice’ to articulate their rights, are likely to receive inadequate attention. This is problematic from a human rights perspective, which seeks to recognise and elevate attention to those who are most vulnerable and marginalised. It is important to note that recognition of rights-holders in stakeholder analysis and engagement does not suggest that we should no longer include impacts and considerations associated with other stakeholders. A human rights-based approach requires a holistic analysis, which includes consideration of the various relationships, power-dynamics and actors at play. However, it does require greater attention to those workers and communities who are impacted by projects, in particular where these impacts may constitute or give rise to human rights-based claims.

It is also relevant to identify impacts as human rights-based claims. A human rights-based claim is based on a legal entitlement, which can be claimed by rights-holders, and for which corresponding duty-bearers can be held accountable. The recognition of impacts as rights-based claims (where applicable), provides a stronger rationale for us to ensure such impacts are effectively addressed, including ensuring that appropriate avenues for access to remedy are available where such rights-based impacts constitute a breach of human rights standards.

An analysis of rights-holders and duty-bearers in stakeholder analysis also provides a basis on which to attribute responsibilities for addressing identified impacts, grounded in international human rights. In international human rights law, as well as domestic implementation of international human rights, States and State-actors are considered to be the primary duty-bearers. This means the State has the duties to protect, respect and fulfil human rights. This role of the State is re-iterated in the first pillar of the UN Guiding Principles framework which clearly articulates the State duty to protect against the human rights abuses of third parties, including businesses.⁶² In international human rights law companies are not considered to be direct human rights duty-bearers. In terms of domestic implementation, however, this does not mean that companies are devoid of all legal duties with regard to human rights. For example, where international human rights standards related to labour rights (e.g. working hours, minimum wage, holidays and leave) are implemented into domestic laws, companies would be in breach of legal requirements at the domestic level if they were not to comply with these legal requirements. With the endorsement of the Human Rights Council of the UN Guiding

⁶¹ Note that in the context of the UN Guiding Principles OHCHR proposes a definition which has an increased focus on individuals and communities who are impacted by elaborating the definition of ‘stakeholder’ with a narrower definition of ‘affected stakeholder’: “A stakeholder refers to any individual who may affect or be affected by an organization’s activities. An affected stakeholder refers here specifically to an individual whose human rights have been affected by an enterprise’s operations, products or services.” OHCHR (2012), *UNGPs Interpretive Guide*, p. 8.

⁶² UN Guiding Principles 1-10.

Principles in 2011, the corporate responsibility to respect has been clearly recognised as “a global standard of expected conduct for all business enterprises wherever they operate. It exists independently of States’ abilities and/or willingness to fulfil their own human rights obligations, and does not diminish those obligations.”⁶³ It has also been clearly elaborated that the responsibility to respect is not merely one of non-interference, but that it requires positive steps in the form of undertaking human rights due diligence.⁶⁴ As such, the UN Guiding Principles recognise the duties of the State and the responsibilities of companies vis-à-vis human rights as differentiated but complementary.

This raises the issue of how State duty-bearers and any associated impacts are dealt with in impact assessment. For example, a company may be hesitant to identify human rights impacts associated with a government-led resettlement process as the subsequent inclusion of these impacts in an impact mitigation plan can be interpreted as ‘the company telling a State-actor what to do’, whereas the company considers that it does not have the authority, power or leverage to do so. Arguably, however, a nuanced understanding and articulation of the respective duties and responsibilities of the State and company with regard to their human rights duties and responsibilities would in fact assist in devising suitable mitigation measures which are consistent with acknowledging the State as the primary duty-bearer and the company as having responsibilities regarding human rights impacts. This is a critical point from a human rights perspective that maintains that States have the primary obligation regarding human rights and that any assumption by companies of State-like human rights obligations must be carefully scrutinised from an accountability perspective.

This is said notwithstanding the realities faced by many projects and communities, in which government actors lack the will and/or capacity to protect, respect and fulfil human rights and projects face pressure from governments and communities for delivering on human rights-related aspects such as job creation, healthcare and educational services. This is something which requires our further attention, in particular the exchange of ideas and effective examples from practice of how the differentiated but complementary roles of the State and companies can be acknowledged and realised in impact mitigation to ensure concrete outcomes for impacted rights-holders.

In sum, the recognition of rights-holders and duty-bearers in impact assessment can assist in recognising specific impacts on individuals as entitlements, as well as impacted workers and communities as active agents in impact assessment processes and project-related decision-making and implementation. Relatedly, it can help us to understand the differentiated duties and responsibilities of State and company duty-bearers with regard to identified impacts, and in particular their effective management and mitigation.

⁶³ UN Guiding Principle 11 and commentary.

⁶⁴ UN Guiding Principle 17 and commentary.

3.4.2 ASSIGNMENT OF RESPONSIBILITIES AND RESOURCES FOR IMPACT ASSESSMENT

Before moving our discussion to the topic of access to remedy, let us consider a few points regarding internal accountability, including the structures, processes and resources deployed by companies for impact assessment. To date, whilst much discussion about human rights impact assessment has focused on issues such as ‘what is the additionality of human rights’, ‘what is the difference between human rights impacts and social impacts’, ‘what changes in our procedures and practices are necessary to integrate human rights and implement due diligence’ and so forth, far less attention has been paid to the organisational resources in companies (as well as consulting agencies and others carrying out impact assessments for private sector extractive industries projects) that may be necessary to ensure that human rights are properly considered. This includes human resources and skills, time and financial resources. In this regard, the human rights discipline suffers from the same problematic as do other social disciplines in extractive industries sector companies. Strong evidence remains that areas such as social impact assessment, community relations and grievance resolution continue to be significantly marginalised within corporate cultures and organisational structures.⁶⁵ This includes the associated abilities of practitioners (including but not limited to social practitioners within companies) to access and use the resources necessary to effectively implement human rights due diligence, including impact assessment.

This under-resourcing appears to be particularly evident in the area of impact mitigation and monitoring, and in relation to the human rights skills of practitioners. For example, whilst the business and human rights field is growing rapidly we currently appear to find ourselves in a situation where there is a distinct lack of human rights practitioners with private sector experience, and vice versa a distinct lack of social practitioners in the private sector with human rights skills and experience. This means that even in those instances where companies are willing to invest financial resources for the assessment of human rights impacts and the implementation of human rights impact mitigation measures they may struggle to find the human resources necessary to do so.

Relatedly, whilst there is a growing practice and literature around human rights impact assessment this appears to be lacking a clear, holistic and integrated focus on the effective implementation of impact mitigation measures, as well as monitoring and follow-up. Whilst this problem of under-prioritisation of social issues is not specific to human rights it is critical that issues of resourcing, skills and prioritisation are treated as seriously as developing human rights impact assessment methodologies and practice, if the implementation of human rights due diligence and corporate respect for human rights are to become a reality.

⁶⁵ See e.g., Deanna Kemp and John Owen (2013), ‘Community Relations in Mining: Core to business but not “core business”’, *Resources Policy*, 38, pp. 523-531.

3.4.3 ACCESS TO REMEDY

Access to remedy is itself a human right as well as a core procedural component of other human rights.⁶⁶ Access to remedy also constitutes the third pillar of the UN Guiding Principles, which addresses both judicial and non-judicial avenues of access to remedy for victims of corporate human rights abuses.⁶⁷ As flagged above, it is also a central tenant of the rights-holders and duty-bearers analysis as duty-bearers have the obligation to provide effective access to remedy for human rights breaches.

According to the UN Guiding Principles, for impacts that the business causes or contributes to it is obliged to provide for or cooperate in their remediation. For impacts that are directly linked the responsibility to respect does not require that the enterprise provides for remediation, but it is acknowledged that the business may take a role in doing so.⁶⁸

Operational-level grievance mechanisms are considered to be an integral part of human rights due diligence, and companies are expected to participate in or establish such mechanisms as a source of access to remedy and early warning system for human rights abuses.⁶⁹ Since the development of the Protect, Respect and Remedy Framework and the UN Guiding Principles, the aspect of non-judicial operational-level grievance mechanisms has gained significant traction. This appears to be so particularly in the extractive industries where numerous guides for the design and implementation of grievance mechanisms have been developed and many companies have taken steps to implement operational-level grievance mechanisms.⁷⁰

The focus on access to remedy will have implications for company-based impact assessments. For example, meaning that legal framework analysis should include a focus on the availability and effectiveness of judicial remedies, and that operational-level grievance resolution must be available throughout an impact assessment process, as well as throughout the project lifecycle, to capture any shortcomings in impact identification, mitigation, and new issues arising.

3.4.4 TRANSPARENCY AND FORMAL REPORTING

As well as transparency and information disclosure throughout the impact assessment process, transparency considerations are debated in relation to disclosure of impact assessment reports and other aspects of impact assessment reporting. Does a human rights-based approach require the disclosure of a full impact assessment report in all cases? Should all human rights impact assessments be publicly available? These are two common questions in the area of human rights impact assessment.

⁶⁶ Universal Declaration of Human Rights (1948), Article 8.

⁶⁷ UN Guiding Principles 25-31.

⁶⁸ UN Guiding Principle 22 and commentary.

⁶⁹ UN Guiding Principles 22, 29 and 31.

⁷⁰ See e.g., International Council on Mining and Metals (2009), *Human Rights in the Metals and Mining Industry: Handling and Resolving Local Level Concerns and Grievances*, ICMM: London; IPIECA (2012), *Operational level grievance mechanisms: good practice survey*, IPIECA: London; IPIECA (2014), *Community Grievance Mechanisms Toolbox*, IPIECA: London.

From a human rights perspective the presumption is clearly in favour of as much disclosure as possible, with the proviso that information disclosure should not cause harm or risks of harm to the rights-holders involved. The UN Guiding Principles evidence a slightly more conservative approach, suggesting that formal reporting on due diligence is required in cases of severe human rights abuses, with provisos for rights-holder safety and legitimate requirements of commercial confidentiality.⁷¹ This can be contrasted with other views from the human rights impact assessment space, which note the importance of transparency in the form of formal and public reporting on impact assessment processes and findings.⁷² However, the UN Guiding Principles also emphasise the importance of information disclosure and communications beyond formal reporting requirements, noting that in all cases information disclosed should be in formats accessible to rights-holders and sufficient to enable understanding of the project plans and any associated potential impacts.⁷³

From a company perspective, hesitations regarding public reporting on human rights impacts are often associated with concerns about publicly disclosing information that may generate legal liability claims or may be perceived as critical of a host-government. For example, companies express concerns about submitting impact assessment findings that may contain sensitive human rights information and be perceived as critical of the host-government, to a public regulator. These concerns, whilst a reality, are not insurmountable however, which is often how they are presented by private sector actors. For example, in many cases parallel reporting to workers, communities and other interested stakeholders is not prohibited by government regulation and can therefore be utilised to share impact assessment information with impacted rights-holders and other interested stakeholders.

One thing is for certain: that in the absence of more examples of human rights impact assessments that are publicly available, and more exchange about human rights impact assessment methodologies, it is difficult for practice to advance by being subject to the scrutiny that is required to ensure assessment of human rights impacts attains its goal of avoiding and minimising human rights harm and providing better outcomes for impacted rights-holders.

3.5 EVALUATING IMPACT SEVERITY AND ADDRESSING IMPACTS

Impacts should be assessed according to the severity of their human rights consequences. This means including in the evaluation of impact severity the criteria of scope, scale and ability to remedy the impact, and taking into account the views of rights-holders and/or their legitimate representatives in determining impact severity. Addressing identified impacts should follow the mitigation hierarchy of 'avoid-reduce-mitigate-remedy'. All human rights impacts must be addressed, and where it is necessary

⁷¹ UN Guiding Principle 21 and commentary.

⁷² See e.g., WB/Nordic Trust Fund (2013), *HRIA Literature Review*, p. 16.

⁷³ UN Guiding Principle 21.

*to prioritise actions to address impacts the severity of human rights consequences should be the core criterion.*⁷⁴

3.5.1 EVALUATION OF IMPACT SEVERITY

According to the UN Guiding Principles, impact severity should be evaluated by considering the ‘scope, extent and irremediability’ of the impacts.⁷⁵ Together, these three factors determine the impact’s ‘severity’. Notably, the UN Guiding Principles adopt the terminology of ‘severity’ rather than ‘significance’. Significance is the terminology that is usually applied in company-based impact assessments and involves combining an assessment of ‘severity’ with the factor of likelihood to determine significance. According to the UN Guiding Principles approach, by moving from significance to severity, we are asked to pay greater attention to those impacts which might be severe if they were to occur, even if the likelihood is low. Neither the UN Guiding Principles, nor the Corporate Responsibility to Respect Interpretive Guide use ‘likelihood’ of impact occurrence as a factor in determining priority for action.⁷⁶ Prioritising impact severity is also consistent with the UN Guiding Principles approach of proceeding from a ‘risk to rights-holder’ rather than a ‘risk to business’ perspective.

Given that there is already a range of existing terminology in company-based impact assessment practice to guide evaluation of impact severity (or significance), it may be somewhat confusing to bring additional terms into the mix, in particular when working with the integration of human rights into existing impact assessment methodologies. Arguably, there are notable synergies between terms (e.g. scope in UN Guiding Principles terms might be akin to numbers affected in social impact assessment, extent to scale, and irremediability links to the concept of resilience). To make human rights analysis understandable in the extractive industries impact assessment context there is a need to ensure alignment of existing impact assessment terminology and human rights impact assessment terminology, also with the view of understanding what the human rights framework brings to current analysis or where a change in focus may be required.

Two questions related to the evaluation of impact severity which have received far less attention than that of terminology, but are arguably just as important, are the involvement of rights-holders in the evaluation of impact severity, and how human rights standards and the issue of justiciability play into the evaluation of impact severity.

With regard to the first aspect, the UN Guiding Principles provide a clear statement on the need to include rights-holders in the evaluation of impact severity. Consistent with our discussion above on participation and inclusion, this will require more than a validation of impact findings by impacted rights-holders, to including rights-holders in the formulation of criteria for the evaluation of severity, as well as other steps to increase the meaningful participation of rights-holders in the evaluation of impact severity. This is said acknowledging that many aspects require specific technical evaluations to determine severity, and the involvement of rights-holders and technical

⁷⁴ See note 8, above.

⁷⁵ UN Guiding Principle 14 commentary.

⁷⁶ UN Guiding Principles; OHCHR (2012), *UNGPs Interpretive Guide*.

expertise would therefore need to be combined. When adopting a human rights-based approach, the onus would be on the project and impact assessment team to communicate the relevant information so that it enables impacted workers and communities to engage meaningfully in an evaluation of impact severity. Furthermore, there would be a greater effort to create a joint impact assessment process, which is from the outset more cognizant of communities' contexts (including rights, values, beliefs etc.) and how these contexts will influence a collaborative evaluation of severity. For example, evaluation of water quality may require complex technical data collection and evaluation, however, communities may be involved in the collection of such data; similarly, other factors which may render the impact on river water quality severe, such as cultural heritage or spiritual values of the river, will only be recognised and accounted for through identifying and understanding these cultural heritage aspects in the impact assessment in the first place.

In addition to a greater focus on the role of rights-holders in the determination of severity, the substantive content of human rights, including questions of justiciability, will be relevant in the evaluation of impact severity. To date, whilst many human rights impact assessments frame impacts in human rights language, the extent of legal analysis in terms of precisely how and to what degree a particular human right is impacted remains rather limited. In the future, this is unlikely to be sufficient. Incidentally, these questions raise the issue of impact assessor skills and competencies, again highlighting the need for us to focus on skills development in the area of human rights impact assessment.

3.5.2 PRIORITISATION OF ACTIONS TO ADDRESS IMPACTS

The UN Guiding Principles state clearly that all identified human rights impacts must be addressed.⁷⁷ This includes impacts that the business causes, that it contributes to, and impacts that are directly linked to operations, products or services. The UN Guiding Principles add the proviso that in those cases where it is not possible to address all human rights impacts simultaneously it is permissible to prioritise mitigation measures based on the human rights consequences of the identified impacts. That is, to first prevent and mitigate those impacts that are most severe or where a delayed response would make them irremediable.⁷⁸ It is also noted that “severity is not an absolute concept in this context, but is relative to the other human rights impacts the business enterprise has identified.”⁷⁹

It cannot be overstated that the starting premise is that all impacts must be addressed, and that prioritisation is only relevant for the purposes of determining the timing for the implementation of actions to address the identified impacts. Taking this in combination with the above considerations regarding severity should prompt us to think seriously about the purpose and utility of evaluation of impact severity and any prioritisation regarding the implementation of impact mitigation measures. In many discussions I have been involved in regarding assessment of human rights impacts there is a tendency to

⁷⁷ UN Guiding Principle 24 commentary.

⁷⁸ UN Guiding Principle 24 and commentary. See also, OHCHR (2012), *UNGPs Interpretive Guide*, pp. 82-84.

⁷⁹ UN Guiding Principle 24 commentary.

focus on evaluation of severity and prioritisation of impacts and impact mitigation measures, at times with the view of making evaluation of human rights impacts 'speak to' current technical and engineering frameworks, to fit them into corporate language, analysis and action. The intentions behind this are not necessarily purely company-interest driven. Often practitioners argue that to demonstrate that a particular impact is 'severe', i.e. to give it a corresponding number and red rating, will be the most effective way to generate internal traction to address the identified impacts. Similarly, a mitigation plan which provides analysis regarding the order in which impacts should be addressed corresponds to the realities of projects and impact assessments in which resources (including time, financial and human resources) are finite, and in some circumstances limited. However, there is a challenge here because by its nature a human rights framework and a human rights-based approach require us to take a holistic approach, including for instance, paying increased attention to the inter-relatedness of various human rights impacts (as well as the inter-relatedness between human rights, social and environmental impacts). That is, a human rights analysis does not lend itself to the current focus on evaluation of severity and prioritisation. Rather, it would lend itself to an approach that increases our focus on understanding human rights impacts and their consequences from the perspectives of the rights-holders involved, and finding solutions to these. With regard to prioritisation, it should also be sufficiently acknowledged that projects invest significant resources into technical possibilities and solutions, often solving complex technical issues by investing financial and human resources to addressing and solving these, so there is no reason (other than political will) why the same resources cannot be invested into addressing the human rights impacts of projects (and social and environmental impacts for that matter).

CONCLUSION

4 CONCLUSION

In this paper I have sought to elaborate on some of the conceptual and practical considerations in the area of human rights and impact assessment in the private sector context. I have sought to share these observations with the view of generating further debate and discussion, rather than attempting to provide authoritative guidance or solutions. I am convinced that it is only through more discussion, debate and scrutiny of current human rights impact assessment practice that we can move forward, improve impact assessment practice and ensure better outcomes for impacted workers and communities.

Arguably, the current absence of publicly available human rights impact assessments and methodologies, as well as limited fora where practitioners, companies, workers, communities and other stakeholders can share experiences, including both challenges and best practice, poses one of the major obstacles to improving practice in the area of human rights impact assessment. I see this as correlating directly to an urgent need to build skills and resources in the area of human rights impact assessment, so that more human rights practitioners have a solid understanding of the realities of private sector projects, including current impact assessment practices, and vice versa that social specialists working in or for companies have an increased understanding of human rights. This does not mean that all those involved in impact assessments need to develop completely new areas of specialisation, but at least further cross-sharing of basic knowledge and skills will be necessary to understand the value of, and entry points for, paying greater attention to human rights in impact assessment, including ensuring internal company buy-in for conducting impact assessments that address human rights.

A further area for attention should be the potential connections between company-based human rights impact assessments and the methodologies and practices developed in the area of community-based human rights impact assessment. We should examine how these methodologies might inform and learn from each other, in particular in terms of recognising, analysing and potentially reconfiguring the power relations at play in private sector project contexts.

I have suggested that working with human rights impact assessment, either in the form of stand-alone human rights impact assessments or through integrating human rights into existing impact assessment methodologies, should engage our thinking on the five criteria elaborated in this paper:

CONCLUSION

1. Applying international human rights standards – as the benchmark for the assessment, to guide impact identification, evaluation of severity, mitigation and remedy;
2. Addressing the full scope of impacts – including both actual and potential impacts that are caused by the business, impacts that the business contributes to and impacts directly linked through operations, products and services;
3. Adopting a human rights-based process – emphasising the principles of participation and inclusion, equality and non-discrimination, and accountability and transparency;
4. Ensuring accountability – identifying rights-holders and duty-bearers, assigning responsibilities and adequate resources for impact assessment, including a focus on access to remedy, and making adequate provisions for reporting; and
5. Evaluating impact severity and addressing impacts – making sure that evaluation of impact severity is guided by human rights considerations and that all identified human rights impacts are effectively addressed.

I will conclude by emphasising that the application of a human rights-based approach must be fundamental to any impact assessment that proclaims to address human rights. Adopting a human rights-based approach has the potential of enabling us to better recognise, understand and challenge the existing power-dynamics at play in an impact assessment context; positions impacted workers and communities firmly as rights-holders with agency in the impact assessment process, as well as with regard to outcomes; and can help to ensure that the rights and voices of those individuals most vulnerable or marginalised in a given project context are meaningfully included. It is worth remembering that human rights are fundamental, that they are about recognising and realising basic standards of treatment and addressing basic needs, in particular of those who are most vulnerable, marginalised or discriminated against. Applying a human rights-based approach has the potential to enable us to make a meaningful contribution towards realising this in impact assessment methodology and practice.

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