

This Co-Praxis will review and systematize common elements and challenges of human rights impact assessment (HRIA) methodologies designed for use by civil society organizations, third party experts or businesses to assess the actual or possible impact of business operations or trade agreements on human rights. These HRAs can be customized for application across a business sector, in a geographical area, for a specific right or set of rights (e.g. labour rights or indigenous peoples rights) or one aspect of a trade agreement.

JGG EXPERIENCE. JGG, as a consulting network with specialization in human rights, has assessed human rights risks or impacts of agricultural and extractive business operations, infrastructure projects, and also trade agreements. This work, especially in Latin America, focused on the impact of business operations on the rights of indigenous peoples.

Common Elements of HRIA Tools and Reports Reviewed

FOUNDATIONAL SOURCES

The HRIA tools reviewed reference the United Nations' *Guiding Principles on Business and Human Rights* and human rights treaties as their normative framework. The Guiding Principles emphasize States' duty to *protect, respect, and remedy* violations of human rights while businesses have a responsibility to respect human rights. The Guiding Principles are themselves based on international minimum standards, commonly referenced in the HRIA tools reviewed: the *Universal Declaration of Human Rights*, *International Covenant for Civil and Political Rights*, and the *International Covenant for Economic, Social, and Cultural Rights* (known together as the International Bill of Rights) and fundamental rights identified in the International Labour Organization's (ILO's) *Declaration on Fundamental Principles and Rights at Work*: (a) freedom of association and the effective recognition of the right to collective bargaining; (b) the elimination of all forms of forced or compulsory labour; (c) the effective abolition of child labour; and (d) the elimination of discrimination in respect of employment and occupation.

INDEPENDENT THIRD-PARTY EXPERTS

The Danish Institute for Human Rights (DIHR) identifies independence as essential to a rigorous HRIA and the *Guiding Principles* note that independent assessment can strengthen content and credibility. The DIHR's HRIA

International Standards

Office of the United Nations High Commissioner on Human Rights, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, (2011).

UNICEF, *Children's Rights and Business Principles*, (2013).

United Nations, General Assembly, Human Rights Council, *Guiding principles on human rights impact assessments of trade and investment agreements: report of the Special Rapporteur Olivier De Shutter on the right to food*, A/HRC/19/59 Add.5 (2011).

Measurement Tools and Methodologies Reviewed

Abrahams, Desiree (IBLF) and Yann Wyss (IFC), *Global Compact Guide to Human Rights Impact Assessment and Management*, (2010).

Danish Institute for Human Rights, *Human Rights Impact Assessment: Guidance and Toolbox*, (2016).

Enodo Human Rights, *The Enodo Rights HRIA Method*, (2014).

NomoGaia Global *Human Rights, Human Rights Impact Assessment Toolkit*, (2016).

Oxfam, *Community-Based Human Rights Impact Assessment: The Getting it Right Tool (Rights & Democracy)*, (2011).

UNICEF and the Danish Institute for Human Rights, *Children's Rights in Impact Assessment*, (2013).

HRIA Reports Reviewed

Bansal, Tulika and Wyss Yann, *Talking to Human Rights: Nestle's Experience Assessing Human Rights Impacts in its Business Activities*, (2013).

NomoGaia Global Human Rights, *Dole Human Rights Impact Assessment: El Muelle Pineapple Project of Cutris District*, (2011).

Pastoral Land Commission, *Starving to Death Little by Little Every Day: impacts on human rights caused by Usina Trapiche Company to a fishing community in the municipality of Sirinhaém / state of Pernambuco, Brazil*, (2016).

guidance and toolbox identify the following relevant factors to consider in composing a HRIA team: skill-set, neutrality, gender, local outreach, local language, and reference group/steering committee.

COMMON STEPS

The HRIA tools follow similar steps for the assessment process based on those identified in De Shutter's *Guiding Principles*: (1) screening, (2) scoping, (3) evidence gathering, (4) analysis, (5) conclusions and recommendations, (6) monitoring and evaluation mechanisms. These are normally identified as phases in the methodology and are often broken down by additional steps within each phase. For the evidence gathering and assessment phases there are often additional tools such as NomoGaia's template; the DIHR's sample questions, framework for assessing impact severity, and interview guides based on the respondent's position; and Rights & Democracy's mapping process for identifying stakeholders and interview questions.

STAKEHOLDER ENGAGEMENT

Meaningful consultation with rights-holders was identified as an essential element in the *Guiding Principles on Business and Human Rights* since it brings legitimacy to the assessment and builds trust within and between the community, company, and government. The *Getting it Right* tool and the DIHR tool identify the value in treating the process of conducting a HRIA not just as gathering information but also as an exchange of knowledge among participants.

INDICATORS/ ISSUES AND QUESTIONS

The OHCHR set out three categories of human rights indicators that are useful and were adapted and adopted by the DIHR: structural, process, and outcome indicators. The DIHR also notes the importance of having both quantitative and qualitative indicators. Both the DIHR and Rights & Democracy's tools have extensive lists of questions to be asked regarding particular human rights issues. The questions for the *Getting it Right* tool are also organized by groups of stakeholders.

ENGAGING VULNERABLE RIGHTS-HOLDERS

HRIA teams should ensure that vulnerable groups, such as women, children, and indigenous populations, are engaged and consulted, keeping in mind their language, culture, and potential lack of awareness of their human rights. Additional tools may be used when considering the rights of vulnerable groups, such as the *Children's Rights and Business Principles* developed by UNICEF, the United Nations Global Compact and Save the Children.

LINKING HUMAN RIGHTS IMPACTS TO BUSINESS OPERATIONS

The DIHR identified three levels of connection between companies and human rights impacts: cause, contribute to, or directly linked. The *Getting it Right* tool assesses whether the government or company derived benefit or participated in the violation, was complicit in the action, or knew about and failed to take adequate measures to stop or prevent a human rights violation. After determining the level of state responsibility for the human rights breach, the tools then look at the severity of the breach. The DIHR recommends that this be assessed in dialogue with stakeholders and that it should be taken into consideration whether this issue affects vulnerable groups, as well as the scope, severity, and the availability of remedies for the human rights violations. NomoGaia's scoring system is based on the severity to which an impact will alter life and the degree to which the company is responsible. The DIHR and the IBLF/IFC/ UN Global Compact Guide both use the mitigation hierarchy of avoid, reduce, restore, and compensate to prioritize the type of mitigation that should be taken.

REPORTING RESULTS

As noted, transparency and stakeholder engagement are cross-cutting principles for any HRIA. In this vein, NomoGaia calls for draft reports on ratings to be disseminated to stakeholders for consultation prior to their publication. The DIHR argues that in the name of transparency the HRIA final reports need to be publicly available and disseminated to stakeholders. The style of HRIA final reports varies significantly, from concise templates assigning numerical scorings to each right (NomoGaia) to descriptive dialogues (reports based on the *Getting it Right* tool).

Challenges Identified in the HRIA Tools & Literature Reviewed

EX ANTE

Environmental impact assessments (EIAs) and Social Impact Assessments (SIAs) are typically conducted *ex ante* (based on forecasted results) whereas most HRAs are *ex post* (based on actual results). The DIHR notes the benefit of *ex ante* assessments in allowing stakeholders to be involved in all phases of the project, including consultation prior to the commencement of operations. Additionally, De Shutter's *Guiding Principles* note that for a HRIA to fulfil the role of corporate due diligence it must include an *ex ante* assessment. Nonetheless, *ex post* HRAs remain much more common.

In the absence of an *ex ante* assessment, the post fact creation of a baseline during an *ex post* HRIA makes it more difficult to determine the chain of causation.

STAND-ALONE HRIA OR INTEGRATED?

The guide on *Integrating Human Rights into Environmental, Social, and Health Impact Assessments* notes that context information for HRAs and other Integrated Assessments (IAs) are often the same and thus integrated methodologies are efficient. However, organizations conducting IAs must ensure that their IAs team has sufficient human rights knowledge and bases the assessment on international, regional, and domestic human rights laws, conventions, and treaties. This guide emphasizes the importance of stakeholder engagement

in both stand-alone HRAs and IAs and uses a similar methodology for IAs as the DIHR uses for stand-alone HRAs.

MONITORING AND EVALUATION WEAK OR ABSENT

Civil Society participants in a discussion on HRIA hosted by Columbia's law school identified one-time funding as an obstacle to the creation of effective grievance mechanisms and on-going monitoring processes. Additionally, academic articles, such as Harrison's, have identified the importance of having a credible and independent body monitor and review performance by corporations. Nestle's HRIA report identified the lack of involvement of the DIHR in monitoring as a challenge to their HRIA.

JGG Reflections

LIMITED COMMITMENT OR BUY-IN FOR EX ANTE AND PERIODIC HRIA

JGG consultants have noted that companies do not focus sufficiently on *ex ante* or baseline HRAs. The lack of a baseline is particularly challenging when experts conduct *ex post* assessments and need to recreate a baseline by comparing the enjoyment of human rights in practice at the outset of operations to the applicable international and regional human rights instruments and domestic law at the time. While baseline information can be found in reports by government agencies, international organizations, and NGOs, it is limited to information that is publicly available.

Ideally, in the extractive sector *ex ante* or baseline assessments would be conducted during the exploration phase of the project with periodic HRAs as the project evolves. Operations change in cyclical commodities and impacts among rights holders may be distinct in different phases of the project.

WEAK GENDER ANALYSIS

While methodologies may contain specific questions on women's and girls' rights, gender analysis is not cross-cutting in the reports reviewed. JGG finds it helpful to include a gender equality expert on an HRIA team.

CUSTOMIZE METHODOLOGIES USING MULTIPLE TOOLS

One HRIA tool may not meet the needs of the stakeholders. Trying to decide whether to conduct a community-based or a company-based HRIA is a false dilemma. Community-based HRIA on its own is not very successful at persuading companies to change their actions. Although many of the existing HRIA tools are very well developed and useful, there is no one-size-fits-all methodology for conducting a HRIA. Rights & Democracy's *Getting it Right* tool acknowledges this explicitly by making the third phase of its tool "adapting the guide". Some methodologies may be so broad in scope that they are impractical for application with rights holders or in the local context. Adaptation of tools by a HRIA team to suit the context of the business operation or trade agreement contributes to a more practical process.

ENGAGING BOTH COMPANIES AND RIGHTS HOLDERS

JGG consultants note that HRIA should not be considered a dispute resolution process (contrary to general idea of *Getting it Right*). The main purpose of a HRIA is to get the company and government to act. Community-led HRAs are almost always conducted *ex post* and by that point there is a lot of distrust between companies and communities. Engaging vulnerable rights holders (e.g. children involved in child labour) requires special consideration in the customized methodology. Involving

child protection agencies or other representative organizations rather than individual children may be the most feasible approach to ensure the voice of rights holders.

GOVERNMENTS' ROLE

The engagement of government agencies in HRAs is important. As duty bearers, government agencies should manage tensions between businesses and society and ensure respect for human rights. Governments can facilitate community participation in HRAs by ensuring local organizations receive information on business operations and have access to public debates and HRIA processes. JGG finds that too often the duty bearers are absent or distant from HRIA processes.

SELF-DETERMINATION OF INDIGENOUS PEOPLES

The collective rights of indigenous peoples and communities are often at risk of violation in extractive activities. Government agencies and companies should guarantee intercultural dialogue based on respect of land rights and customary government. In *Multiples No. 19*, JGG explored approaches to economic self-determination among indigenous peoples,

including the negotiation of impact benefit agreements with extractive companies.

HRIA REPORTING

JGG consultants have found that "naming and shaming" in reports is counterproductive to influencing companies to publish reports and change policies and practices. Rather, using a "knowing and showing" approach is more consistent with Ruggie's principles.

ATTRIBUTION/CAUSALITY

There is a legal and reputation implication of identifying "violations" in a company HRIA, therefore experts often reference "adverse impact" of company operations on rights (e.g. health or labour). Individual cases that come to light during a HRIA and appear to amount to a human rights violation can be dealt with in two ways: information on an individual case can be shared with the appropriate authorities, while the public HRIA report could emphasize recommendations to change company systems. Causal analysis in trade and investment agreement HRAs requires expertise in economic impacts as well as human rights.

Secondary Literature

Columbia Center on Sustainable Investment, Sciences Po Law School Clinic and Columbia Law School Human Rights Institute, *Human Rights Impact Assessments of Large-Scale-Foreign Investments: A Collaborative Reflection*, (2014).

Harrison, James, *Establishing a meaningful human rights due-diligence process for corporations: learning from experience of human rights impact assessment*, in Impact Assessment and Project Appraisal, Vol. 31/2 107-117 (2013).

Myanmar Centre for Responsible Business, *Sector-Wide Impact Assessments*, (2017).

The Danish Institute for Human Rights and IPIECA, *Integrating human rights into environmental, social and health impact assessments: a practical guide for the oil and gas industry*, (2013).

UNICEF: *Children are Everyone's Business: Workbook 2.0*, (2014).

Watson, Gabrielle, Irit Tamir and Brianna Kemp, *Human Rights Impact Assessment in Practice: Oxfam's application of a community-based approach* in Impact Assessment and Project Appraisal, Vol. 31/2 118-127 (2013).



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