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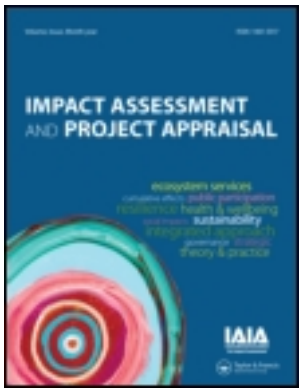

Impact Assessment and Project Appraisal
Publication details, including instructions for authors and subscription information:
http://www.tandfonline.com/loi/tiap20

Human rights and impact assessment: clarifying the connections in practice

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Published online: 22 May 2013.

To cite this article: Deanna Kemp & Frank Vanclay (2013) Human rights and impact assessment: clarifying the connections in practice, Impact Assessment and Project Appraisal, 31:2, 86-96, DOI: 10.1080/14615517.2013.782978

To link to this article: http://dx.doi.org/10.1080/14615517.2013.782978

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Impact Assessment and Project Appraisal, 2013
Vol. 31, No. 2, 86–96, http://dx.doi.org/10.1080/14615517.2013.782978

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Human rights and impact assessment: clarifying the connections in practice

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Historically, impact assessment practice has not explicitly considered human rights. That human rights are relevant to business has been confirmed through the United Nations Human Rights Council's endorsement of the 'Guiding Principles on Business and Human Rights'. Special Representative to the Secretary-General on business and human rights, Professor John Ruggie, advocated awareness of 'rights-holders' and 'duty-bearers' and a shift from third parties "naming and shaming" companies as a way of addressing human rights harms to companies also "knowing and showing" how they are taking responsibility for their human rights impacts and managing their human rights risks. Consideration of human rights should therefore be central to impact assessment for private sector projects, especially those affecting livelihoods, environment, health, safety and security, land and property, culture and gender dynamics. We provide an introduction to the business and human rights debate, discuss the relevance of human rights to the field of impact assessment, and examine a range of challenges associated with integrating the fields of human rights and social impact assessment.

Keywords: Human rights impact assessment; social impact assessment; due diligence; corporate social responsibility; social licence to operate

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Introduction

Extraordinary expansion in the reach and power of the private sector in last half-century has been accompanied by a corresponding increase in the nature and intensity of its impacts – both positive and negative – on the social and bio-physical environment. Many of these impacts have wide-ranging implications for the enjoyment of human rights, which are considered to be the inherent dignities and freedoms to which all human beings are entitled (UNGA 1948). Multinational companies and heavy-footprint industries in particular – including agriculture, mining, manufacturing, tourism, telecommunications and infrastructure – all have considerable potential to impact on human rights. Impact assessment is an established domain of practice in these and other industries; however, its methodologies and scope have tended not to cover the human rights impacts of projects, plans, programmes and policies in any substantive sense, beyond suggesting that human rights are integral to the core values of the social impact assessment (SIA) community (MacNaughton & Hunt 2011; Vanclay 2003, 2006). Forging stronger connections between human rights and impact assessment can bridge this gap and help ensure that businesses uphold their human rights responsibilities.

Internationally agreed human rights were enshrined in the *Universal Declaration of Human Rights* (UDHR), which was adopted by the United Nations (UN) in 1948. It is now well established that human rights are inalienable, universal, indivisible, interdependent and interrelated, and apply equally to all human beings (UNGA 1993). The UDHR, together with the *International Covenant on Civil and Political Rights* (UNGA 1966a) and the *International Covenant on Economic, Social and Cultural Rights* (UNGA 1966b), form the *International Bill of Human Rights*. In broad terms, 'civil and political rights' are associated with physical security such as freedom from torture and arbitrary detention, the right to a fair trial, and freedom of religion and free speech (UNGA 1966a). The 'economic, social and cultural rights' include considerations such as the right to a livelihood; the right to participate in the cultural life of a community; the right to a fair wage, health care and other social services; the right to family life; and freedom from gender and other types of discrimination (UNGA 1966b). As will be elaborated below, while the Bill of Human Rights and a range of other international human rights legal instruments apply to signatory states, the UN has confirmed that international human rights law holds particular relevance to business (UNHRC 2011).

In this article, we outline the development of the 'business and human rights' agenda, and explain the key elements of contemporary human rights thinking, especially with respect to the responsibilities of business. An introduction to the business and human rights debate is provided, before discussing the relevance of human rights to the field of impact assessment and examining a range of conceptual and operational challenges associated with integrating the fields of human rights and SIA.

Business and human rights: An introduction to the debate

Human rights has become a prominent political discourse on a global scale. Evidence of its emergence as a 'field of practice' lies in the inexorable growth of human rights organisations (Ergas 2009) as well as its emergence as a specialist field of academic research and teaching (Morrison & Vermijs 2011; Risse 2009). The arena of 'business and human rights' has also expanded amid clashes between a rights-based approach to development and market-based notions of access and entitlement to

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resources (De Feyter 2005; Newell & Wheeler 2006). The business and human rights debate has been shaped by a series of egregious cases of alleged human rights abuses by business entities (Wright 2008).

A long-standing and emblematic case involves Shell and the Ogoni people in Nigeria (Frynas 2001; Obi 1997; Welch 1995; Boele et al. 2001). Shell had been operating in Ogoniland since 1958. As a result of severe environmental degradation, a lack of benefits to local people, and no 'social licence to operate' (amongst other things), the Movement for the Survival of the Ogoni People (MOSOP) was founded in 1990 to seek self-determination for the Ogoni People. MOSOP prepared and presented an Ogoni Bill of Rights to advance their cause (MOSOP 1991). It also began a vigorous, non-violent campaign of opposition against the Nigerian government and the oil companies. A repressive response by the Nigerian government ensued. A Human Rights Watch (1995, online) report, which documented the human rights abuses, stated that:

> In the wake of the murders [of four Ogoni chiefs in May 1994], which occurred under disputed circumstances, the Rivers State Internal Security Task Force embarked on a series of punitive raids on Ogoni villages. These raids were characterised by flagrant human rights abuses, including extrajudicial executions, indiscriminate shooting, arbitrary arrests and detention, floggings, rapes, looting, and extortion.

The murders provided a pretext for the military government to arrest MOSOP leader, Ken Saro-Wiwa, and eight colleagues, accusing them of inciting the murders. Following a sham trial, which violated international norms for judicial procedure, the Ogoni Nine were executed on 10 November 1995 amidst widespread international pleas for clemency and condemnation of Shell and the Nigerian government. The British government, for example, called it "judicial murder" (Wettstein 2012, p. 50). Shell was accused of complicity in various human rights abuses including killings and torture, and of "a vicarious role in the executions" (Wheeler et al. 2002, p. 301; Frynas 2001; Wettstein 2012). As a consequence, Shell suffered a significant reputational loss, was the subject of organised boycotts and sabotage attacks on their retail outlets around the world, and considerable disinvestment and an associated fall in share price (Wheeler et al. 2002). Civil cases using the Alien Tort Claims Act (which allows US courts to hear cases brought by non-US citizens in relation to activities that occurred outside the USA) are still underway.

Another notable case of human rights concern relates to Anvil Mining's alleged complicity and logistical support of a 2004 massacre by the Congolese military in a village near its Katanga copper mine (McBeth 2008). This event led to separate legal trials in the Democratic Republic of Congo, Australia and Canada and an investigation by the International Finance Corporation (IFC) Compliance Advisor/Ombudsman (CAO) at the request of the President of the World Bank (CAO 2005a). Although no court action against the company has been successful, the costs to the company and to its reputation have been considerable.

Another example is Barrick Mining. Barrick was accused of the systematic rape of local women by security staff at the Porgera Joint Venture in Papua New Guinea (Human Rights Watch 2011). For years Barrick denied all charges, until finally initiating a series of investigations, which confirmed many of the original claims. The company has since developed a framework of remediation initiatives to help confront violence against women in the Porgera Valley (Barrick Mining 2012).

A final example, also now emblematic, is that of the Marlin Mine in the San Marcos Department of south-western Guatemala. In 2002, the Guatemalan government gave endorsement to Montana Exploradora, a subsidiary of Glamis Gold to develop the mine. In 2004, the IFC approved a US$45 million loan to the mine and it commenced operation in 2005. In 2006, Glamis Gold merged with Goldcorp, a Canada-based company. From the beginning, the mine was vigorously opposed by the local Indigenous (Mayan) people and in January 2005 they blockaded the access road, delaying a delivery convoy by over a month. Police action to enable the convoy to pass resulted in the killing of one protester and several injuries (Fulmer et al. 2008). The Guatemalan President, Oscar Berger, defended the police action by saying that, "We have to protect the investors" (Nolin & Stephens 2010, p. 53). Since then, there has been a range of concerns about damage to the environment relating in particular to the cyanide leaching process used, water use, royalty payments to the central government, and the benefits that flow to local people. A major concern relates to the notion that large-scale land disturbance is incompatible with the Mayan 'cosmovision' and that development has nothing to offer them: "We don't want gold; what we want is to defend our way of life and our water" (Fulmer et al. 2008, p. 93). In 2005, a complaint was lodged with the IFC's CAO, raising issues of reduced community access to water and contamination of waterways, and that the project proceeded without adequate consultation with the local Indigenous people and in violation of their rights. The subsequent report (CAO 2005b) rejected concerns about reduced water quality and access. On the matter of consultation, the report said:

> The CAO found a genuine difference in understanding amongst the parties about the purpose of consultation with and disclosures to local people. Without endorsing either perspective, CAO found that the project sponsor and IFC believe it was sufficient to inform parties of the impending project, some of its potential impacts and solicit input for associated development projects. Many of the local leaders in Sipacapa believe that they should have the right to determine whether or not the project should be allowed to operate in their territory. (CAO 2005b, p. ii)

Although the mine has contributed to the local community in various ways, it is clear that there was significant opposition to the mine, with the protestors managing to gain considerable international interest in their cause. In early 2008, a group of institutional investors in Goldcorp who were committed to ethical investment – specifically

Ethical Funds, First Swedish National Pension Fund, Fourth Swedish National Pension Fund, Public Service Alliance of Canada Staff Pension Fund, and SHARE – sent a delegation to Guatemala to inspect the site. Subsequently they called upon Goldcorp to undertake an independent human rights assessment, which was completed by a Canadian consulting firm (On Common Ground 2010).

In the face of mounting international pressure from these and other cases, the issue of business and human rights was taken up by the UN in 2005 and given particular prominence through the appointment of Professor John Ruggie as the "United Nations Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises". Ruggie is the Berthold Beitz Professor in Human Rights and International Affairs at Harvard University's Kennedy School of Government. Ruggie, who has an extensive background in UN work, including the development of the Global Compact and the Millennium Development Goals, was appointed to identify and clarify standards of corporate responsibility and accountability with regard to human rights. Often referred to as the 'Ruggie mandate', indicating a long-term international mission authorised by the UN, Ruggie sought to address the uncertainty created by the *Draft Norms on Transnational Corporations and Other Business Enterprises* (2003), which sought to impose on companies the same range of human rights duties under international law as states (refer to Ruggie 2007 for details). The Draft Norms created confusion, division and tension amongst a range of stakeholders in relation to the responsibilities of business and other actors on the issue of human rights (Kinley & Chambers 2006), and were never adopted by the UN (United Nations 2010).

After three years and a process of broad-based global consultation, in 2008 Ruggie proposed the *Protect, Respect and Remedy* framework to clarify the responsibilities of business and government in relation to business-related human rights harm.

> The framework rests on differentiated but complementary responsibilities. It comprises three core principles: the State duty to protect against human rights abuses by third parties, including business; the corporate responsibility to respect human rights; and the need for more effective access to remedies. Each principle is an essential component of the framework: the State duty to protect because it lies at the very core of the international human rights regime; the corporate responsibility to respect because it is the basic expectation society has of business; and access to remedy, because even the most concerted efforts cannot prevent all abuse, while access to judicial redress is often problematic, and non-judicial means are limited in number, scope and effectiveness. The three principles form a complementary whole in that each supports the others in achieving sustainable progress (Ruggie 2008, pp. 4–5).

The mandate was subsequently extended in order to focus on operationalising the framework, recognising the significant challenge of implementation. This led to the UN *Guiding Principles on Business and Human Rights* (hereinafter 'UNGP'), which the UN Human Rights Council unanimously endorsed in 2011. In addition to the official, internal UN version (Ruggie 2011), a public version has also been produced (United Nations 2011). This was the first time that the UN had ever endorsed standards to govern the adverse impacts of business activities on the human rights of individuals and groups. A range of companies and industry organisations officially recognised the UN framework on its release and have subsequently endorsed the UNGP.

Establishing standards for human rights observance by business

Because the contemporary concept of human rights is codified in the 1948 UDHR and other international human rights treaties, the responsibilities of states are well established. However, before the Ruggie mandate, the international legal framework for human rights did not adequately address the responsibilities of companies, and indeed there was a question as to what extent companies were subject to international human rights law. It is now clear that companies are subject to international human rights law (UNHRC 2008, 2011) and that various watchdog organisations will pursue companies that abuse human rights. However, the precise requirements that businesses need to follow to fulfil their human rights obligations in practice are still emerging.

The respect principle in the *Protect, Respect and Remedy* framework provided one way of establishing the minimum standard of business conduct: to avoid infringing the human rights of others, which Ruggie refers to as the "do no harm" principle (Ruggie 2010). However, in the UNGP, Ruggie is more specific about what constitutes the minimum standards for human rights observance. Principle 12 reads:

> The responsibility of business enterprises to respect human rights refers to internationally recognised human rights – understood, at a minimum, as those expressed in the International Bill of Human Rights and the principles concerning fundamental rights set out in the International Labour Organization's Declaration on Fundamental Principles and Rights at Work.

The four principles in the International Labour Organization's (ILO) Declaration of Fundamental Principles and Rights at Work (ILO 1998, online) are:

(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.

The UNGP states that businesses may need to consider additional standards, depending on host and home state circumstances. In many industries, particularly those that require land acquisition and/or cause disruption to culture and heritage, instruments such as the ILO Convention 169, which concerns Indigenous and tribal peoples, and the UN

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Declaration on the Rights of Indigenous Peoples (UNDRIP) may be relevant. These instruments bring into frame the issue of 'free prior and informed consent' (FPIC) as a primary tool for securing and protecting Indigenous peoples' rights. While some companies and industry organisations have indicated 'in principle' support for these instruments (*e.g.* Rio Tinto 2012; ICMM 2011), FPIC remains highly contested in terms of how it is interpreted and applied in the business arena (Esteves et al. 2012; Hanna & Vanclay 2013). FPIC does not form part of the UNGP's 'minimum standard', but it is now embedded in other human rights-related regulatory regimes, such as the pervasive IFC's Performance Standards (2012), which apply to IFC-funded projects, and, by extension, the Equator Principles, which apply to an increasing number of financing institutions. There are many facets to the debate about FPIC and business, including the issues of representation, the power of veto and the applicability of FPIC beyond Indigenous peoples (Hanna & Vanclay 2013).

Debates about additional human rights standards also relate to some human rights not being explicitly enshrined in international law, such as the right to water. The right to water was not recognised as a distinct right in the UDHR, but observers have argued that the right to air and water were so obvious that the original drafters of the UDHR saw no reason to list them (IHRB 2009; Gleick 1999). In 2008, the UN Human Rights Council appointed an Independent Expert, Professor Catarina de Albuquerque, to consider the contentious issue of water as a human right. Ultimately, access to potable water was recognised by the UN General Assembly as a distinct human right, in conjunction with the human right to sanitation (UNGA 2010). For water-intensive industries such as mining, manufacturing and/or water infrastructure facilities (whether state or privately owned), these 'emerging rights' have considerable relevance to the business and human rights debate (Kemp et al. 2010a). Beyond water and sanitation, other emerging rights include, for example, the right to food (Narula 2006).

There are a wide range of other significant international developments and global initiatives that reinforce, consolidate, challenge and shift the boundaries of the business and human rights debate. In addition to those mentioned above, one of the most significant developments has been the 2011 revision of the OECD Guidelines for Multinational Enterprises. The Guidelines, which were originally adopted in 1976, apply to the current now 34 OECD member states, and outline what these governments expect of business. The 2011 revision aligns with the UNGP and includes a new chapter on human rights with reference to 'due diligence' – a concept embedded within the UNGP, which we elaborate below. The European Union has also endorsed the UNGP, and invited Member States to develop national plans for implementing the UNGP by the end of 2012. For individual states, new legislation such as the 'Dodd-Frank Wall Street Report and Consumer Protection Act' passed by the US Congress in 2010 has ushered in new corporate reporting requirements specifically in the context of conflict minerals (Earthworks 2010), although it is expected that the concept will be applied more generally.

A number of voluntary schemes have also aligned with the UNGP. The ISO 26000 Guidance on Social Responsibility (ISO 2010), for example, was revised to be consistent with the intent and substance of the UNGP (Atler 2011). The UN's flagship business and human rights scheme, the UN Global Compact (which was established and overseen by Ruggie a decade earlier) has released a guidance tool about the UNGP to support and enhance their implementation by businesses (UNGC 2011). The Office of the UN Office for the High Commissioner on Human Rights (2011) has also released an Interpretive Guide, providing guidance on the business responsibility to respect human rights.

Some stakeholders are concerned about the absence of enforcement provisions in the UNGP and the lack of ability to hold companies to account for human rights abuse (e.g. Amnesty International 2011, SOMO 2012). Certainly, not all countries have been willing to embrace the legal aspects relating to the 'protect' pillar of Ruggie's *Protect, Respect and Remedy* framework. Despite ongoing contention on the issue of 'enforceability', the intensity of the business and human rights debate has bolstered the strength of non-government organisation (NGO) campaign platforms by raising the profile and currency of the important issue of human rights abuses by companies (e.g. Human Rights Watch 2011). The UNGP are undoubtedly the most authoritative instrument in this realm. Their endorsement by the UN Human Rights Council has given weight to the notion that businesses have human rights responsibilities. This level of support has not previously been seen in the history of the debate about non state actors, or indeed the UN. Although the weaknesses inherent in the UNGP continue to be debated, there is no doubt that they provide an unprecedented global reference point for businesses to demonstrate their respect for human rights.

The UNGP, due diligence and impact assessment

Principle 17 of UNGP proposes the concept of 'human rights due diligence' as a mechanism for improved practice and a method for demonstrating respect for human rights. In the domain of business, the notion of human rights due diligence is as much routine as it is revolutionary. It is routine in the sense that businesses customarily conduct due diligence to satisfy themselves that a proposed business action, transaction or acquisition has no hidden risks to the business. It is revolutionary in the sense that instead of only considering risks to the business, human rights due diligence requires the business to consider risks to people. While the two approaches are not mutually exclusive, human rights due diligence requires a 180 degree shift from an approach that focuses solely on the business entity to one that has an equivalent focus on the human rights of individuals and groups affected by a business's activities or relationships. Ruggie (2010, p. 3) described human rights due diligence as a "game changer" in the sense that it moves the debate from only "naming and shaming" to also "knowing and

showing". 'Naming and shaming' is a third-party response to the failure of companies to respect human rights, whereas 'knowing and showing' represents the internalisation of that respect by companies themselves through comprehensive human rights due diligence and reporting processes.

While the concept of due diligence lies at the heart of the corporate responsibility to respect human rights, impact assessment and the concept of human rights impacts are integral to any human rights due diligence process. The UNGP describes due diligence as a process that companies should undertake "to identify, prevent, mitigate and account for how they address their impacts on human rights" (Principle 15). The process should include: "assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed" (Principle 17). The UNGP explains the importance of undertaking a comprehensive due diligence process that considers whether a business causes, contributes to or is linked to adverse human rights impacts through its business relationships. Thus, undertaking ex ante impact assessment and regular ex post audits is essential for a company to respect human rights.

While human rights was always a consideration in SIA (Vanclay 2002, 2003, 2006), the reality is that they were seldom systematically considered in SIA practice (Maassarani et al. 2007). Following the Ruggie mandate and with increasing corporate interest in the business and human rights agenda, as well as with a change in SIA practice from the production of point-in-time reports of predicted impacts to a regulatory agency to being "the process of managing the social issues" (Vanclay 2004, p. 269; Vanclay 2012, p. 150; Esteves et al. 2012), SIA should now fully incorporate the assessment and management of human rights issues. The UNGP provides a stronger legal mandate than has existed in the past in terms of considering of social issues, now under the guise of human rights. Under the UNGP, project-affected peoples are no longer simply stakeholders or impacted communities; they are rights-holders with legitimate interests that need to be respected.

The burgeoning interest in business and human rights has given rise to a blossoming human rights impact assessment fraternity. While some in the fraternity connect with SIA, most come from a legal or para-legal background and do not necessarily connect with impact assessment. Human rights impact assessment (HRIA) differs from SIA in the sense that it proceeds from a clear starting point of the internationally recognised rights, whereas SIA proceeds following a scoping process whereby all stakeholders (including the affected communities) nominate key issues in conjunction with the expert opinion of the assessor in terms of what the key issues might be based on experience in similar cases elsewhere and a conceptual understanding.

While advances in SIA have been important in terms of managing impacts (Esteves et al. 2012; Vanclay & Esteves 2011), without specific consideration of all established human rights norms, it is possible that they might not all be considered. Therefore, impact assessment that provides comprehensive coverage of human rights would need to consider how a policy or project interacts with the full range of human rights by using agreed international human rights standards as the primary reference point and considering additional legal instruments that may have relevance. The systematic inclusion of human rights in this way will represent a significant shift in SIA practice in the coming years.

Challenges of integrating human rights into impact assessment practice

In many ways, the *Protect, Respect and Remedy* framework and the UNGP could be interpreted as clarifying and perhaps streamlining the myriad expectations that fall under the ever-broadening rubric of corporate social responsibility (CSR). From an impact assessment perspective, however, the issue of human rights brings with it a number of conceptual and operational challenges (discussed below) that are not immediately apparent when engaging in global debates about the human rights responsibilities of businesses.

Communicating human rights concepts

Business and human rights is a complex and specialised field characterised by legalistic language. A key challenge for the impact assessment community is to communicate human rights impacts in a language that businesses and other stakeholders can understand and respond to. The international human rights discourse introduces a new lexicon of responsible business, which requires a certain level of expertise or familiarity with international human rights law to engage with accuracy and precision. Principles 16 and 18 of the UNGP explicitly require that appropriate 'expertise' be utilised. As such, this area has increasingly become an arena for specialists with particular knowledge, rather than the domain of generalists. The high level of expertise required to assess human rights may be problematic, at least from an organisational change perspective. To successfully mainstream human rights into business, experts must ensure that the language, discourse and knowledge of human rights is somehow accessible to non-experts, including those within the business sector who may not have previously engaged with human rights language.

The challenge of connecting the discourses of human rights and conventional business was an issue canvassed by Ruggie (2010), who emphasised the need to engage business in order to influence conventional practice. HRIA may need to present findings and recommendations through mainstream business language (e.g. risk, cost, benefit) when communicating a human rights message, but overuse of conventional business concepts may inhibit the take-up of those ideas. Instead of gaining influence, the new language runs the risk of being subsumed within dominant industry constructs, or being positioned as an 'alternative' language that exists at the fringes of corporate practice. It is important that, as part of the assessment

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process, HRIA raises awareness of human rights so that it acquires meaning in corporate policy and practice. Careful and considered use of language can help to facilitate changes when the right balance is struck between organisational receptivity and resistance (Hardy et al. 2000, Kemp et al. 2010b). Embedding human rights requires sensitivity to existing systems within the organisation in order to achieve buy-in, particularly with managers and decision-makers who are unfamiliar with human rights concepts, processes and practices. Harrison (2011) has called for more research into the ways in which the HRIA process can be made accessible to a wider range of users while not losing its underlying robustness.

The challenge of change for business and the impact assessment family is significant given the nature of the discursive and conceptual shifts that accompany a human rights perspective. A case in point is the changing nature of what constitutes a 'key stakeholder', a core construct of CSR theory (Carroll 1991; Campbell 2007; Banerjee 2008; Brammer et al. 2011; EC 2011). No longer are 'stakeholders' the dominant theoretical construct, but rather 'rights-holders', 'duty-bearers' and 'responsible parties' are now central to the expanded notion of CSR. All individuals and some groups (such as Indigenous groups) hold human rights and are considered to be 'rights-holders'. In the context of business and human rights, the language of 'rights-holder' is used to refer to people whose rights have been (or may be) impacted by a decision or activity. While all stakeholders are in some way rights-holders, not all human rights of all stakeholders are put at risk in every circumstance. When using a human rights lens, impact assessors and businesses must focus on rights-holders who are affected by policies or projects, including the issue of direct and indirect responsibility for impacts. These and other shifts in language have the potential to complicate the human rights message and the generation of shared meaning between HRIA experts, impact assessors and the business community.

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Approach to human rights and impact assessment: dedicated, integrated and issue-specific

Another challenge in connecting human rights and impact assessment is determining the appropriate approach for assessing human rights impacts; specifically, whether the assessment should be undertaken through a dedicated, integrated or issue-specific approach. Decisions about the approach to human rights and impact assessment have implications for scope, resourcing, expertise and methodology. In any case, the common feature in each of these approaches is that human rights is deliberately and explicitly considered, providing an evidence base for alignment with international human rights standards, and highlighting the need to change and transform established ways of conducting business.

A dedicated approach is captured by the term 'human rights impact assessment'. Various notions of HRIA have been utilised since the late 1990s by specialist human rights organisations, such as human rights institutes, commissions, NGOs, government and intergovernmental organisations (Harrison 2011). Some business and human rights practitioners use the terminology of HRIA on the assumption that dedicated assessments were implied by the UNGP; however, Ruggie was not specific on the form that impact assessment should take. Nonetheless, there are several companies that now undertake or require a dedicated HRIA as a part of doing business (*e.g.* BHP Billiton 2012). Some practitioners describe dedicated HRIAs as 'drawing on' SIA (Hunt & MacNaughton 2011), whereas others position HRIA as 'distinct from' SIA (Graetz & Franks 2013). Clearly, there are different interpretations on the point of whether HRIA is related to, or indeed an extension of, SIA or other forms of impact assessment (Kemp et al. 2010a).

Some organisations advocate integrated assessments as the default approach, where human rights are embedded within the scope of environment, social and health impact assessments (IPIECA in press). This approach would require the integration of human rights specialists into an assessment team and/or for generalist assessors to update their knowledge to the extent that they could cover this domain. Issues of expertise aside, an integrated assessment raises other issues in a multi-disciplinary impact assessment frame. SIA has traditionally been the weaker impact assessment discipline (Burdge 2002; Maassarani et al. 2007), largely because of the challenge of defining, predicting and measuring social change and impact, in addition to legal and regulatory frameworks that are persistently weak or ineffectual in terms of social impact (Esteves et al. 2012). In integrated mode, human rights may find itself 'competing for space' in an already weak area of impact assessment practice. This issue tends not to be discussed in documents providing guidance on integrating human rights into impact assessment.

Whether a dedicated or integrated approach is preferred, it may be necessary to tailor an assessment to a specific need, circumstance, situation or issue. An integrated assessment may, for example, highlight a need to understand a particular issue in more depth, in which case specialised human rights assessments may be commissioned. Similarly, a specific HRIA process may be warranted in the case of resettlement, when there is conflict, or where a group of people have suffered egregious harm. Alternatively, an issue-specific assessment may be triggered by a concern lodged through a project-level grievance mechanism. There are a range of possible approaches to assessing human rights impacts, including a desktop assessment of already completed environmental impact assessments or SIAs to determine the degree to which human rights considerations were covered in prior assessments. Whether a retrospective study would meet the intent of the UNGP in some circumstances, or would only ever be a preparatory step, is not entirely clear, but at a minimum, such a review would hopefully serve to draw attention to human rights considerations.

Operational challenges

Despite the recent focus on business and human rights, frameworks for assessing human rights impacts are still relatively immature. Nonetheless, there are important issues to consider, not least of which are how methods

used to engage individuals and groups can impact on human rights such as freedom of expression, self-determination and non-discrimination. One important challenge emerges in jurisdictions where discussing human rights is forbidden or inhibited, governance frameworks are weak, corruption is high, human rights awareness is low, and/or where civil society activism is constrained by the state. In these jurisdictions, stakeholders may be unaware of their rights under law, and may not frame issues in a rights language, even where issues may relate directly to human rights. In traditional societies, rights to land and water are typically negotiated and based on customary tenure, social exchange and group interaction, rather than internationally conceived notions of 'universal' rights and duties. An impact assessment must be aware not only of international and national legal frameworks, but also the micro-context, including how issues are framed and negotiated in the local culture. While SIA practitioners face these challenges irrespective of whether human rights impacts are being explicitly addressed, this 'global to local' knowledge base is central to human rights impact assessment. Misinterpretations can result in misreading particular situations.

In some jurisdictions, stakeholders may not claim their rights or seek to hold the state or companies to account for violations or abuse, largely owing to the political context. Some individuals and/or groups would face persecution for even suggesting that impacts may constitute a corporate human rights abuse. This does not render human rights irrelevant, but rather calls attention to the challenges for an assessment team seeking to understand business-related human rights risks and impacts. The process for assessing rights in these contexts will require alternative methodologies. For situations where direct consultation may put groups at risk, it may be necessary to engage third parties, such as NGOs or other agencies or individuals who have worked closely with particular groups. Assessment teams must be vigilant about ensuring that individuals and groups are not put at risk by virtue of the human rights assessment itself. These situations raise the question of how (or indeed whether) an inclusive or participatory assessment can be undertaken if there is a risk of backlash.

It can be particularly difficult to engage with the issue of human rights where social and cultural protocols prevent or inhibit engagement with some groups or individuals. For example, in some cultures women are discouraged from participating in public meetings, or are prevented from meeting with outsiders where men are not present (Srinivasan & Mehta 2003; Lahiri-Dutt & Ahmad 2011). However, it cannot be assumed that, because women or other groups do not participate in an open meeting that they do not influence the process, as O'Faircheallaigh (in press) has highlighted in the context of gender and agreement-making in mining. At other times, lack of participation in the assessment process can relate to more practical aspects of assessment, such as the timing of meetings, the availability of translators and so forth. Nonetheless, it is important that the complex issue of local culture vs universal norms is addressed so that the human rights assessment process itself does not inadvertently privilege particular people or practices, and upholds human rights in the process. This challenge is amplified in impact assessments that seek to connect universal human rights and context-specific impact assessment processes.

Internalising the responsibility to respect

The prominence of the human rights discourse globally and the proliferation of human rights organisations in the face of continued violation and abuse raises important questions about putting principles into practice (Ergas 2009; Harrison 2011). Certainly there have been long-standing debates about the effectiveness of international human rights law and whether it makes a difference in terms of a country's human rights performance. Hathaway (2002), for example, completed an extensive study into the relationship between human rights treaties and human rights practice and found that, although countries that had ratified treaties had generally better practices than those that had not, non-compliance with treaty obligations was common. Hathaway concluded that not only was treaty ratification not infrequently associated with the *worst* human rights practices, but also that treaty ratification accrues reputation points and results in a reduced pressure to comply in practice. In the business and human rights arena, the risk that companies 'sign on' to international human rights standards with limited enforcements mechanisms and subsequently benefit in terms of reputation credits is significant. For the SIA community, the challenge is in ensuring that human rights and impact assessment processes provide mechanisms through which businesses can internalise or integrate human rights thinking in practice.

Following endorsement of the UNGP by the UN Human Rights Council on 16 June 2011, many companies incorporated human rights commitments into their policies, management systems and procedures (IHRB 2012). To be effective, management systems must provide useful information so that a business can avoid infringing upon human rights in its business activities and relationships (Boele et al. 2001). The challenge, however, is ensuring that HRIAs are a meaningful rather than superficial response to the emerging agenda. Companies can create policies, mechanisms and processes, but ultimately, alignment will be measured by a company's ability to link impact assessment to decisions and actions. In fact, implementation of normative guidance is considered to be one of the most significant challenges in the business and human rights arena (IHRB 2012), and impact assessment could play an essential role in this process.

Kemp et al. (2010) described a range of barriers relating to the implementation of a 'water and human rights' perspective in mining, including: disciplinary barriers between the dominant engineering and natural science professions and the minority social science professions; and lack of team integration both intra (i.e. within departments) and inter (i.e. between departments). There were also hierarchical considerations. Human rights policies are usually driven by corporate head-offices,

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whose representatives have engaged at the global level, whereas operational personnel – who are required to implement corporately mandated policies – are rarely involved in any substantive sense. Clearly there are both disciplinary and organisational factors to consider in policy development and implementation, as well as the methodological challenges outlined above.

The challenges associated with embedding knowledge from impact assessment into organisational realities are well recognised (Esteves & Vanclay 2009; Kemp 2011). However, the emphasis of impact assessment – even leading practice impact assessment – continues to focus on the impact that a policy or practice has on the external stakeholders or the bio-physical environment, rather than also considering organisational aspects. Rarely does the scope of an impact assessment include the project proponent's ability to understand or respond to assessment findings or recommendations (Kemp 2011). This lack of focus on internal or organisational dynamics continues to limit policy implementation, planning and integration of social considerations into organisational processes. An assessment of internal capacity and organisational capability may serve to open up space for capacity building as a prelude to, or in conjunction with, a human rights impact assessment so that non-expert managers and decision-makers can engage with the assessment process and potentially co-create forward strategies. Internal assessment may also serve to identify organisational barriers and enablers to human rights take-up so that constraints can be addressed from the outset. In the context of business and human rights concerns, organisational process considerations are more relevant than ever. Organisational diagnostic work would also enable adjustments to organisational structures and processes that support a business and human rights perspective, rather than relying only on an agency-based model where external assessors and other internal champions continually push for change from the periphery.

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What role should advocacy play in impact assessment practice?

In the arena of business and human rights, campaigners and advocates have played and will continue to play a prominent role in driving an agenda for change. Alternative voices have long sought to open up space for public debate about business and human rights, including capacity building for civil society (SOMO 2012). With human rights entering mainstream business discourse, the issue becomes one of whether, and if so how, advocacy and assessment can constructively co-exist within a common frame. Human rights stems from an advocacy tradition that applies external pressure to raise awareness of particular issues in order to trigger a response. Impact assessment, on the other hand, stems from a permitting tradition that utilises project plans and processes as the basis for engagement. This is particularly so for environmental impact assessment, to which SIA remains connected in many cases.

Contemporary SIA encourages broad-based consultation, meaningful participation and transparency of assessment findings (Esteves et al. 2012; Vanclay 2003). However, the limited availability of corporate-commissioned HRIAs seems to suggest that confidentiality, rather than transparency, is standard practice. This tends not to be the case for NGO/civil society-driven SIAs, as demonstrated by Watson et al. (2013), where the HRIA was explicitly used as a campaign tool and a strategic lever to prompt industry change. Corporate-commissioned HRIAs may represent a shift from "naming and shaming" to "knowing and showing", but the lack of publicly available assessments raises questions about alignment with contemporary approaches to SIA, other than in exceptional cases, such as the Marlin Mine HRIA (On Common Ground 2010).

Whatever the approach to change, rarely will impact assessors hold formal authority in the organisational realm. Assessors are typically external to the project proponent organisation and hold only *informal* authority by virtue of their specialisation. They must therefore be adept at identifying and using effective levers for change. The point has been made above that this will require familiarity with context, including organisational dynamics. Assessors need to be well informed about the internal domain in order to calculate the tactical concessions that they may need to make in order to effectively raise human rights issues of significant concern. Assessors cannot afford to isolate themselves from project proponents as they will, in effect, lose influence. In the language of adaptive leadership, systems distress must be kept within the productive range (Heifetz 1994; Heifetz et al. 2009).

This, in turn, raises important ethical issues. If, for example, assessors find that a company has directly or indirectly caused or contributed to an abuse of human rights, assessors must be clear about what they do with this information, including how such abuse is to be reported within – or outside – the impact assessment frame. This is where the delineation between assessment and advocacy becomes less clear. These and other challenges must be discussed and debated within the assessment community to ensure that its own core values are upheld in each and every impact assessment.

Conclusion

Human rights are firmly established on the global agenda. Expectations of business in relation to human rights have increased markedly, as has industry's willingness to engage in the debate. Much progress has been made in terms of clarifying the roles and responsibilities of different actors, and the necessary processes to ensure that companies achieve at least minimum performance. While some clarity has been provided through the Ruggie mandate, the business and human rights agenda is far from static and continues to evolve. It is impossible to predict which points of contention will be resolved and which will continue to generate conflict into the future. Some questions are likely to fade from prominence, such as whether integrated or

stand-alone HRIAs should apply – clearly, it will be a case of 'fit for purpose'. The greater issue is how to make rapid gains in the methodological realm, especially because a philosophy or culture of 'shared practice' is perhaps underdeveloped in this sector as companies try to obtain a competitive advantage in social performance.

As some issues are resolved, others will come to the fore. Issues likely to gain momentum include questions relating to how FPIC should be implemented, and about appropriate accountability mechanisms in cases of human rights abuse. One issue that has not been as prominent in debates about business and human rights is the role of business in improving the enjoyment of human rights. The focus of the current debate has been on harm minimisation, rather than realising rights and enhancing enjoyment, which was considered outside the scope of the Ruggie mandate. In effect, the current business and human rights discourse is largely framed in the negative, emphasising 'harm' and 'avoidance' and therefore does not tend to speak to broader debates, where 'development benefit' and 'shared value' sit at the forefront (Esteves & Vanclay 2009; João et al. 2011). While the point was clearly made in the *Protect, Respect and Remedy* framework that companies cannot offset human rights harm by doing good deeds elsewhere, substantive discussion about the link between human rights and human development has not been as prominent, despite the fact that a human rights-based approach has gained currency in the development sector and that companies often make substantial contributions to human rights enjoyment. Rarely are these contributions framed from a human rights perspective. It will be interesting to see whether human development and rights discourses forge closer connections over time, particularly in the context of the urgent need to accelerate progress in the achievement of other human rights-related frameworks, such as the UN's Millennium Development Goals, towards which several companies have indicated their support.

The role that impact assessment can play in contributing to these debates is considerable. The impact assessment community can play an important support role in helping companies determine their level of compliance with voluntary commitments and international human rights standards. Alternatively, it can take a more active role by advocating for improved human rights performance. Impact assessors also have an opportunity to build on the current momentum and identify other points of connection, not taken up in this paper. For example, impact assessment provides a key opportunity to strengthen the focus on access to remedy. The remedy landscape is important in any given development context, and impact assessment has an important role to play in understanding the effectiveness of existing mechanisms, in addition to highlighting the need for additional grievance mechanisms to fill an identified remedy gap. The UNGP states that the value of grievance mechanisms is to identify impacts and facilitate early remediation. The connection between impact assessment and the remedy pillar deserves careful thought and attention.

In this article we have provided an introduction to the business and human rights debate and considered many complexities associated with establishing a stronger connection between human rights and impact assessment. We have also highlighted several opportunities for impact assessment to meaningfully contribute to the emerging business and human rights agenda – in fact we suggested that impact assessment provides one of the cornerstones of the business responsibility to respect human rights. The UNGP provides impact assessment with a global authority that has never before underpinned impact assessment practice. Human rights offers a powerful pathway to renew and rejuvenate the very meaning of impact assessment and, with a commitment to shared learning and innovation, the impact assessment community could, in turn, support a global agenda for change.

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