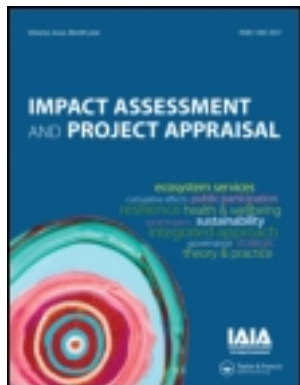


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Establishing a meaningful human rights due diligence process for corporations: learning from experience of human rights impact assessment

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The United Nations Special Representative of the Secretary-General on Business and Human Rights, Professor John Ruggie, has constructed a new international framework, which is set to become the cornerstone for all action on human rights and business at the international level. The principle of human rights due diligence (HRDD) is the central component of the corporate duty to respect human rights within that framework. This article argues that Ruggie's HRDD principle contains the majority of the core procedural elements that a reasonable human rights impact assessment (HRIA) process should incorporate. It is likely that the majority of corporations will adopt HRIA as a mechanism for meeting their due diligence responsibilities. However, in the context of the contentious debate around corporate human rights performance, the current state of the art in HRIA gives rise to concerns about the credibility and robustness of likely practice. Additional requirements are therefore essential if HRDD is to have a significant impact on corporate human rights performance – requirements in relation to transparency; external participation and verification; and independent monitoring and review.

Keywords: due diligence; human rights impact assessment; John Ruggie; United Nations Guiding Principles; multinational corporations; transnational business

Introduction

The United Nations (UN) Special Representative of the Secretary-General on Business and Human Rights, Professor John Ruggie, undertook six years of research and consultation from 2005 to 2011, examining the relationship between corporations and human rights (refer to Kemp & Vanclay 2013). The main fruits of this labour are the 'protect, respect and remedy' Framework (Ruggie 2008a) and the UN Guiding Principles on Business and Human Rights (Ruggie 2011), which work towards the implementation of the Framework. The Framework addresses the 'what' question: what States and business enterprises need to do to ensure business respect for human rights. The Guiding Principles address the 'how' question: how to move from the conceptual framework of responsibilities to practical, positive results on the ground (Human Rights Council 2011a). The Framework and Guiding Principles have been universally endorsed by the UN Human Rights Council, leading Ruggie himself to claim that they are 'the authoritative global reference point for business and human rights' (UN News Centre 2011).

Early signs support Ruggie's claims and suggest that the Framework and Principles will become the cornerstone for all action on human rights and business at the international level. The UN Human Rights Council established a 'UN Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises' (UN Working Group) to promote the Framework and Guiding Principles in a variety of ways, including through dissemination, exchange of good practices, country visits and ongoing dialogue (Human Rights Council 2011b). The Framework has been utilized by the OECD in their 2011 version of the *OECD Guidelines for*

Multinational Enterprises (OECD 2011); the European Investment Bank is incorporating the Framework into its project social performance standards; and key concepts also find their way into the International Organization for Standardization ISO 26000 Guidance on Social Responsibility (ISO 2010). In addition, there are increasing instances of individual governments utilizing the Ruggie Framework and Principles as the basis for their own national strategies on human rights and multinational corporations (e.g. UK Government 2011). Therefore it is important that the Framework and Guiding Principles are carefully scrutinized in order to better understand what their impact will be in relation to corporate human rights performance.

This article concentrates on one specific aspect of the Framework and Guiding Principles – the concept of 'human rights due diligence'. Human rights due diligence is a (if not 'the') central element of the Guiding Principles. It is certainly the biggest single responsibility placed on businesses as a result of Ruggie's work. This article argues that Ruggie's human rights due diligence (HRDD) has a strong resemblance to human rights impact assessment (HRIA) and contains many of the core procedural elements that other forms of impact assessment generally entail. It also argues that it is highly likely that the majority of corporations will utilize HRIA as the mechanism for complying with Ruggie's HRDD obligation.

However, the article presents evidence that the context in which this corporate HRDD obligation is being introduced is very different to other forms of impact assessment. The history of the business and human rights debate and the stage of development of HRIA mean that there is a need to scrutinize carefully the type of practice that is likely to occur as a result of Ruggie's Framework

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and Guiding Principles and to learn lessons from previous experience of institutionalizing HRIAs. The article argues that such experience dictates that there are certain core essential issues, beyond those set out by Ruggie, that must also be addressed if human rights due diligence is to be effective. Three requirements are set out that must become integral to the HRDD process: requirements of transparency; external participation and verification; and independent monitoring and review. Finally this Article makes the case that the UN Working Group should be the body that is the main catalyst for action on these issues.

The article is based on the author's review of the Ruggie Framework and existing analyses and practice in relation to the Framework. It also draws extensively on HRIA practice, commentary and analysis across a wide range of sectors, as well as the author's own experience of undertaking HRIAs and advising on HRIA methodologies.

This article evaluates the potential and limitations of Ruggie's principle of HRDD in terms of the opportunity costs of its adoption for those Ruggie seeks to assist – communities and individuals affected by business activities (Ruggie 2010, para. 6). HRDD is the central obligation placed on corporations with regard to their human rights performance. Furthermore, HRDD is operating within a Framework, which as discussed above, is set to be the foundation for all action on human rights and business at the international level for the foreseeable future. Therefore, for the HRDD principle to be deemed effective and valuable, it must lead to widespread adoption of robust and meaningful HRDD processes by corporations globally, which, as a result, lead to improved human rights performance on the ground (Melish & Meidinger 2012). A few isolated examples of good practice will not represent the transformational change that justifies the focus and energy which international organizations, States, businesses and other actors are investing in the Ruggie Framework.

Human rights due diligence and its relationship to human rights impact assessment

The HRDD obligation is the central component of the corporate obligation to respect human rights. Ruggie defines human rights due diligence as 'the steps a company must take to become aware of, prevent and address adverse human rights impacts' (Ruggie 2008a, para. 56). Ruggie argues that businesses can potentially impact on almost all 'internationally recognized rights' (Ruggie 2008a, para. 52). Therefore, companies should consider all such rights in undertaking HRDD, while paying special attention to rights that are particularly relevant to the sector in which they are operating. For instance, an internet service provider may have to pay particular attention to the right to freedom of expression and the right to privacy, but this would not be such a central concern of HRDD for a mining company.

Ruggie argues that human rights due diligence can be 'a game-changer' for companies. It can transform a company's relationship with human rights from one based

primarily on 'naming and shaming' by external actors for failures by companies to respect human rights to one of 'knowing and showing' by companies in relation to their own human rights performance (Ruggie 2010, para. 80). There *could* be a number of potential benefits of this 'knowing and showing' approach. A potential result is that companies might develop greater ownership of their human rights performance as they consider the human rights issues they face during the process of policy development and reflection on existing practice, rather than primarily engaging with human rights only when they are subject to external challenge. Human rights due diligence might also have an impact on overall corporate culture by enabling human rights to be mainstreamed within corporate thinking and decision-making. It could thereby transform managerial attitudes so that managers start to regularly take into account human rights issues in their decision-making processes. HRDD could also lead to the development of policies that are designed to respect the human rights of *all* groups and individuals (potentially) affected by a company's activities, rather than only those who have the resources to make challenges and bring cases to courts (Harrison & Stephenson 2010). So there is potential for HRDD to have a profound effect on corporate human rights performance. However, the question remains whether that potential can be translated into actual transformative change in practice. To begin to scrutinize this question, there is a need to carefully analyse the HRDD process as Ruggie envisions it.

Ruggie sets out his conception of what HRDD entails in considerable detail in five of his Guiding Principles. While Ruggie does not explicitly use the term 'human rights impact assessment', the HRDD process Ruggie describes contains the core procedural elements that a reasonable HRIA process should entail. It includes a screening or prioritization process so that companies undertake assessments where human rights risks are greatest (Principle 17); consultation with stakeholders and otherwise gathering of evidence of potential or actual impacts (Principle 18); analysis of impacts in relation to recognized international human rights standards (Principle 18); action to prevent or mitigate any adverse impacts that have been identified (Principle 19); monitoring or tracking of the effectiveness of their response to impacts identified (Principle 20); and communication with relevant stakeholders about how human rights impacts are being addressed (Principle 21). These elements will be very familiar to those acquainted with HRIA processes. Existing corporate HRIAs, as well as HRIAs in a range of other fields (e.g. HRIAs of international trade agreements), tend to include these core procedural elements as essential parts of conducting an HRIA (Harrison 2011). There is some variation among other types of impact assessment such as Social Impact Assessment and Environmental Impact Assessment. Neither of these, for example, analyses impacts in relation to human rights standards. However, they do adopt core procedural elements analogous to those found in the HRDD principle.

It should be stressed that Ruggie at no point uses the term 'human rights impact assessment' as the process through which his due diligence should be accomplished.

He does, however, talk of ‘assessing human rights impacts’ a number of times in the Guiding Principles. He also recognizes that companies are already conducting environmental and social impact assessments and it may well be a natural extension of those processes to combine them with HRIAs (Principle 18). Undertaking an HRIA is not therefore the *only* way in which companies can meet the HRDD obligation, but it does seem to be the most likely mechanism that corporations will utilize. This supposition is supported by existing practice in the field. There are already significant initiatives that have been undertaken for designing models for HRIAs with regard to corporations (Aim for Human Rights 2009, International Finance Corporation 2010). A number of transnational corporations have adopted HRIA as a process for dealing with human rights concerns raised by their businesses, including the mining company Goldcorp, the internet company Yahoo!, the Food Company Nestlé, and the energy firm BP (all discussed below). Many other companies have made public statements in relation to how they are meeting the HRDD obligation by integrating human rights into existing impact assessment processes.

A number of non-corporate actors have undertaken HRIAs of transnational corporations. Most notably, the non-profit research and policy organization, Nomogaia, has produced four HRIAs of corporate projects: Paladin Energy’s Kayelekera Uranium Project in Malawi; Green Resources’ Tree Plantations in Tanzania; the Nuiguvo Project, a gold and silver mine in Indonesia; and Dole’s El Muelle plantation in Costa Rica (Nomogaia 2009a, 2009b, 2010a, 2010b). Rights and Democracy (an independent agency funded by the Canadian Government) have undertaken HRIAs of corporate activities in the Philippines, Tibet, the Democratic Republic of Congo, Argentina and Peru (Rights and Democracy 2007). Industry associations where human rights are a concern are suggesting that either standalone HRIAs or combined human rights, social and environmental impact assessments are the most appropriate mechanism for implementing the HRDD obligation (e.g. ICMM 2012; IPIECA 2012). Scholars are also suggesting that HRIA will form the basis for human rights due diligence (e.g. Deva 2012; Melish & Meidinger 2012). Consequently, there are many reasons for believing that the majority of corporations will see HRIA (often integrated into existing social and environmental impact assessment processes) as the preferred mechanism for fulfilling their HRDD obligation.

The importance of context: recognizing the origins of the human rights and business debate and the state of the art in HRIA

Examination of the potential of HRIA to improve the human rights performance of corporations needs be undertaken with two key contextual issues taken into account. First, it is important to recognize the origins of the debate around corporate human rights performance, the particular pressures that this is likely to bring to bear on the process and the need to respond effectively to those

pressures. Second, it is important to recognize the relatively low level of consensus around shared values and appropriate standards of good practice in HRIA. These issues are discussed below.

The Ruggie Framework has come about as a result of many years of pressure for effective international action to tackle corporate human rights abuses. This pressure has primarily been fuelled by high profile allegations of human rights abuses by transnational corporations including ‘sweatshop’ labour in the apparel and footwear industries in Asia, Shell’s actions in the Niger Delta in Nigeria, the complicity of Unocal and Total in forced labour in Burma, Google and Yahoo!’s acceptance of censorship in China, Coca Cola’s deprivation of local communities of water in India, and the use of highly poisonous pesticides in banana plantations in Central and South America. However, allegations of human rights abuses by corporate actors are more widespread in relation to an even broader range of civil and political, economic, social and cultural and labour rights issues (see Ruggie 2008b, para. 58).

At the same time, the failures and inadequacies of existing international mechanisms for effectively tackling these human rights issues are well catalogued and have been the subject of much criticism by a wide range of civil society actors (Harrison 2010a). Most analogous to the HRDD process, a wide range of companies have utilized various self-regulatory processes in order to respond to criticism of their human rights performance. Ruggie identified the problem with existing self-regulatory initiatives, arguing that their quantity has not been matched by their quality. Problems include the fact that ‘companies do not necessarily recognize those rights on which they have the biggest impact’, interpretations of rights can be so elastic that they lose all meaning and become ineffective as a measure of performance and that ‘anecdotal descriptions of isolated projects and philanthropic activity often prevail’ (Ruggie 2007a, p. 21).

Past scepticism of self-regulatory processes means that there is likely to be intense scrutiny of companies utilizing HRIAs in order to meet their HRDD obligations. Relevant stakeholders will want to be re-assured that an HRIA represents a robust and meaningful process that will identify the most significant human rights risks and concerns, even where the identification of such issues might be seen as causing problems for the companies concerned. It therefore becomes even more important to examine the degree to which there are shared understandings in relation to the HRIA process, and that these shared understandings can act as a firm foundation for future practice in the field.

As stated above, the due diligence process Ruggie describes contains most of the core procedural elements that a reasonable HRIA process should entail. However, far more important than the formalities of the adoption of the procedural elements prescribed is the manner in which each element of the process is actually conducted in each individual HRIA. There is now considerable practice in undertaking HRIAs across a range of subject areas. In addition to the HRIAs of corporations as outlined above, there is a growing body of assessments (as well as

toolkits and guidance) in relation to HRIAs of international trade agreements; HRIAs of the health rights of women; children's rights impact assessments; HRIAs of public spending decisions; HRIAs by public authorities of their policies and practices; and a range of other HRIAs that do not fit neatly into the categories above (Harrison & Stephenson 2010; Harrison 2010b, Harrison 2011). The Human Rights Impact Resource Centre (<http://www.humanrightsimpact.org>) catalogues a wide range of HRIA initiatives. Analysis of existing practice demonstrates that there is great variation and significant divergence about what the HRIA process does as well as should entail (Harrison & Stephenson 2010; Harrison 2011).

Most interesting and novel for a generalist impact assessment audience is the issue of the human rights framework within which the assessment process takes place. One of the key strengths of utilizing human rights as the analytical basis for impact assessment is that HRIAs measure impacts in terms of codified human rights standards that are the legal obligations of governments. The content of these rights, and the obligations to which they give rise, have been elaborated in case law, or at the very least in expert commentary by academic scholars. This *potentially* gives them a more secure and precise normative foundation than, for example, social impact assessment where the theoretical and philosophical foundations that form the basis for assessment are more contested (Vanclay & Esteves 2011). In fact, the core principles of social impact assessment rely heavily on human rights obligations and values (Vanclay 2003). Therefore, understanding how human rights norms and standards have been utilized in HRIA practice is important for the wider impact assessment community.

Translating human rights obligations contained in national and international legal texts into analytical tools that can form the basis of assessment is a complex and difficult process, made even more so by the divergences among practitioners and scholars concerning how that should happen. There has been much work by UN agencies to put together indicators to measure human rights performance and to monitor the implementation of human rights at the national level. Use of these indicators is now advocated by a range of actors as the way to ensure that human rights obligations are robustly measured during the process of impact assessment (De Schutter 2011). However, there is little evidence of their active use in the majority of existing assessments. In some HRIAs where indicators are used as analytical tools, smaller lists of very context-specific questions are often created, as in the HRIA of the external human rights policy of the European Parliament (EIUC 2006) or the Health Rights of Women Assessment instrument (Aim for Human Rights 2010). Other assessments, more worryingly, do not seem to use human rights standards as tools of analysis at all (Thailand National Human Rights Commission 2006; Harrison & Goller 2008). Existing HRIAs in the corporate field also demonstrate great divergences in practice. For instance, the HRIA of Goldcorp's Marlin Mine (On Common Ground 2010) adopts a very different approach to determining

indicators for assessment than that of Nomogaia (2012) in their impact assessment methodology.

A second example of variation in practice comes in the area of consultation and participation of relevant stakeholders. Scholars generally agree that public participation and consultation are essential to the HRIA process (e.g. Hunt & MacNaughton 2006; De Beco 2009). Indeed, it has been argued that the enshrining of participatory rights in many international and national human rights instruments means that *human rights* impact assessments are particularly well-suited to ensuring appropriate levels of public consultation and participation (e.g. MacNaughton & Hunt 2011).

It is, however, important to recognize that there is evidence of very different levels of consultation and participation in the practice of HRIA. Take, for instance, HRIAs in the field of international trade agreements. At one extreme, right to food impact assessments of various international trade agreements conducted by a coalition of civil society groups included extensive consultation processes that provided much of the evidence-base for the findings of the HRIA (e.g. Paasch et al. 2007). However, an HRIA of the Central American Free Trade Agreement, conducted by a leading commentator and analyst of HRIAs, was limited to consultation with experts (Walker 2009). At the other extreme, the Thailand National Human Rights Commission, which undertook an HRIA of a proposed trade agreement between the USA and Thailand, did not deem it necessary to document any consultation process at all in the final report produced (Thailand National Human Rights Commission 2006). In the field of corporate HRIAs, there are also very different levels of public engagement, for instance between those conducted by Nomogaia and the HRIA conducted in relation to the Goldcorp mine. The latter assessment explicitly acknowledged the limitations of its consultation processes, but at the same time argued that there is a lack of consensus on the degree of participation and consultation that an HRIA requires (On Common Ground 2010).

It is true that there has been criticism across all major forms of impact assessment of the standards of public consultation in relation to a great deal of existing practice (Bond & Pope 2012). However, the particular pressures on HRIA in the corporate field, which have been catalogued above, are such that the credibility of the whole process is far more strongly threatened by inadequacies in relation to acceptable standards of consultation and participation. Failure to adequately consult with affected stakeholders will be very damaging for a process that has been largely constructed as a result of pressure from civil society groups.

Analysis of other key elements of the HRIA process reveals similar divergences in practice and opinion (Harrison 2011). Underlying this is a sense that HRIA is a relatively young form of impact assessment, without a strong sense of shared values, undertaken by a wide range of practitioners from different types of bodies, with no strong professional community to create links between assessors or to forge a sense of common identity or purpose. There are clear risks in seeing HRIA as a widespread mechanism for fulfilling the HRDD obligation

in the context of the divergences in practice outlined above, particularly in light of the intense scrutiny there is likely to be upon the practice that develops.

The one previous attempt to institutionalize a wide-spread impact assessment process across multiple actors in relation to human rights performance has been in the UK.¹ In the UK, public authorities adopted 'equality impact assessment' as a tool for meeting their equality duties under the Equalities Act 2010 and previous equality legislation. The principle of equality created by the UK equality legislation is directly analogous to the principle of non-discrimination found in all major UN human rights treaties. Equality impact assessments measure the impact of policies and practices on particular disadvantaged and vulnerable groups including women, ethnic minorities and those with disabilities. Therefore the equality impact assessment can be conceptualized as a specialized and narrower form of HRIA, which concentrates on the fulfilment of the human rights principle of non-discrimination.

Guidance produced by the UK's Equality and Human Rights Commission advocated a process containing key elements very similar to those recommended by Ruggie in his Guiding Principles, including screening, evidence gathering and consultation, analysis, taking action to deal with impacts and ongoing monitoring and review (EHRC 2009). However, public authorities across the country produced large numbers of equality impact assessments that were, for the most part, 'tick box' exercises 'with little use of evidence to support conclusions, minimal consultation, limited understanding of key human rights and equality principles and little real impact on decision making' (Harrison & Stephenson 2013). A number of these impact assessments were strongly criticized in judicial review proceedings in the UK courts.² Despite numerous adverse court decisions, the overall standards of practice continue to be very poor, so much so that the current UK government has put in place new regulations for public authorities in England which the government has made clear remove any obligation to carry out impact assessments in order to comply with their legal obligations under the Equality Act (Harrison & Stephenson 2012). Relevant bodies in Scotland have reacted differently by attempting to stimulate better forms of impact assessment through working very closely with selected public authorities in order to improve performance (SHRC 2012).

While international corporate actors are clearly very different in many ways from UK public authorities, there are strong reasons for thinking that the problems identified in institutionalizing HRIA processes are likely to be similar. High-level guidance by itself is very unlikely to create widespread and robust HRIA processes, particularly in the absence of any detailed, shared understanding of what key elements of the process (like human rights analysis or consultation) should entail. In fact, the problems are likely to be exacerbated in relation to corporate HRIAs because of the scepticism about existing self-regulatory processes identified above.

There is therefore a significant danger that the high-level guidance provided by Ruggie will lead to widely divergent practice, with some practice being deeply

unsatisfactory and thus, by association, tarnishing other practice as a result. This should be of concern for a wide range of actors. It should be of most concern to campaigners and to those whose rights are being abused by corporate actors because of the dangers that sub-optimal HRIA processes will be insufficient to uncover (potential) abuses. It should also be of concern to companies who genuinely wish to use HRIA as a mechanism for meeting their HRDD obligations. There are dangers that they will not gain the kudos of being associated with a robust and trusted process. Finally, it should be of concern to the impact assessment community. There is likely to be a great deal of public scrutiny of corporate HRIA at a stage in its development where it is not very well understood by many of the actors who will be involved in its implementation. In the next section, we therefore consider the mechanisms that exist for creating a better shared understanding of what the HRIA process might entail, and for ensuring that HRIA can be a credible and trusted process for implementing the HRDD principle.

Mechanisms for enhancing the prospects of robust and meaningful corporate HRIAs

There is both long-term and short-term action required to enhance the prospects of robust and meaningful HRIAs. In the longer term, there is a need to develop a better shared understanding of what HRIA can and should entail. This will evolve partly as a result of the creation of a stronger professional community of HRIA practitioners and scholars, more practice in undertaking HRIAs, more individual and collective reflection on that practice, better resources to support assessments and greater learning from the experiences of other branches of impact assessment that have longer histories of practice and better shared understandings of values and processes (Harrison 2011). However, in the field of corporate HRIAs, there is a particular need to ensure that practice is credible and robust from an early stage of development. Otherwise, as stated above, there is a danger that there will be swift disillusionment from key stakeholders and doubts that HRIA can play a significant role in enhancing corporate human rights performance.

Ruggie seems to believe that the quality of the HRIA process will be scrutinized and standards of performance upheld through the attachment of due diligence processes to harder forms of State-based conditionality. The Ruggie Framework envisions that relevant State agencies will make, for instance, export credit guarantees, investment assurance or development assistance conditional on human rights due diligence processes being carried out (Principle 4). Developments at the European Investment Bank and the OECD described earlier indicate that this is now happening in practice. Other commentators also focus on the potential for legally binding State-based obligations to 'harden' the due diligence obligation and create a legally binding obligation to respect human rights (e.g. Muchlinski 2012).

The linking of HRDD to harder forms of State-based conditionality is vitally important. Once companies realize that there are significant financial incentives for undertaking HRDD (or penalties for not doing so), there are likely to be many more adherents to the process. However, we are not only concerned that HRDD has taken place. Much more importantly, we are concerned that the process and results of HRDD, fulfilled by undertaking HRIA, are credible and robust. The question then arises whether the State agencies that review the HRIAs that are undertaken will, by themselves, be capable of conducting the type of fine-grained analysis of individual corporate performance that is needed in order to distinguish the credible and robust from the weak and inadequate, and whether this will drive up levels of performance more generally. Particularly in a form of assessment like HRIA, where good practice is still developing, it seems highly unlikely that non-specialist agencies will be able to determine requisite standards and effectively distinguish between good and bad practice in terms of, for example, level of human rights analysis or appropriateness of consultation.

Even the potential for judicial review of individual due diligence processes is unlikely to have a significant impact by itself in the all-important early stages of practice. Cases will take a long time to come to the courts. Even when they do, judicial edicts are not the best mechanism for improving performance in the ways that are required. In the UK, even where judges were highly critical of the performance of public authorities in undertaking equality impact assessments, and criticized their processes of consultation, analysis and consideration of findings, this did not lead to widespread adoption of better processes across public authorities more generally. This is because the threat of litigation is rare, and court judgments are not designed to provide relevant actors with detailed guidance as to how to improve future performance.

Stakeholders should therefore be sceptical of the degree to which connecting 'soft' self-regulatory processes to harder forms of conditionality will, by itself, ensure robust and meaningful assessment processes that lead to widespread transformations in human rights performance on the ground. What is required are mechanisms for ensuring that any process which describes itself as an HRIA and which thereby seeks to fulfil the HRDD responsibility has been properly scrutinized and evaluated. This scrutiny and evaluation needs to be undertaken by individuals and groups with detailed knowledge and understanding of the HRIA process and the human rights at issue *before* HRIAs reach the stage where State agencies or courts are conducting their own inquiries. The latter inquiries may then be significantly aided and strengthened by the earlier scrutiny and evaluation that has been undertaken.

Below, three issues are discussed where, I will argue, minimum standards must be clearly set out *now* to ensure that effective scrutiny and evaluation can occur: first on transparency and openness; second, in relation to external participation and verification; and third with regard to independent monitoring and review. Ruggie partially deals with aspects of the first two of these issues. However, I will

argue that he does this in a way that fails to clearly specify the minimum standards that are prerequisites of the effective institutionalization of the HRDD principle through HRIA. I will then argue in the final section of this article that the UN Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises is the appropriate body to recommend minimum standards on these issues and ensure their effective implementation in relation to practice as it develops.

1. Transparency

Transparency of the due diligence process is a *sine qua non* of its effectiveness. However, Ruggie's Guiding Principles do not go far enough in enshrining the appropriate levels of transparency as a requirement of due diligence. Ruggie does include a principle that deals with the issue of 'external communication' (Principle 21). It contains a requirement to communicate with relevant stakeholders about how companies are addressing their human rights impacts and a requirement for formal reporting where 'operations or operating contexts pose risks of severe human rights impacts'. The test of the adequacy of a company's response is that they need to provide 'information that is sufficient to evaluate the adequacy of an enterprise's response to the particular human rights impact involved' (Ruggie 2011, p. 20).

Ruggie's idea of external communication sounds reasonable in principle, but it will not lead to the kind of routine transparency that is vital to creating widespread, robust and meaningful due diligence processes. What is required is for companies who are claiming to undertake HRIAs, as a matter of routine, to publish the full methodology and results of their assessment processes – no matter what human rights risks they uncover. Any non-disclosures must be fully justified and be as narrowly framed as possible (see discussion of this issue below). Transparency is vital for two reasons.

First, assessors conducting due diligence processes need to learn from each other about how those processes should function. There are many issues where HRIAs in other subject areas have demonstrated that it is only by learning from practice that appropriate models begin to be developed. For instance, the UN Guiding Principles on HRIAs of trade and investment agreements were developed as a result of extensive examination and reflection on existing practice in the field (Human Rights Council 2011d, Berne Declaration 2010). Transparency allows vital issues to be deliberated and practice improved as a result. There are myriad issues in the field of business HRIAs where open learning from existing practice is vital. For instance, what indicators should be utilized in order to demonstrate whether positive or negative human rights impacts have occurred? What evidence is required to support conclusions about impacts in relation to particular aspects of corporate activity (e.g. field visits, collection of particular types of data)? What form should recommendations take to ensure that they are likely to be acted upon by those who will enact change?

The second issue is that transparency in reports is necessary for the engagement of actors who can then evaluate performance. Civil society actors, academics, UN actors, State officials and even consumers cannot hope to become educated about a company's performance if they do not have access to information about how due diligence processes were performed and the results they gave rise to.³ Transparency is also a prerequisite of effective participation and independent monitoring, two issues that are discussed below. Ultimately, there is no way in which individual assessments can be scrutinized and strong assessments distinguished from weaker ones without the methodology and results of the assessments being made publicly available.

Existing practice demonstrates the problem. The multinational company Yahoo! is able to claim that they undertake HRIAs of their business even though there are no publicly available documents about the process or any completed assessments publicly available.⁴ Claims that a company is undertaking HRIAs post-Ruggie will allow that company to benefit from the kudos and credibility that comes with following the Ruggie Framework, but without any actual scrutiny of the company's human rights performance or the way it is monitored. For instance, Nestlé highlight on their website how, since 2010, they have undertaken a series of impact assessments in Colombia, Nigeria, Angola and Sri Lanka as part of their commitment to Human Rights Due Diligence, but again there is no publicly available information about these HRIAs or their methodologies.⁵

There is a need to distinguish carefully between a public and verifiable human rights impact assessment process and a private human rights risk assessment conducted by companies purely for their own internal use. For instance, the Danish Human Rights Centre's Human Rights Compliance Assessment tool is widely perceived as a form of HRIA (e.g. see Aim for Human Rights 2009). While it is a very useful risk assessment tool, it is primarily used for internal monitoring processes by registered companies and reports are generally not published. It therefore should not be seen as a form of due diligence that would meet the requirements of the Ruggie Framework without, at a minimum, the additional transparency requirements set out above being adopted.

There will be occasions where there is a need to keep some information secret and not to publish it as part of the reporting process – for instance the name of an informant in order to protect their safety, or commercially sensitive information. However, the situations in which this will be necessary should be relatively rare and the information that needs to be kept secret should not be extensive. Existing practice demonstrates how comprehensive and robust reports of HRIAs can be prepared in potentially sensitive areas of business such as the mining and extractive sector (Nomogaia 2009a, 2009b, 2010a, 2010b). Experiences with public interest immunity have taught us that organizations tend to abuse processes where they can obtain broad exemptions from disclosure and that it is up to judicial processes (or their equivalents) to demand that information is disclosed in all but exceptional circum-

stances (Zuckermann 1994). Only then will proper evaluation of evidence be possible. Therefore in the context of corporate HRIAs, the decision not to disclose information in a report should be fully justified and as narrowly framed as possible.

Transparency must therefore be a core and overriding principle of the assessment process. Companies who are claiming to undertake impact assessments must as a matter of routine publish both the process and results of their assessment processes. Only then should they be able to lay claim to the credibility that comes with complying with the principle of human rights due diligence. It is only by adopting a principle of widespread transparency that communities of learning and improvements in practice will occur. It is also a vital prerequisite for effective participation and monitoring, which are the two further elements discussed below.

2. External participation and verification

Despite the self-reflective nature of the due diligence process, it is clear that there is a need to engage with actors outside the corporation. All forms of impact assessment stress the importance of effective consultation processes, and as discussed above, consultation and participation are seen as even more vital in HRIA because of the entrenchment of the principle of public participation in various international human rights instruments. Underlying this issue is that affected individuals and communities are often in the best position to inform the HRIA process about the actual and potential human rights impacts of corporate actors upon them. However, external stakeholders are also vital to the credibility of the HRIA process in another way – they are a vital catalyst of change. As noted above, it is primarily because of external civil society pressure that the human rights performance of transnational corporations has been brought to global attention, leading to the current initiative. It is therefore vital that these stakeholders are also able to engage with the HRIA as verifiers of the credibility of its methodology and the reliability of its results (Melish & Meidinger 2012; Parker & Howe 2012). The issues of external participation and verification of performance are both addressed in the Guiding Principles, But in both cases there is a need to build upon Ruggie's approach to create stronger obligations and to further concretize the guidance.

Ruggie (2011, pp. 17–18) identifies that impact assessment processes should involve 'meaningful consultation with potentially affected groups and other relevant stakeholders', taking into account barriers to access of their engagement. Where this is not possible, businesses should consider consulting 'credible, independent expert resources' as an alternative (Ruggie 2011, p. 18). Ruggie (2011, p. 20) also recognizes the value of independent verification of the process of reporting on human rights impacts, stating that it 'can strengthen its content and credibility'.

On the issue of consultation with affected stakeholders, it is clearly an important mechanism for allowing them to participate in the due diligence process, but

commentators have noted that ‘such participation is neither required by the framework, nor can it be asserted by civil society groups as a “right”’ (Melish & Meidinger 2012, p. 311). The extent of engagement is still very much up to the company to determine and ‘meaningful consultation’ is open to a broad spectrum of interpretations. Existing practice in corporate and other forms of HRIA, as highlighted above, indicates that often consultation processes are superficial exercises that do not have any impact on the substantive results of the assessment. Where consultation processes are genuine, barriers to effective engagement involve multiple and context-specific issues such as language, time, computer-literacy and accessibility of physical venues (Harrison & Stephenson 2010). There is a clear need for much more detailed guidance to be developed on what constitutes effective consultation processes and for corporate performance to be assessed according to the standards set out in that guidance (Harrison 2011).

On the issue of verification of performance, it is a vital driver of meaningful change that external stakeholders are sufficiently engaged in the process of due diligence in order that they can ensure there are consequences for poor performance and for failures to uncover and take action with regard to (potential) human rights abuses. This has been described as ensuring a ‘logic of consequences’ (Melish & Meidinger 2012, p. 311). Ruggie recognizes the value of an independent element in the due diligence process and in verifying results, as noted above. However, again, there is no obligation created, and it is left to the company’s discretion to decide whether and how to adopt an independent element to the process. This is a surprise, since Ruggie himself has been very clear that it is voluntarism and lack of an external accountability mechanisms that have blighted many of the existing self-regulatory human rights initiatives that have taken place (Ruggie 2007b).

Previous experience of both HRIAs and corporate private governance issues more generally highlights that the absence of a significant independent element in the assessment process leads to serious dangers of superficial processes that lack credibility and are unlikely to lead to change on the ground (Harrison 2011; Melish & Meidinger 2012). Some form of independent verification should therefore be a requirement of the assessment process and there is a need to clarify what any independent element should look like. For instance, if due diligence processes are carried out by legal or accountancy firms who are already conducting a great deal of business for the corporation in question, there are bound to be questions about their willingness to ask difficult questions of the company (Redmond 2003). Will the firm jeopardize its larger-scale business with the corporation in order to expose problematic human rights issues in a reporting process that will inevitably be far less well remunerated?

3. Independent monitoring and review

The third essential element of the institutionalization of HRDD is some form of *overall* monitoring and review of corporate performance in undertaking human rights due

diligence. There must be a credible independent body that monitors and reviews performance by corporations in undertaking HRIAs and responds to this performance in the ways identified below. This is not an issue that is considered in the Ruggie principles, but it is a vital aspect of ensuring that the due diligence process is a valuable one and that standards of performance improve over time. There are two important rationales for overall monitoring of performance to take place.

The first rationale for monitoring is to ensure that the lessons from good performance in HRIAs are captured and disseminated so that those lessons can be learnt by others undertaking assessments. If, as is hoped, a large number of corporations embrace the Ruggie Framework and as a result human rights due diligence is undertaken by a wide range of different corporate actors globally, there is a great danger that no one will learn the lessons of good performance from others because of the sheer volume of processes, the complexity of the methodological issues faced and the difficulty of distinguishing robust from poor practice. The overall quality of equality impact assessment in the UK has certainly suffered as a result of failures to identify and disseminate lessons from good and bad practice to future assessors.

The second rationale is that there is a need to effectively incentivize good performance and dis-incentivize the bad. Previous self-regulatory and soft law human rights initiatives in the corporate field have suffered as a result of an inability to distinguish between different levels of corporate performance (Harrison 2010a). This dynamic creates problems for all corporations engaged in self-regulatory processes like HRIA. Corporations will start to see diminishing returns from the ‘kudos’ of associating themselves with Ruggie’s HRDD if they see their competition able to claim equal reputational enhancement for undertaking superficial assessments that fail to meet minimum standards of robustness. It is only through high standards of independent evaluation that any genuine participant in the process will benefit. Effective monitoring therefore needs to highlight businesses and other bodies who are conducting superficial assessments and seeing HRIAs primarily as a public relations exercise.

Even with current low levels of practice, there is a huge gulf between verifiable levels of performance and standards in different assessments undertaken. For instance, Yahoo! is able to claim that they undertake HRIAs of their business activities, while, as stated above, there are no public and accessible documents about the process or any completed assessments available. The HRIA of BP’s Tangguh LNG Project only makes publicly available a brief summary of conclusions and recommendations (Smith & Freeman, 2002). There is a full publicly available report of the HRIA of Goldcorp’s Marlin Mine, and it was carried out by independent consultants, but the report itself admits to serious inadequacies in the consultation process (On Common Ground 2010). Rights & Democracy’s HRIA does include a consultation process, but is largely limited to consulting project opponents. It also focuses primarily on summarizing negative impacts, and there is no monitoring programme to encourage improved human rights performance at the end of the assessment (Rights and Democracy 2007). Finally, assessments carried out by

Nomogaia we undertaken on the instigation of Nomogaia itself, by completely independent experts. These HRIAs appear to contain, *inter alia*, rigorous consultation processes, and *ex post* monitoring of performance. The methodology for assessment and full reports is made fully available on the internet (Nomogaia 2009a, 2009b, 2010a, 2010b).

There are many more nuanced differences that could be teased out between different assessments through a more detailed analysis. A proper monitoring and review mechanism would be able to do this and to ensure that lessons could be learnt from existing practice and different levels of performance appropriately distinguished. However, in the absence of such a mechanism, all of the above processes can be (and often are) described as ‘human rights impact assessments’.⁶ Without the development of shared normative understandings of what the HRIA process should represent, there is a danger that the nomenclature will lose its status as representing a robust evidence-based process of assessing impacts.

Concluding thoughts

Ruggie’s principle of due diligence *could* be, as he argues, ‘a game-changer’ that transforms companies’ relationship with human rights from one based primarily on ‘naming and shaming’ to one of ‘knowing and showing’. However, the elaboration of due diligence that Ruggie provides is not a sufficient basis upon which to ground future work in this field. As Muchlinski (2012, p.158) commented, ‘at worst, it could degenerate into a “tick-box” exercise designed for public relations purposes rather than a serious integral part of corporate decision-making’.

This article has argued that three issues must be addressed, and minimum standards for each created, if the HRIA process is to have any chance of being an effective mechanism for the successful institutionalization of human rights due diligence. This is the case because of the particular context in which corporate HRIAs will be undertaken – against a backdrop of generally poor human rights self-regulatory mechanisms that have been largely ineffective in the past, a deeply sceptical civil society and a limited shared understanding of what the HRIA process does, or should, entail. Yet it is also true more generally that other commentators on reflexive and ‘soft’ regulatory instruments have identified the importance of ensuring effective stakeholder engagement and meaningful monitoring of practice as vital to the successfulness of such endeavours (Braithwaite 2008; Hepple 2011).

The UN Working Group on the Issue of Human Rights and Transnational Corporations is the obvious body that can be a catalyst for action on this issue. The Working Group’s mandate includes the power to make recommendations in relation to the implementation of the Guiding Principles (Human Rights Council 2011c). First they should recommend transparency and openness as an immediate and fundamental principle of human rights due diligence. Therefore any HRIAs that are purporting to fulfil the HRDD obligation should be fully published together with a detailed methodology setting out the process by which they were undertaken. Confidentiality

concerns should only be the basis for very limited and narrow non-disclosure in the ways described above. On participation and verification, the Working Group should engage in drawing up detailed guidance in relation to effective participatory methods and should create minimum standards for the independent verification of HRIAs. In relation to independent monitoring and review, the Working Group itself would be the obvious place for such review to take place, given that its mandate includes the identification, exchange and promotion of ‘good practices and lessons learned in the implementation of the Guiding Principles’ (Human Rights Council 2011b).

The recommendations that flow from the monitoring and review process of the Working Group would immediately become a basis upon which civil society organizations and others could distinguish high-performing corporations from those companies not living up to the requisite standards. In the longer term, the Working Group’s ability to effectively monitor and differentiate performance in a way that will have an effect on the companies concerned will be greatly enhanced by the UN Human Rights Council endorsing a set of minimum standards for HRDD which might build upon the ideas in relation to transparency, participation and verification set out above. The Council should also provide a much stronger and more detailed mandate to the Working Group to empower it to perform an ongoing monitoring and review role, together with the requisite resources needed for the task.

Action on these issues is absolutely vital for the credibility of HRIA as a mechanism for fulfilling the HRDD principle. Without these minimum steps being taken, the human rights community, corporations themselves and the impact assessment community should be deeply concerned that HRDD will create more problems than it actually solves. There are grave dangers of entrenchment of non-transformational mechanistic practices that end in the disillusionment of all engaged actors and even the undermining of the concept of ‘impact assessment’ as a robust and valuable process.

However, even if these three elements are accepted, this is not sufficient to the extent that there is much that needs to be done beyond what has been described here. At a general level, as assessments are undertaken and reviewed, there is a need to keep appraising and revising what is considered good practice in a variety of aspects, for instance: the process by which issues are prioritized as worthy of assessment; how human rights obligations are translated into meaningful indicators that can measure performance; how relevant evidence is collected and analysed; and how conclusions and recommendations are created that prompt action to be taken.

There is also considerable work that cannot be done at a general level in relation to all corporate HRIAs. An HRIA of a mining company will look very different from an HRIA of an internet company. It is important to be clear that this article does not argue for a uniform model in all fields of corporate HRIA. There will inevitably be wide variations in practice of conducting HRIAs depending on the subject matter of the assessment and the human rights issues that are therefore likely to be prevalent as a result.

Much thinking and refining of processes must therefore be done in individual areas of corporate activity.

Improvements in practice at the generic as well as sector-specific levels require a stronger sense of a professional community of actors who are engaged in the assessment process. There must be more individual and collective reflection on that practice, as is beginning to happen with respect to HRIAs of international trade agreements. There must also be greater learning from other branches of impact assessment that have longer histories of practice and better shared understandings of values, processes and techniques for gathering evidence. However, in the meantime, the requirements set out above represent a minimum core that must be followed if the concept of human rights due diligence is to be viewed as a fundamental building block for improving corporate human rights performance.

Notes

1. An extensive search was undertaken in order to find other examples of 'institutionalization' – including all the materials and commentaries on the Human Rights Impact Resource Centre website (<http://www.humanrightsimpact.org>) and a review of more than 100 articles and reports on human rights impact assessment identified through a literature review of major academic databases.
2. Among many cases, see e.g. *R (on the application of W) v Birmingham City Council* [2011] EWHC 1147 (Admin); *R v London Councils (ex parte Hajrula and Hamza)* [2011] EWHC 151; *R v Birmingham City Council (ex parte Rotao Rahman)* [2011] EWHC 944 (Admin).
3. Although I am deeply sceptical about claims that consumers will be sufficiently informed to take effective action as a result of corporate HRIAs – The reports will be too extensive and the presentation of the issues too nuanced for effective comparison of corporate performance.
4. The only reference to their HRIA process can be found at <http://www.yhumanrightsblog.com/blog/our-initiatives/human-rights-impact-assessments> (Accessed on 15 November 2012). Emails and telephone enquiries to the company elicited no further response other than a reiteration of this information.
5. Nestlé, *Human Rights and Labour Rights, available at* <http://www.nestle.com/csv/Compliance/globalprinciplesandgoals/HumanRights/Pages/HumanRights.aspx> (Accessed on 15 November 2012)
6. The Goldcorp assessment is self-described as a 'Human Rights Assessment' but has been categorized as a 'Human Rights Impact Assessment' by other actors.

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