

## WORKING PAPER 37

# Human Rights Impact Assessments as a New Tool for Development Policy?

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### IMPRINT

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**List of Abbreviations**

CAFTA	Dominican Republic-United States-Central America Free Trade Agreement
CCIC	Canadian Council for International Co-operation
CCOFTA	Canada-Colombia Free Trade Agreement
CESCR	Committee on Economic, Social and Cultural Rights
CP	political and civil rights
EC	European Commission
EP	Equator Principles
ESC	economic, social and cultural rights
ETO	Extraterritorial obligation(s)
EU	European Union
FIDH	Fédération International des Ligues des Droits de l'Homme
GATS	General Agreement on Trade in Services
GSP	Generalized System of Preferences
HRBA	Human Rights-Based Approach
HRIA	Human Rights Impact Assessment(s)
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
IFC	International Finance Corporation
IMF	International Monetary Fund
NGO	Non-governmental Organization
NORAD	Norwegian Agency for Development Cooperation
OHCHR	Office of the High Commissioner for Human Rights
PHM	People's Health Movement
PS	Performance Standards
SIA	Sustainability Impact Assessment(s)
TNC	Transnational Corporation(s)
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNDP	United Nations Development Programme

**Abstract**

Development policy affects human rights in manifold ways. For example, trade agreements can have an adverse impact on the rights to health or food by making essential medicines or goods less accessible or available. Or large-scale investment projects influence indigenous rights when they entail resettlement programs or the expropriation of traditional lands.

Policy-makers have tried to tackle these issues by employing various impact assessment tools. These include, inter alia, the Sustainability Impact Assessments of EU trade agreements, and the impact assessments of projects by development finance institutions, which are commonly based upon the IFC Performance Standards. Traditionally, economic and environmental effects are at the centre of the existing tools, while social effects are only included to a lesser extent. This paper argues that the existing tools are insufficient for reasons that concern their legal status, their methodology and, in particular, their effectiveness. Human Rights Impact Assessments (HRIA) promise to cure some of these shortcomings. In the paper, the specific added-value of HRIsAs, methodological approaches and challenges, and potential fields of application of HRIsAs in development policy will be addressed.

**Keywords**

Human Rights, Impact Assessment, Development Policy

## 1. Introduction

Development policy affects human rights in manifold ways. For example, trade agreements can have an adverse impact on the rights to health or food by making essential medicines or goods less accessible or available; large-scale investment projects influence indigenous rights when they entail resettlement programs or the exploitation of traditional lands; labor rights may be violated by a state that supports businesses in countries with dubious human rights records; the rights to non-discrimination and participation are infringed by discriminatory or excluding implementation of development policies. And the list continues.

In view of this conflictive interaction between development policy<sup>1</sup> and human rights, many states are struggling to comply with their obligations under international human rights law – a struggle that becomes even more challenging in times of economic hardship and international crisis. A preventive approach can be helpful in this process and various human rights-based initiatives and impact assessments have been used to avoid the potential conflict between development policies and human rights and to reinforce positive mutual effects instead. For example, U.N. bodies have made efforts to mainstream human rights into their activities; the EU is systematically evaluating the social and ecological impacts of its programs since the late 1990s; and international finance institutions try to guide multinational corporations towards assuming responsibility for their worldwide activities.

However, this paper argues that these existing tools are insufficient for reasons that concern their legal status, their methodology and, in particular, their effectiveness. Human Rights Impact Assessments (HRIA) promise to cure some of these shortcomings. By using the framework of internationally recognized human rights and adopting a broad and participatory methodology, they have the potential to make a real change in current development practice.

Thus, it is the aim of this paper to introduce HRIA as a new tool for assessing the impacts of development policy on human rights. It addresses three specific questions:

- 1) What is the **added value** of HRIA over existing human rights-based approaches and impact assessments?
- 2) How should the HRIA **methodology** look like, i.e. how can HRIA be operationalized?
- 3) What are the most important **fields of application** for HRIA?

In order to answer these questions, we divided our paper into six sections. Subsequent to this introduction, we present the concept of HRIA and explore its normative basis, its various types, the human rights that form its content and the actors involved in the assessment (Section II). Then, we look at existing human rights-based initiatives and impact assessment instruments (Section III). This enables us to assess the added value of the HRIA concept in Section IV. The fifth section outlines a methodology for HRIA and identifies potential challenges. The sixth and last section describes important fields of application for HRIA and contains recommendations.

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<sup>1</sup> We use the term “development policy” in a broad sense. It therefore includes trade agreements, concrete development and investment projects (in particular in extractive industries and infrastructure), as well as public policies (for example targeting at promoting education, health or other human rights).

## 2. Human Rights Impact Assessments – HRIA

### 2.1. What are HRIA?

Human Rights Impact Assessments (HRIA) are a systematic process to measure the impact of policies, programs, projects or any other intervention on human rights. They examine a wide range of different activities, including development programs, national legislation and policy, activities of transnational corporations and Non-governmental Organizations (NGOs) (Harrison/Goller 2008: 588). They are a mechanism to ensure that the human rights implications of a policy are considered when developing this policy (ex ante assessment) or to assess the impact of a certain policy on the situation of right holders after it has been implemented (ex post assessment) (Harrison/Stephenson 2010: 14).<sup>2</sup>

The main purpose of HRIA is to identify any inconsistency between a state's human rights obligations and other legal obligations that it has agreed to respect, for example those stemming from a trade agreement (United Nations, Human Rights Council 2011a: 5). Therefore, HRIA can prevent a state from entering any obligation that it might not be able to fulfill due to pre-existing human rights treaties.

Furthermore, HRIA help to ensure the right of every citizen to take part in the conduct of public affairs<sup>3</sup>. By evaluating (a) the impact of a certain policy on the state's capacity to respect, protect and fulfill<sup>4</sup> its human rights obligations and (b) the capacity of individuals to enjoy their rights, they can substantially contribute to a well-informed public debate based on concrete evidence rather than ideological biases. Insofar, HRIA strengthen democratic control and accountability (Human Rights Impact Resource Centre 2012: 1; United Nations, Human Rights Council 2011a: 5).

It is important to note that HRIA do not create *new* obligations for states but help to identify and comply with *existing* obligations (United Nations, Human Rights Council 2011a: 4). Therefore, they should be regarded as a tool to ensure coherence between potentially conflicting obligations and not as a limitation of a state's range of policy options.

Finally, it has to be clearly stated that HRIA are not a tool to assess a state's human rights obligations in order to see if they might be outweighed by economic advantages that, for example, a trade agreement promises. Human rights allow for no such balancing of interests and HRIA cannot provide a legitimate basis for such a decision. Rather, they reveal pre-existing human rights obligations that prevail over any other treaty obligation (United Nations, Human Rights Council 2011a: 5). Consequently, it is not the human rights obligations that are being assessed but the particular policy's compatibility with them.

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<sup>2</sup> In this paper, we look primarily at ex ante assessments since we consider it to be of vital importance to assess potential impacts of development policies *before* they actually come into effect. However, we are aware of the fact that methodological challenges are exacerbated in the case of ex ante assessments (cf. below section 5.3.).

<sup>3</sup> As laid down in Art. 25 (a) ICCPR.

<sup>4</sup> Introduced by the CESC and spelt out by the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights (see United Nations 2005a: 117ff) the "respect, protect, fulfill – framework" has been recognized as the basic structure of a state's human rights obligations. The obligation to *respect* human rights means that the state must refrain from any policy that may lead to a violation of human rights. States must further *protect* human rights as they need to avert human rights violations committed by third parties. Finally, they are bound to *fulfill* human rights, i.e. to make use of any means available for the full realization of human rights. This last aspect also requires states to avoid policies that would affect their public budgets in a way that renders impossible or delays the fulfillment of human rights (cf. Paasch 2011: 6; Balakrishnan/Elson 2011: 6; Lukas/Hutter 2009: 119; United Nations, Human Rights Council 2011a: 7).

## 2.2. Human Rights as the Normative Basis: Treaties & Principles

The most important human rights treaties in terms of ratification, that should be considered in the screening process of a HRIA, are the following: the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the Convention on the Rights of the Child (Human Rights Impact Resource Centre 2012: 1, FIDH 2008: 7). In the European context, the European Declaration of Human Rights and the Fundamental Rights Charter need to be taken into account as well. Furthermore, states are bound to respect general (including customary) public international law, of which human rights form a part.

As already mentioned, human rights prevail over all other legal obligations, such as those arising from trade agreements. Human rights represent *ius cogens* norms, which means that no derogation from them is permitted and any treaty inconsistent with them should be considered void and terminated (United Nations, Human Rights Council 2009: 16; Lukas/Steinkellner 2011: 371). However, it has been noted that states tend to prioritize obligations that could lead to sanctions in case of breach (which is typically the case for trade agreements) and often lack the understanding of the binding nature of human rights obligations (cf. Paasch 2011: 5; Walker 2009: 79; De Schutter 2007: 11).

Despite this lack of awareness, states are bound by the following general human rights principles (cf. United Nations 2005b; Balakrishnan/Elson 2011: 5; Walker 2009: 34f; 3D 2009a: 4):

- *Universality & Inalienability*: All people are entitled to human rights. Individuals cannot voluntarily give them up and they cannot be taken away by others.
- *Indivisibility*: All human rights have equal status and cannot be ranked in a hierarchical order. Therefore, it is not permissible for a state to ignore some rights and focus only on others; or to seek to discharge its obligations with respect to some rights in ways that violate other rights.
- *Inter-dependence & Inter-relatedness*: Political and civil (CP) rights on the one hand and economic, social and cultural (ESC) rights on the other form a union that cannot be separated. The realization of one right often depends upon the realization of others. Thus, HRIA are never limited to one sort of human rights but investigate impacts on related rights, too.
- *Equality & Non-Discrimination*: All individuals are equal as human beings by virtue of the inherent dignity of each human person. They are entitled to human rights without discrimination of any kind.
- *Participation & Inclusion*: Every person is entitled to active, free and meaningful participation in the development process. Therefore, all right-holders and duty-bearers must be involved in the conduct of HRIA on a fully informed basis.
- *Accountability & Rule of Law*: Duty-bearers are answerable for the observance of human rights. They have to comply with legal norms and standards enshrined in human rights treaties and are responsible before courts if they fail to do so.

### 2.3. Different Types of HRIA

HRIA are a relatively new tool. It was only in the late 1990s that a few human rights institutes as well as NGOs started working on the measurement of human rights effects (Bakker et al. 2009: 438). However, HRIA have already been applied in a broad range of different fields. They can be clustered as follows (cf. Harrison 2011: 167ff; Harrison 2010a: 6ff):

#### *Development*

Much of the early work on HRIA took place in this field. The Norwegian Agency for Development Cooperation in its pioneering study “Handbook in Human Rights Impact Assessment: State Obligations, Awareness & Empowerment” (NORAD 2001) was the first institution to provide methodological guidance for applying HRIA in development policy. Subsequently, individual studies (for example, Biekart/Thoresen/Ochaeta 2004; Landman/Abraham 2004) have been carried out and the HRIA model was further refined in order to be applicable in specific contexts (see FAO 2009).

However, there is little recent work on the impacts of development policy on human rights that uses HRIA. Instead, there is a growing body of literature referring to the somewhat fuzzier concept of a Human Rights-based Approach (HRBA) to Development<sup>5</sup> (Fenkart 2011; Amnesty International 2010; Kämpf/Würth 2010: 9ff; McInerney-Lankford 2009; Boesen/Martin 2007; UN 2003; UNDP 2003, 2006).

#### *Health*

A central figure on HRIA in this field is the UN Special Rapporteur on the right to health, Paul Hunt, who published extensively on the issue (cf. Hunt/MacNaughton 2006; Hunt: 2003: 17f). Additionally, NGOs, such as the People’s Health Movement, contributed to the development of an overall methodology for HRIA by developing toolkits that became heavily used also beyond their specific field (PHM 2006). Within the field of health, the impact of the TRIPS agreement on the right to the highest attainable standard of health received special attention (3D 2006; Harrison 2009b).

#### *Multinational Corporations*

In recent years, there has been a veritable boom of HRIA models and methodological guides in the field of business (see, for example, UN Global Compact/OHCHR/BLIHR 2011; UN Global Compact/PRI 2010; IFC/International Business Leaders Forum 2010; Danish Institute for Human Rights 2012; United Nations, Human Rights Council 2007; NomoGaia 2011; Aim for Human Rights 2009).<sup>6</sup> However, there are significantly less HRIA that have actually been published. Among the few assessments that are publicly available are those commissioned by BP, Goldcorp and Dole (Smith/Freeman 2002; On Common Ground Consultants Inc. 2010; NomoGaia 2010a).<sup>7</sup>

#### *Trade*

Trade policy seems to be the most dynamic field in the discussion on HRIA at the moment. NGOs, UN bodies and national parliaments alike call for a systematic conduct of HRIA in this area. However, practical implementation lags far behind.

Presently, there is only a limited number of HRIA on trade agreements. The first one concerned the Free Trade Agreement between Thailand and the US and was conducted by the Thailand Human Rights Commission in 2006 (Harrison 2010a: 11; Harrison 2011: 169; Berne Declaration/CCIC/Misereor 2010: 8). In 2008, FIAN produced several assessments on the right to food in selected farmers’ communities in Ghana, Honduras, Indonesia, Uganda

<sup>5</sup> For this concept see below section 3.1.

<sup>6</sup> For a detailed list of resources on HRIA in the field of business see <http://www.guidetohriam.org/stage-4-assessment>.

<sup>7</sup> For a more comprehensive list see <http://www.humanrightsimpact.org/case-studies/>.

and Zambia (Paasch 2008). Furthermore, there is a HRIA on the intellectual property provisions of the Dominican Republic-United States-Central America Free Trade Agreement (CAFTA) (Walker 2009: 123ff). Quite recently, the EU-India Free Trade Agreement has also been subject of a HRIA (Paasch et al. 2011). Lastly, although not explicitly termed HRIA, the Free Trade Agreement between Canada and Colombia (CCOFTA) contains a Human Rights Reporting Process and is considered to be the first government HRIA (cf. Harrison 2009a). However, the human rights mechanism foreseen in the CCOFTA did not meet expectations so far. As the Canadian government failed to produce the first human rights report that was due in May 2012, it is still to be seen if the reporting process is an adequate instrument to deal with the effects of CCOFTA on Colombia's already dubious human rights situation (cf. CCIC 2012; Barrett, 17 May 2012; Moore, 16 May 2012).

#### **2.4. Which Human Rights are assessed?**

The question of which human rights are potentially affected evidently depends on the nature of the policy that is being assessed. The effects of trade agreements on a country's human rights situation are most likely to be quite different from those of a peace building project. However, experience with past HRIA has shown that economic, social and cultural (ESC) rights received special attention while civil and political (CP) rights played a less significant role (Harrison/Goller 2008: 592, 611).

ESC rights include, inter alia, the right to health, water, education, food and work. Although they are explicitly foreseen in the ICESCR, they are often treated as second rate obligations by states as compared to CP rights (Farnsworth 2010: 166f; De Schutter 2007: 11). This may be part of the reason why international NGOs and scholars working on HRIA especially focused on this set of rights. In their various studies they came to the conclusion that trade policy in particular affects the situation of human rights<sup>8</sup>: for example, the right to health is often considered to be threatened by the provisions on intellectual property included in the TRIPS agreement; the right to water and education could be affected by the GATS agreement; the right to food may be hampered by the Agreement on Agriculture and the right to work by trade liberalization in general (De Schutter 2007: 11; Paasch 2008: 6; cf. FIDH 2008: 2-6).

Though ESC rights take center stage in the debate on HRIA, some scholars point out that it is also CP rights like the freedom of speech, of assembly and of strike that should be considered in the screening process of a HRIA (cf. Lukas/Hutter 2009: 98; Balakrishnan/Elson 2011: 5; Berne Declaration/CCIC/Misereor 2010: 8). If one agrees with this view, the following categorization by the U.S. research organization NomoGaia might be useful:

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<sup>8</sup> For a categorization of these positive and negative impacts, see Berne Declaration/CCIC/Misereor 2010: 14.

Table 1: Human Rights Potentially Affected

Labor	Environment / Welfare	Social / Political
Right to Work	Right to Life	Right to Liberty
Right to Favorable Working Conditions	Right to Health	Freedom from Arbitrary Arrest
Right to Just Remuneration	Right to Adequate Supply of Water	Freedom from Degrading Treatment and Torture
Freedom from Exploitative Child Labor	Right to Clean Environment	Freedom of Thought
Freedom from Involuntary Labor	Right to Adequate Standard of Living	Freedom of Expression
Equal Pay for Equal Work	Right to Food	Freedom of Assembly
Nondiscrimination	Right to Housing	Freedom of Religion
Right to Belong to a Trade Union	Right to Security of Person	Right to Participate in the Cultural Life of the Community
Right to Strike	Right to Privacy	Right to Education
Freedom of Association	Freedom of Residence	Right of Self-Determination

Source: NomoGaia 2009a: 8f.

## 2.5. Actors of HRIA

*Who* is entrusted with carrying out the HRIA is, of course, a central question (cf. Harrison/Goller 2008: 613). In the past, it has been primarily NGOs who used HRIA. If HRIA are to be used at state level, governments may choose among a national human rights institution, a parliamentary committee or an independent department to conduct the assessment (cf. Berne Declaration/CCIC/Misereor 2010: 15f). In any case, certain principles must be respected in order to guarantee independence and credibility. These include, for example, a participatory and inclusive assessment process and the use of clear and transparent indicators (see below Chapter 5.1. and 5.3.).

A second vital question concerns the *subject* of HRIA. In recent literature, not only the human rights impacts of state policy but also those of transnational corporations' activities is considered to be an important field of application for HRIA. In this regard, HRIA can be useful to assess if and how transnational corporations comply with their (vaguely defined and very cautiously acknowledged) human rights obligations (cf. United Nations 2012: 37; Hamm/Scheper 2011; Roling/Koenen 2011). In further opening up the range of potential duty-bearers, even the international community, trade unions, corporate lobby groups and other civil society organizations as well as individuals could be subjected to HRIA. In the light of the Preamble of the UDHR<sup>9</sup> all those actors have a duty to respect and secure human rights (Walker 2009: 21ff).

However, it is *states* that remain the primary duty-bearers of human rights under international law and it is thus states that are the primary subjects of HRIA. Still, this focus is not meant to overly restrict the reach of HRIA. It is important to note that a state's obligation under human rights law does not only exist towards its own population but also towards affected

<sup>9</sup> " [T]he General Assembly proclaims this Universal Declaration of Human Rights [...] to the end that *every individual and every organ of society* [...] strive [...] to promote respect for these rights and freedoms and [...] to secure their universal and effective recognition and observance [...]." (Preamble of the UDHR, emphasis added)

populations beyond its borders (OHCHR 2011: 3). This controversial concept of extraterritorial obligations (ETO) is advocated for by many experts working on HRIA and international law more generally (with the Special Rapporteur on the right to food Olivier De Schutter and his immediate predecessor, Jean Ziegler, on the forefront)<sup>10</sup>. In their view, a state using its means of influence (e.g. its economic leverage) to induce policies in another state's territory that undermine the latter state's human rights obligations, is responsible under international law (United Nations, Human Rights Council 2011a: 7; cf. Ruggie 2007: 828, footnote 46). This opinion is supported by Art. 2 (1) of the ICESCR that does not include any territorial restriction and explicitly requires each signatory state to "take steps, individually and *through international assistance and co-operation*, especially economic and technical, [...] with a view to achieving progressively the full realization of the rights recognized in the present Covenant [...]" (emphasis added). Consequently, the CESCR, as the body overseeing the ICESCR, has repeatedly acknowledged extraterritorial obligations of states, especially with regard to the rights to health, water and food (United Nations CESCR 1999: para. 36; 2000: 38f; 2002: para. 34).

Following this line of argument, a state can also be held accountable if it fails to prevent human rights violations by *private* actors falling under its jurisdiction. It is argued that, by promoting corporate activities in foreign countries through bilateral trade agreements, states are no longer responsible solely for private corporate behavior within their own borders but also for extra-territorial businesses of their corporate nationals (McCorquodale/Simons 2007; Ruggie 2007: 828).

However, the scope of ETO is still somewhat unclear among scholars and industrialized countries have shown solid resistance towards this concept altogether (De Schutter et al. 2012: 7; Knox 2010: 88). It seems that, despite the universal application of human rights, there is a tendency to think of their enforcement – and sometimes even of the responsibility for their violation – as being limited by territorial boundaries. Therefore, we can see a huge gap between academic interpretation of the relevant human rights treaties and actual state practice.

In order to overcome these disparities, the ETO Consortium, a network of currently about 30 NGOs and academics, has recently published the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights.<sup>11</sup> Formulated straightforwardly, Principle 3 foresees the obligation of all States to respect, protect and fulfill human rights both within their territories and extraterritorially. The document also provides a definition of extraterritorial obligations, thereby clarifying the scope of the ETO concept. Furthermore, in Principle 14, states are required to conduct prior HRIA on the potential extraterritorial impacts of their laws, policies and other practices and to publish the results. As the Maastricht ETO Principles are not primarily designed for academic purposes but to change current state practice, it is the aim of the signatories to initiate the adoption of a General Comment by the CESCR (Gibney 2011: 142) that would eventually have a wider political impact.

In sum, judging from recent initiatives and opinions, there is a clear trend towards holding states more accountable for their extraterritorial activities. The idea that states have human rights obligations not only within but also outside their own borders gains more and more acceptance. This is only natural if one realizes that the concept of ETO is not as groundbreaking as it may seem at first glance. Instead, as Mark Gibney puts it, it is based on the very idea that not only are human rights universal, but so are the obligations to protect such rights (Gibney 2011: 151).

<sup>10</sup> For details on the concept of ETO and its proponents see Gibney 2011: 144; Gibney/Skogly 2010; United Nations, Human Rights Council 2011a: 7f; De Schutter 2011; Berne Declaration/CCIC/Misereor 2010: 7; Kämpf/Würth 2010: 6f; Skogly 2006.

<sup>11</sup> The final version as of February 2012 can be found at: <http://www.maastrichtuniversity.nl/web/show/id=596286/langid=42>

### 3. Existing Human Rights-Based Initiatives & Impact Assessments

In the last section we introduced HRIA as a possible new form for impact assessment in development policy. In order to assess its added value over existing approaches we shall now review the tools currently used in the field. Three spheres of instruments can be distinguished: those (a) at UN level, (b) at EU level and (c) at the level of development finance.

#### 3.1. UN Level

In the early 1990s, various UN bodies discovered the language of human rights as being immensely powerful in setting the normative basis of debates about how best to address – and ultimately eliminate – world poverty (Schuftan 2010: 168). The Vienna Declaration that had been unanimously adopted in 1993, first linked the issues of development and human rights. Four years later, the UN Programme for Reform 1997 called on all entities of the UN to mainstream human rights in their various activities. Victims of human rights violations became right-holders; state officials became duty-bearers responsible before courts. This so-called “Human Rights-based Approach to Development” (HRBA) constructs people as key actors in their own development rather than passive recipients of development aid. Its keywords of participation, empowerment, ownership and accountability are omnipresent in development co-operation ever since their first introduction (cf. United Nations 2005b; Fenkart 2011: 42, 46).

More concretely, the UN seeks to strengthen the human rights-development-nexus by holding transnational corporations (TNC) responsible for respecting and protecting human rights (Farnsworth 2010: 166). The principal problem with these efforts lies in their non-legally binding character. Past initiatives concerned mostly *voluntary* codes of conduct. Attempts to make human rights directly binding for TNC have not yet been successful (cf. Seppala 2009: 403; Lukas/Hutter 2009: 165ff; Ruggie 2007; Wagner 2011). However, when the UN “Draft Norms”<sup>12</sup> failed to become formally adopted due to strong political resistance, the UN Commission on Human Rights created the post of the Special Representative on Business and Human Rights and a range of other initiatives were launched (cf. Ruggie 2007: 822). Perhaps most prominent are the Guiding Principles on Business and Human Rights (United Nations, Human Rights Council 2011b) that have been endorsed by the Human Rights Council in June 2011 (Hamm/Scheper 2011). Yet, they too are not legally binding.

#### 3.2. EU Level

A major precursor of HRIA are the Sustainability Impact Assessments (SIA) that have been commissioned by the EU in the field of trade policy on a systematic basis since 1999. According to the European Commission, a Trade SIA is a process that seeks to identify the potential economic, social and environmental impacts of a trade agreement. It is undertaken *ex ante*, i.e. before a trade agreement is concluded and has two main purposes: (a) to integrate sustainability into trade policy by informing negotiators and (b) to make information on the potential impacts available to all actors (NGOs, aid donors, parliaments, business etc.) (European Commission 2006: 7).

However, it seems from their practical implementation that the overall significance of SIA is quite limited. While the European Commission (EC) is obliged to perform an independent impact assessment, it is not bound by the results of the study. Although the Commission must formally respond to the findings and recommendations of a SIA, these responses have

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<sup>12</sup> UN Draft Norms on the Responsibility of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (E/CN.4/Sub.2/2003/12).

mostly been regarded as inadequate and there is no mechanism in place to challenge the EC's position vis-à-vis a SIA (FIDH 2008: 12; cf. Lukas/Steinkellner 2011: 369).

Consequently, though a SIA might recommend compensation or a remedy to those individuals or groups affected by a certain policy or project, there is no guarantee for this to happen (Walker 2009: 47). This lack of a legal framework has naturally greatly weakened the recommendations usually contained in SIA. Consequently, SIAs have been criticized for providing an ex-post-legitimation of decisions that have already been taken rather than a serious attempt to ensure sustainability in trade policy. In this view, they were never designed to restrain the negotiation mandate but to secure public consent (George 2011: 22).

Moreover, SIAs have been criticized for their methodology (cf. Harrison/Goller 2008: 598). Theoretically, they adopt a mixed-methods approach and emphasize the importance of qualitative methods like interviews and case studies to complement quantitative methods like causal-chain analysis and economic modelling (European Commission 2006: 34). However, scholars as well as civil society organizations have found the SIA methodology to have an unbalanced coverage of different types of impacts (Lee/Kirkpatrick 2004: 27), thus being economically biased and lacking a holistic understanding of the impacts of trade agreements (Friends of the Earth Europe et al. 2006: 5).

Even if one accepts a certain preference for quantitative methods in SIAs, they still might not be flawless in methodological terms. For example, their use of indicators has been criticized for being not entirely clear. Operating with vague terms like "poverty" or "equity" to assist in the development of indicators, the SIA methodology risks that each assessment constructs different indicators based on different understandings of these notions (Walker 2009: 110). Unlike the SIA framework, the one used by OHCHR<sup>13</sup> has the advantage of referring to precise, internationally agreed definitions, which makes it more robust and reliable in its outcomes.

Lastly, SIAs are problematic in terms of their overall legitimacy. First, it seems that the choice of relevant stakeholders has been selective and those consulted have often not been provided with the necessary information to make their participation effective and meaningful. Second, SIAs have often been made public only at a late stage of the policy implementation process. Thereby, they generally have not been able to influence the final outcome in a significant way (FIDH 2008: 11f).

Besides SIAs, there are two other mechanisms to promote human rights in development that are applied in EU trade policy: (a) human rights clauses in bilateral trade agreements and (b) the Generalized System of Preferences (GSP). While both instruments tie trade agreements to the respect for human rights and introduce monitoring mechanisms, only the latter allows for sanctions and – as a last resort – the suspension of preferences in case of violation of internationally recognized core human rights (cf. Walker 2009: 58). While it lies beyond the scope of this paper to elaborate on these tools<sup>14</sup> it nevertheless should be noted that they have been criticized for their poor transparency, inconsistency and dubious efficacy (cf. Paasch 2011: 13ff; Lukas/Steinkellner 2011: 365, 369).

Additionally, human rights clauses in international trade agreements have often been perceived as neo-imperialist tools from a developing country's perspective. Governments in the global South frequently distrust the motivations of their trading partners and are concerned about protectionist aims concealed behind the language of human rights (Prove 2007: 6). In sum, the general suitability of human rights conditionalities to avert negative impacts of EU trade policy seems highly questionable.

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<sup>13</sup> As outlined below, 5.3.

<sup>14</sup> For a detailed discussion see Paasch 2011: 13ff. For a quite different view see Hafner-Burton 2005, 2009.

### 3.3. Development Finance

The third set of existing impact assessment instruments presented here are the IFC Performance Standards (PS)<sup>15</sup> and the Equator Principles (EP)<sup>16</sup>. The PS were developed by the International Finance Corporation (IFC), i.e. the private sector financing arm of the World Bank, and have become the most widely-accepted framework for managing environmental and social risks in development project finance (Herz et al. 2008: 1). The PS are not only applied by the IFC itself but also by a wide range of other international financiers, including multilateral and national development banks as well as export credit agencies. Additionally, the EP, a voluntary framework for determining, assessing and managing environmental and social risks in project finance transactions, are derived from the PS. The IFC has thus become the global standard-setter in the field (NomoGaia 2010c: 1). Despite or maybe due to this authoritative role, the PS have been subject to extensive critique by scholars as well as NGOs.

First, as the PS are ex-ante assessments on social and environmental impacts without an explicit focus on human rights, NGOs have raised very similar points of critique as those regarding the European SIA described above (3.2.). For example, they found a lack of a consistent methodology and a restrictive choice of stakeholders that render PS inadequate to address human rights concerns in project finance (NomoGaia 2010c). Furthermore, PS have been criticized for simply not addressing many critical human rights issues and discussing others only partially (Herz et al. 2008: 6).

Second, there seem to be serious deficiencies in the enforcement of client compliance with PS. It has been noted that project proponents tend to see the environmental and social assessments as a bureaucratic necessity in order to obtain project approval rather than as an important step in project planning and that lax implementation of the PS framework encourages this view. Large amounts of liquidity in the financial system and a highly competitive climate allegedly further contribute towards keeping risk assessments superficial. As long as the client's performance is satisfactory, there seems to be a significant degree of leeway in the application of PS (Wiher Fernandez 2011: 182ff).

Third, the grievance mechanism foreseen in the PS framework is criticized for being inefficient. The importance of minimum procedural standards in seeking redress for the violation of rights caused by corporate activities has been underlined in the work of the Special Representative to the Secretary General on Human Rights and Transnational Corporations and other Business Enterprises, John Ruggie (United Nations 2012: 64f). However, no such minimum standards are incorporated in the PS (Herz et al. 2008: 12f).

Despite these serious and widespread criticisms, the IFC seems to remain unaware of them and just recently missed the chance to address the alleged shortfalls in its policies. When updating its Sustainability Framework<sup>17</sup> and the PS<sup>18</sup>, it failed to harmonize these documents with the Ruggie Guiding Principles on Business and Human Rights (United Nations, Human Rights Council 2011b) which require all States as well as corporations to prevent, mitigate or remedy adverse human rights impacts that they cause or contribute to (Seier 2011: 1).

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<sup>15</sup> The recently updated version can be found at:

[http://www1.ifc.org/wps/wcm/connect/b9dacb004a73e7a8a273fff998895a12/IFC\\_Sustainability\\_Framework.pdf?MOD=AJPERES](http://www1.ifc.org/wps/wcm/connect/b9dacb004a73e7a8a273fff998895a12/IFC_Sustainability_Framework.pdf?MOD=AJPERES).

<sup>16</sup> For details see <http://www.equator-principles.com/>.

<sup>17</sup> [http://www1.ifc.org/wps/wcm/connect/b9dacb004a73e7a8a273fff998895a12/IFC\\_Sustainability\\_Framework.pdf?MOD=AJPERES](http://www1.ifc.org/wps/wcm/connect/b9dacb004a73e7a8a273fff998895a12/IFC_Sustainability_Framework.pdf?MOD=AJPERES)

<sup>18</sup> [http://www1.ifc.org/wps/wcm/connect/c8f524004a73daeca09afdf998895a12/IFC\\_Performance\\_Standards.pdf?MOD=AJPERES](http://www1.ifc.org/wps/wcm/connect/c8f524004a73daeca09afdf998895a12/IFC_Performance_Standards.pdf?MOD=AJPERES)

Although the IFC had sufficient time to include the widely supported new UN standards in its updated PS, there is no single reference to it and throughout the 56-pages document, “human rights” are mentioned only 9 times.<sup>19</sup> It thereby created an unfortunate situation for human rights protection in the corporate sphere as its clients might not be aware of the higher international standards as embodied in the Ruggie Framework. Indeed, the updated PS “constitute a step backward in terms of one of the objectives of the Ruggie mandate – to gather all the disparate corporate social responsibility initiatives, voluntary guidelines, industry best practices, etc. under a single umbrella” (Seier 2011: 3).

#### 4. What is New? The Added Value of HRIA

Whether the described existing instruments are only soft-law standards, questionable in methodological terms, problematic for their overall legitimacy or simply ineffective, they are in one way or another insufficient to adequately ensure the respect for human rights in development policy. The need for a new and comprehensive human rights-based tool is long evident. This begs the all-important question: have HRIA the potential to be this new tool? This paper argues that they have. Six reasons are provided to support this view:<sup>20</sup>

First, HRIA refer to human rights, i.e. a legally binding framework. Human rights are based on a strong normative consensus and their principles are universally agreed due to a multitude of binding international agreements (see above 2.2.). Compared to existing soft-law-instruments, the power and universality of human rights is one of the main advantages of HRIA (cf. Walker 2009: 47).<sup>21</sup>

Second, fundamental human rights principles such as equality and non-discrimination require a disaggregation of data according to gender, ethnicity and region in order to fully assess the impact of a certain policy on particularly vulnerable persons (United Nations, Human Rights Council 2011a: 12). This focus is a distinctive feature of a human rights-based perspective and not commonly found in other approaches. Therefore, HRIA allow for a more in-depth analysis tailored to specific target groups.

Third, the human rights perspective allows for a more comprehensive assessment. It includes rights that might be overlooked by other impact assessments (e.g. the freedom of expression) (United Nations, Human Rights Council 2007: 6). HRIA start broadly and evaluate the full range of internationally agreed human rights, narrowing them down in the screening process. Contrary to SIA, HRIA are not limited by a predetermined set of human rights but adopt an open and more flexible methodology.

Fourth, in undertaking HRIA, there is a focus on the empowerment and ownership of right-holders (Harrison/Goller 2008: 611). They are perceived not as passive subjects but encouraged to fully participate in the assessment. Unlike SIA, HRIA concentrate on the voices of the powerless; to rely only on authority perspectives is not sufficient within a human rights framework (NomoGaia 2010c: 2).

Fifth, HRIA favor the engagement of a broad range of human rights actors that might not become involved in other impact assessments. HRIA draw on transnational human rights networks, that include civil society activists, intergovernmental bodies, judicial, quasi-judicial and expert mechanisms as well as tribunals, which provides a means to take the issue to a wider audience (Walker 2009: 48). HRIA thus strengthen democratic accountability and inclusion (Harrison/Goller 2008: 611).

<sup>19</sup> Unlike the IFC, the OECD took advantage of the opportunity to harmonize its policies with the newly adopted international standards and included the Ruggie Guiding Principles in their updated Guidelines for Multinational Enterprises that came into effect on May 25, 2011: <http://www.oecd.org/dataoecd/43/29/48004323.pdf>.

<sup>20</sup> For the following cf. Harrison 2011: 166f, <http://www.humanrightsimpact.org/introduction-to-hria/hria-tutorial/advantages-of-hria/>; Walker 2009: 43ff; De Schutter 2011; Harrison 2010b: 5; Berne Declaration et al. 2010: 9.

<sup>21</sup> See also below section 6.3.

Sixth, HRIA help to mainstream human rights into policy making. They contribute to the systematic integration of human rights concerns into daily politics and increase sensitivity in areas that, on the surface, seem to bear no or little relationship to the fulfillment of human rights (De Schutter 2010: 787).

## 5. How to Conduct a HRIA – Methodological Issues

There is much recent literature on how to develop a stringent methodology for HRIA. Indeed, methodological issues are seen as the principal challenge for the broader recognition of HRIA today. It is thus one of the central questions in the work of scholars and NGOs alike (see, for example, Walker 2009: 51ff; Andreassen/Sano 2004; Bakker et al. 2009; United Nations, Human Rights Council 2011a: 9ff; Berne Declaration/CCIC/Misereor 2010: 13ff). However, especially in the case of *ex ante* assessments, some methodological questions are yet unresolved.

Before we discuss the process of undertaking a HRIA, the role of indicators and concrete research techniques in greater detail, some important general features of HRIA should be pointed out.

### 5.1. General Features of HRIA

HRIA are a policy mechanism still in the making. As they have been used for only about a decade, on many different issues<sup>22</sup> and by quite different actors across the globe, there is no generally approved, formalized methodology yet (Berne Declaration/CCIC/Misereor 2010: 6). Discussions on the best method for HRIA are still at a rather conceptual level and require further elaboration and practical investigation. However, the Guiding Principles on Human Rights Impact Assessments of Trade and Investment Agreements (United Nations, Human Rights Council 2011a, drafted by the Special Rapporteur on the Right to Food, Olivier de Schutter) that were discussed by the Human Rights Council at its 19<sup>th</sup> session in February/March 2012 (OHCHR 2012) are an important first step towards a harmonized framework. In a participatory process informed by extensive consultations with a variety of stakeholder, they identified some characteristics of HRIA that are commonly considered to be crucial. So far, there seems to be a consensus on three general features and certain minimum conditions for the conduct of HRIA (United Nations, Human Rights Council 2011a: 11f; 3D 2009: 4):

First, any HRIA should make an explicit reference to the relevant human rights obligations (Harrison/Goller 2008: 605). It should be based on the normative content of human rights treaties as clarified by judicial and non-judicial bodies. Broader references to general development goals cannot be a substitute for such clear-cut obligations.

Second, the process of conducting a HRIA must always be consistent with basic human rights principles (see above 2.2.). Human rights are not only the benchmark for measuring the outcomes of a certain policy but also for evaluating the way a HRIA is undertaken: they guide the whole process of HRIA. During this process, special attention should be paid to the principles of participation & inclusion as well as equality & non-discrimination. Though *ex ante* assessments commonly have to be undertaken with relative speed so as to be able to influence the policy making process this should never threaten the participatory character of HRIA (cf. Walker 2009: 113).

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<sup>22</sup> For the different fields of application for HRIA see above 2.3.

Third, HRIA should make effective use of human rights indicators (cf. below 5.3.). They provide decision-makers with evidence in quantifiable terms and assist them in identifying and responding to changes over time. Furthermore, indicators help to establish a causal-chain explanation as they measure the extent to which duty-bearers fulfill their obligations as well as the extent to which people enjoy their rights. For these reasons, they increase both the effectiveness and the credibility of a HRIA (3D 2009).

Additionally, HRIA should fulfill the following minimum conditions (United Nations, Human Rights Council 2011a: 9f):

- *Independence*: Whether the HRIA is carried out by the staff of a national human rights institution, by members of a parliamentary committee or by relevant experts, these individuals or groups should always be independent from the body that is designing or negotiating the policy in question.
- *Transparency*: The sources and methodology that are used for the HRIA should be made public. Additionally, HRIA should be open for public submissions in order to broaden its information base.
- *Inclusive Participation*: Affected right-holders should be equipped with all available information and be consulted directly. The HRIA should make explicit reference to their concerns and include recommendations on how best to address them.
- *Expertise and Funding*: The teams conducting HRIA should consist of experts with different disciplinary and methodological backgrounds. Furthermore, they should be provided with sufficient financial means to prepare high-quality work that respects the principles of participation and transparency.

## 5.2. Conducting the HRIA: An 8-Step-Process

In order to make full use of existing capacities and to render the complex task of preparing a HRIA manageable, it should be broken down into the following key steps (Harrison 2010b: 8ff; Walker 2009: 86ff; cf. United Nations, Human Rights Council 2011a: 14f; Andreassen/Sano 2004: 18).

- 1) *Screening*: selecting key human rights issues that are most likely to be affected and are thus subjected to further analysis.
- 2) *Scoping*: identifying the information needed and formulating concrete questions.
- 3) *Evidence Gathering*: applying a mixed-methods-approach, i.e. using quantitative (economic modelling, regression analysis, etc.) as well as qualitative (interviews with key right-holders, participatory case studies, etc.) research techniques.
- 4) *Consultation*: of affected populations and other potential right-holders. Wherever feasible, participatory methods should be preferred as participation is both a means to inform the process and an end in itself.
- 5) *Analysis*: deciding over the concrete human rights impact of the policy assessed.
- 6) *Conclusions & Recommendations*: formulated as strong and concrete as possible, which requires identifying specific duty-bearers and assigning them concrete responsibilities.
- 7) *Publication* at the earliest stage possible.
- 8) *Monitoring & Review*: continuously or periodically supervising the progress of the policy and reporting about it to the relevant stakeholders.

### 5.3. The Use of Indicators

Mainstreaming human rights in the development context means that the human rights impact of policies needs to be assessed in a reliable and coherent fashion. Indicators play a crucial role in this context. UN bodies as well as scholars working on the advancement of the HRIA methodology seem to unanimously agree on the importance of using human rights indicators. Indicators are designed to heighten the objectivity and thus credibility of any assessment and, for the purposes of HRIA, have been defined as “quantitative or qualitative statements that can be used to describe human rights in situations and contexts and to measure changes or trends over a period of time. They are pieces of information that may provide insight into matters of larger significance [...]” (Andreassen/Sano 2004: 15). As the Human Development Report of 2000 suggests, human rights indicators are tools for improved policies and monitoring, for identifying the relevant actors and for giving an early warning of potential violations of human rights, thereby prompting preventive action (UNDP 2000: 89).

The OHCHR in particular has published extensively on the role of indicators in human rights work and provided detailed guidance on how to translate human rights standards into such quantifiable terms (Berne Declaration/CCIC/Misereor 2010: 11). To this end, it has compiled tables of indicators for key human rights (United Nations 2008: 22ff; for a simplified example of such a table see below table 1.) and developed three key categories of indicators (United Nations 2006; United Nations 2008; cf. Walker 2009: 108; FIDH 2008: 15; United Nations, Human Rights Council 2011a: 11f):

- *Structural indicators* to assess the status of ratification of human rights treaties and their incorporation into domestic law of the state concerned. Thus, they look at a state's *commitment* to human rights and measure whether a particular policy will make it more difficult for a state to adapt its own regulatory framework in line with the human rights treaties it is party to or to set up institutional mechanisms that oversee compliance with them.
- *Process indicators* look at the *ongoing efforts* undertaken by a duty-bearer to respect, protect and fulfill human rights. They measure the obstacles that a certain policy would create for the functioning of the institutions mandated to protect and advance human rights, especially by cutting public budgets.
- *Outcome indicators* look at the *result* of the efforts of duty-bearers with regard to their human rights obligations. They examine the concrete changes that the implementation of a certain policy has brought about for the population's enjoyment of human rights.

Despite such guidance, selecting indicators for HRIA is a complex task. Most importantly, it must be assured that they are verifiable, specific, relevant, and rights-based. In particular, “specific” means that indicators should be contextual and their interpretation should be with regard to the societal context (Andreassen/Sano 2004: 9f, 15, 17).

Moreover, it is important to keep in mind the limitations of human rights indicators. Two analytical issues are especially salient. On the one hand, the problem of attribution: it has proven to be difficult to establish a relationship between the policy implemented and the change in the human rights situation of certain right-holders, i.e. to ensure that the documented effect can be attributed to the particular policy. On the other hand, the measurement of the scale of the impact is problematic. It is hard to quantify the measured impact by scales which is nevertheless important for policy-makers to set priorities and allocate resources accordingly (Andreassen/Sano 2004: 10, 12). These challenges are exacerbated in the case of ex ante assessment.

**Table 2: OHCHR’s Illustrative Indicators on the Right to Adequate Food (Simplified)**

	<b>Food Availability</b>
<b>Structural</b>	<ul style="list-style-type: none"> <li>○ International human rights treaties, relevant to the right to adequate food, ratified by the State</li> <li>○ National coverage of the right to food in the Constitution / domestic law</li> <li>○ Number of NGOs registered / active for the protection of the right to adequate food</li> <li>○ Time frame and coverage of national policy on agricultural production, food availability, drought, crop failure and disaster management</li> </ul>
<b>Process</b>	<ul style="list-style-type: none"> <li>○ Proportion of complaints received on the right to adequate food and adjudicated by national human rights institutions, ombudspersons or the government</li> <li>○ Net official development assistance for food security received / provided</li> <li>○ Arable irrigated land per person</li> <li>○ Share of public budget spent on strengthening domestic agricultural production</li> </ul>
<b>Outcome</b>	<ul style="list-style-type: none"> <li>○ Per capita availability of major food items of local consumption</li> <li>○ Death rates associated with malnutrition</li> </ul>

Source: United Nations 2008: 24.

#### 5.4. Assessment Techniques and their Relevance for HRIA

In order to mitigate such analytical problems, the choice of the appropriate technique is crucial. Five techniques are commonly used in ex ante assessments (for the following see Walker 2009: 114ff):

- *Economic Modeling*: this method, or better family of methods, uses systems of mathematical equations to predict future impacts of certain policies, or to at least define different scenarios and upon that basis conduct simulation exercises about possible economic outcomes. Despite their many shortcomings, modeling exercises can provide important information towards determining the direction of change of human rights in a particular country. For example, when price levels on basic goods rise it can be reasonably argued that the affordability of essential goods is negatively affected, with potential effects on the rights to food or health, in particular for the poor strata of the population. However, it is essential to bear in mind the underlying assumptions and heuristic limitations of the models used.
- *Surveys*: this technique can take quite different forms, from face-to-face interviews to questionnaires or structured observations, etc. With regard to HRIA, surveys are highly relevant as they provide generalized information that is most convincing to policy-makers. Of course, the data must be supplemented by more in-depth information stemming from qualitative methods. However, while surveys are not participatory to the extent that e.g. face-to-face interviews are, they have the advantages of increasing the number of persons whose situation is assessed, of widening the geographical reach and of being a lot more rapid than other methods. In this way, surveys can be used to identify broader trends that are subsequently verified by other forms of data collection.
- *Causal-chain Analysis* is a very important technique for any assessment because it analyses the relevant cause-effect relationship between the policy under scrutiny and its potential impacts. It does so by identifying and explaining factors that could lead to the predicted effect and singles out other factors that are unrelated to the proposed policy. For the purposes of HRIA, it links the policy with the enjoyment of human rights by clarifying the causal steps leading from one to the other. In the context of human rights

this method is particularly useful as it isolates effects that are attributable to the policy assessed from a huge range of other factors of influence. Generally, causal-chain analysis builds on secondary material, such as reports, studies, experiences in similar situations, etc. However, it is mostly applied in combination with other methods that produce primary data.

- *Participatory Case Studies* can provide the real-life context in which a certain policy is implemented and can thus be useful to complement other forms of assessment such as statistical or survey methods. From the range of existing methods, case studies respond best to the human rights-based approach as they respect the principle of participation and provide the interpretative and contextual information that this perspective asks for. However, as participatory case studies are very time-consuming, they are not commonly used for *ex ante* assessments. Furthermore, they produce subjective and highly contextualized data which may not be the best option if one seeks to draw conclusions that are valid at the country level (Walker 2009: 118). With regard to the number of right-holders under scrutiny, participatory methods are most effective where the sample is relatively small, for example when measuring the effects of a specific policy on a particular indigenous community. For purposes such as assessing the impact of agricultural reforms on the farming population, a survey might be more appropriate (Walker 2009: 119).
- *Expert Opinions* represent the most widely used method for *ex ante* assessments. They are a relatively simple and timely way to collect information and are useful in several stages of the assessment (Walker 2009: 119): in choosing the appropriate assessment methods, in the screening and scenario building stages, in confirming cause-effect links in causal chain analysis and in filling gaps in data. Of course, one has to bear in mind the subjectivity of every “expert” opinion and pay attention to the question of *who* is considered an expert.

### 5.5. Which Methodology? Choosing the Appropriate Technique

It is quite obvious that the chosen methodology must be adequate to the specific circumstances of the HRIA, i.e. its focus, time frame and stakeholders. Criteria for choosing the appropriate assessment technique for *ex ante* HRIA include (cf. Walker 2009: 119ff):

- *The Stage of the Assessment*: Which methods are most appropriate at e.g. (a) the screening stage, (b) the full assessment stage and (c) the recommendation stage? The screening stage generally requires less sophisticated methods whereas the full assessment stage should make use of all available resources and appropriate methods. The recommendation stage builds on the previous outcomes and could for example rely on additional expert opinions.
- *The Policy that is Assessed*: Does it concern e.g. economic reforms that can be adequately measured by economic modelling methods or are qualitative methods a better alternative as e.g. in the case of policies concerning a country’s political system?
- *The Human Rights in Focus*: can they be adequately measured by statistical methods as it might be the case for the right to food (by measuring the availability and affordability of essential goods with economic modelling methods)? Or is a case study approach more suitable because the human rights potentially affected concern, for example, issues of participation or non-discrimination?
- *Data Availability*: Does reliable and valid data exist? How can it be accessed (for example from a national statistical office or database)? Is there a need to produce additional data or is it sufficient to rely on secondary data?

- *Time and resources:* is the assessment method feasible given scarce time and resources? When has the HRIA to be finalized so as to be able to feed into the policy-making process? How can tight funding be most effectively dealt with?
- *Skills Capacity:* Is the group conducting the HRIA equipped with the skills to apply a particular research method? Which disciplines need to be represented in the team? Is the team professionally trained so as to produce reliable and meaningful results that are relevant to policy-makers?

In sum, we can maintain that ex ante HRIA require a mix of methods, including quantitative as well as qualitative ones. The methods applied must respond to the concrete field of application and reflect the human, financial, technical and political capacities of the group entrusted with undertaking the HRIA. Despite the growing body of literature on the appropriate methodology of HRIA there is no one-size-fits-all solution. HRIA must remain flexible enough to be adapted to specific national contexts and focus groups (cf. 3D; Berne Declaration/CCIC/Misereor 2010: 3; Walker 2009: 103ff; United Nations, Human Rights Council 2011a: 4). However, the above criteria and set of questions can provide some guidance in choosing the right methodology for the particular assessment in question.

## 6. Fields of Application of HRIA & Recommendations

### 6.1. Where should HRIA be applied?

The field that has recently received most attention in the discussion about HRIA is trade policy. According to the UN Special Rapporteur on the right to food, Olivier de Schutter (De Schutter 2011 & 2007: 11), trade policy can negatively affect human rights in various ways: First, liberalization of agricultural trade endangers the right to food as it weakens the protection of small farmers. Second, provisions on intellectual property rights potentially affect the right to health as they hamper access to essential medicines. Third, investment protection clauses in trade agreements threaten a state's capacity to fulfill its human rights obligations towards its indigenous population as they make it very difficult to return land. Fourth, trade liberalization may affect the right to work by reinforcing inequalities between skilled and low-skilled workers. Finally, trade negotiation processes challenge the right to participation and non-discrimination as negotiation teams rarely represent more than the trade ministries and their results tend to benefit only a tiny elite (De Schutter 2011; cf. Prove 2007: 6). These and other concerns have been reinforced by recent NGO / academic studies<sup>23</sup> as well as by UN bodies<sup>24</sup>. For these reasons, a serious effort should be made by EU-trade policy-makers to systematically subject trade agreements to HRIA.

A second important field of application for HRIA are large-scale development projects, particularly in extractive industries and in the infrastructure sector, as such operations often pose particularly serious human rights risks (Herz et al. 2008: 2). There are several examples of existing HRIA in this domain, although they concern primarily ex post assessments (On Common Ground Consultants Inc. 2010; NomoGaia 2010a & 2010b & 2009; Smith/Freeman 2002). In order to evaluate potential human rights impacts, information is commonly collected in three areas: labor (wages, unionist activity and exploitative practices), health (diseases, local health infrastructure, water and air quality) and political / government (corruption, conflict, freedom of speech, indigenous peoples, poverty rates, education) (NomoGaia 2009a: 56).

<sup>23</sup> See Paasch 2011 on the impacts of the EU-India Free Trade Agreement on the right to food; 3D 2006a on trade-related intellectual property rights and the right to health and participation in the case of Morocco; 3D 2006b on the liberalization of agricultural trade and women's rights and Walker 2009 on the intellectual property provisions of the CAFTA agreement.

<sup>24</sup> See, for example, CESCR 2011: 3, concerning German trade policy and United Nations Commission on Human Rights 2001 dealing with the impact of the TRIPS agreement on human rights.

While this resembles many of the dimensions which are dealt with in impact assessments based on both the IFC Performance Standards and the Equator Principles, the basic difference is that HRIA are benchmarked against a universally applicable, comprehensive legal standard. This standard prevails over other standards, e.g. national law or industry standards. In addition, HRIA emphasize comprehensive stakeholder participation and go beyond the scope of action that is included in the PS or EP, in stipulating that if human rights are violated to an extent which cannot be remedied by mitigation measures, the planned project or activity has to be suspended.

## 6.2. How should HRIA (not) be applied?

The following paragraphs build on the preceding chapter on the methodology of HRIA and deal with the question of how HRIA should be implemented in EU development policy. In addition, it is clarified how HRIA should *not* be applied, thus how to avoid potential risks arising with their implementation. As HRIA are a fairly new policy tool, making such recommendations is preliminary and subject to revisions as more experience has been acquired. However, based on the experience with SIA and existing HRIA, the following key lessons can be learned (Harrison 2010b: 5ff, 15; FIDH 2008: 13):

First, HRIA should be a *technical* not an ideological process so as not to undermine their perceived objectivity and, thereby, effectiveness. Although it is certainly true, that an overly technical approach can lead to a watering down of HRIA to a simple bureaucratic process by losing touch with the underlying values that constitute the human rights critique (cf. Berne Declaration/CCIC/Misereor 2010: 7), we do think that the acceptance of HRIA by development policy-practitioners crucially depends upon the application of a clear methodological framework.

Second, the *timing* of the assessment is crucial. HRIA should be prepared *prior* to the adoption of a certain policy and in time to influence public discussion on the issue (cf. United Nations, Human Rights Council: 8). While it is true that such *ex ante* assessments present complex methodological challenges, they cannot be substituted by *ex post* assessments that are almost certainly unable to bring about substantial changes once the policy is implemented. Ideally, HRIA should be conducted in a cyclical, iterative manner with ongoing monitoring and reviewing. If understood as a one-time exercise, there is a risk of concentrating on short-term impacts that are easily quantifiable, but inadequate to capture the long-term impacts of a policy. Therefore, HRIA should take place both *ex-ante* and *ex-post*, with *ex-post* assessments performed every three or five years, as appropriate (United Nations, Human Rights Council 2011a: 9).

Third, HRIA require an *interdisciplinary team* including people with profound knowledge in human rights law as well as skills in applied economic and social sciences.

Fourth, it is crucial that HRIA are performed at the appropriate level. In the case of trade agreements that might mean at least at the *country level*, even though policy negotiations often take place at a regional level. This is because the concrete adoption of an agreement and the capabilities to protect human rights may substantially differ between different countries of the same region.

Fifth and lastly, there is a serious risk that HRIA are utilized to justify decisions that have long been taken and to pacify further public debate. Once the HRIA is conducted, policy makers could argue that there is no need to consider human rights issues in the future as they have already been “taken into account”. This risk can be reduced by timely and thorough assessments that are widely disseminated and opened up for public consultation.

### 6.3. What to do with HRIA outcomes?

The question of a state's reaction to the outcomes of a HRIA is, of course, a crucial one. In the case of an incompatibility of a certain policy with a state's human rights obligations there are several options: (a) termination of the policy, agreement, project, etc. (b) amendment of the policy, (c) insertion of safeguards, (d) adoption of compensation measures or (e) other mitigation measures (cf. De Schutter 2011: 8).

Safeguard clauses are especially important in the case of an international agreement, for example on trade. They should be inserted to ensure that a state is released from its treaty obligations where an incompatibility with its human rights obligations is found. However, even in the absence of such clauses, states should give priority to their duties under human rights law and consider the problematic provisions of the agreement to be void (United Nations, Human Rights Council 2011a: 9; Lukas/Steinkellner 2011: 371). This follows from the prevalence of human rights over all other treaty obligations.<sup>25</sup>

However, the options to adequately react to the outcomes of a HRIA are often seriously undermined by the timing of its publication. If the final results of an assessment become available only after implementation of the policy or project assessed is already well advanced, anything that goes beyond cosmetic changes becomes unrealistic. Therefore, it is important to finalize a HRIA before the decision-making process enters its concluding phase (United Nations, Human Rights Council 2011a: 9; Berne Declaration/CCIC/Misereor 2010: 3). Ultimately, in order to secure the systematic application and coherence of HRIA, the requirement for performing a HRIA should be stipulated and further specified in national legislation rather than left to the ad hoc choices of the Executive (United Nations, Human Rights Council 2011a: 3).

At the level of the individual right-holder, the outcomes of a HRIA can be crucial for the enforceability of concrete human rights claims. As noted, HRIA use the binding framework of international human rights law, thereby turning social imperatives into legal obligations. They identify human rights violations that duty-bearers are answerable for before national and international judicial bodies (Walker 2009: 47; cf. Hunt/MacNaughton 2006: 13). Both ex ante and ex post assessments can therefore present important evidence in individual cases. Unlike the recommendations of SIA, the outcomes of a HRIA need to be taken seriously by decision-makers; ignoring them could carry significant legal consequences. As compared to existing instruments, this context of legal obligations that States have voluntarily undertaken might be the most distinct and powerful feature of HRIA.

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<sup>25</sup> This prevalence is derived from both the duty of all States to work towards the full realization of human rights as foreseen by the Charter of the United Nations in its Article 103 and from the *ius cogens* character of human rights (cf. Human Rights Council 2011a: 5f). Cf. above 2.2.

## 7. Conclusion

In this paper, we argued that Human Rights Impact Assessments (HRIA) are a promising new tool for development policy. They have a clear added value over existing human rights-based approaches and other impact assessments as they are both precise and based on the powerful foundation of internationally recognized human rights. They are thus an instrument for the specific assessment of human rights impacts and refer to legally binding norms based on a strong normative consensus (as contrary to social and ecological assessments).

However, there are still some methodological challenges that need to be given special consideration. Some of them are particularly acute in the case of ex ante assessments, for example the problems of attribution and scaling of impacts. Others are relevant for the implementation of ex post assessments as well, for example choosing the assessment technique most suitable for the particular context. In any case, HRIA should be a transparent, participatory, inter-disciplinary process that makes an explicit reference to specific human rights obligations and uses indicators in order to strengthen effectiveness and credibility.

As UN bodies, scholars and NGOs all currently work on these methodological issues, there is no doubt that the HRIA framework will shortly become more functional and easy to use for practitioners. As soon as this is the case, HRIA should be systematically incorporated in the development policy-making process. Two fields seem to be especially relevant. First, trade policy, as there are various ways in which the provisions of trade agreements may violate human rights. Second, large-scale development projects, especially in extractive industries and infrastructure, as such projects have proven to pose a particular risk for the human rights of affected communities.

If HRIA are understood and implemented as a tool combining methodological accurateness and a strong commitment to international human rights law, they provide a chance to fundamentally improve development policy. Existing soft-law approaches, voluntary codes of conduct and instruments that are blind for human rights concerns, may finally be countered by a clear-cut tool based on binding human rights obligations. The methodology is sufficiently advanced for giving HRIA a serious try in development policy, e.g. in the form of pilot studies and projects. The necessary next step, of course, would be to summon the political will.

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