

# Extracting Corporate Responsibility: Towards a Human Rights Impact Assessment<sup>1</sup>

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Introduction

Corporations, where free to exercise unfettered power in furtherance of narrow economic interests, should be held accountable to internationally agreed upon norms of human rights. This normative vision contrasts sharply with current reality. A constellation of institutional, political, and historical forces have thus far inhibited the emergence of an international human rights legal framework that can bind corporate entities. Instead, the principal response to revelations of serious human rights abuses resulting from corporate activity<sup>2</sup> has been the promulgation of various voluntary regimes by international institutions, governments, and corporations themselves.<sup>3</sup> Although these are promising first steps, non-binding initiatives alone are unlikely to satisfy the evolving demand for corporate accountability arising from vocal sectors of civil society, the human rights community, academia, shareholders, and the public at large.<sup>4</sup>

This paper sets out to bridge the legitimacy gap between ineffective voluntary mechanisms and prospective, albeit currently unfeasible, compulsory regimes by presenting a model for a human rights impact assessment (HRIA) in the overseas hydrocarbon industry, an industry plagued by allegations of human rights abuse.<sup>5</sup> Part 1 sets out the background of our

2. The Business and Human Rights Resource Centre website contains a continuously updated compendium of documented allegations and rebuttals of corporate human rights abuses. See Business and Human Rights Resource Center, <http://www.business-humanrights.org>.

3. See generally INTERNATIONAL COUNCIL ON HUMAN RIGHTS, BEYOND VOLUNTARISM: HUMAN RIGHTS AND THE DEVELOPING INTERNATIONAL LEGAL OBLIGATIONS OF COMPANIES (2002), available at [http://www.ichrp.org/paper\\_files/107\\_p\\_01.pdf](http://www.ichrp.org/paper_files/107_p_01.pdf) [hereinafter BEYOND VOLUNTARISM]; David Kinley & Junko Tadaki, *From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law*, 44 VA. J. INT'L L. 931, 935 (2004).

4. See, e.g., BEYOND VOLUNTARISM, *supra* note 3, at 7; Kinley & Tadaki, *supra* note 3, at 1021-22; VILJAM ENGSTROM, WHO IS RESPONSIBLE FOR CORPORATE HUMAN RIGHTS VIOLATIONS?, <http://www.abo.fi/instut/imr/norfa/ville.pdf> (last visited Feb. 17, 2005); *Developments in the Law: International Criminal Law*, 114 HARV. L. REV. 1943, 2025 (2001); Robert McCorquodale, *Globalization and Human Rights*, 21 HUM. RTS. Q. 735, 763 (1999).

5. See *infra* note 19 and accompanying text.

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case study: the billion-dollar Yadana Pipeline Project in Burma (Myanmar), the first large international pipeline in Southeast Asia.<sup>6</sup> The Paper then canvasses the relationship between human rights and private extractive industries and describes the need for human rights concepts, as well as attention to environmental concerns and corruption, within the corporate “sphere of influence”—typically its core operations, business partnerships, host communities, and relations with policy-makers.<sup>7</sup> Part 2 assesses the limitations of extant mechanisms, such as voluntary codes of conduct, in regulating corporate human rights compliance, and introduces the HRIA as a stepping stone to more effective regulation. Part 3 outlines the basic history, principles, and processes of environmental and social impact assessment regimes with a view towards developing a model for an HRIA. Part 4 presents the conceptual, legal, and business case for such an HRIA. Part 5 applies this model to the case study and then concludes with several general comments and specific recommendations for creating a viable HRIA regime.

### I. Human Rights at the Bottom of the Barrel

Forced relocation, forced labor, rape, torture and murder: these were the charges that Burmese peasants brought against the U.S. oil company, Unocal, in 1996.<sup>8</sup> Burma’s Yadana gas field, located in the Andaman Sea about 60 kilometers off Burma’s southwest coast, was developed in 1992 under a conventional “production sharing” contract between Unocal (28.26%), TotalFinaElf, the project operator (31.24%), the state-owned oil companies of Thailand (PTT-EP) (25.50%), and Burma (MOGE) (15%).<sup>9</sup> The human rights abuses discussed here occurred along the 65-kilometer onshore Burmese section of the \$1 billion pipeline constructed in 1998 to carry the gas 649 kilometers across Burma into Thailand.<sup>10</sup> The victims filed suit in U.S. federal and California state courts under the Alien Tort Claims Act (ATCA)<sup>11</sup> and state law, respectively, after allegedly suffering abuses at the hands of Burmese army units, who were hired by the consor-

6. Jeff Moore, *Unocal’s Stake in Southeast Asia*, ASIA TIMES ONLINE, Jul. 20, 2005, [http://www.atimes.com/atimes/Southeast\\_Asia/GG20Ae03.html](http://www.atimes.com/atimes/Southeast_Asia/GG20Ae03.html).

7. U.N. GLOBAL COMPACT OFFICE & OFFICE OF THE U.N. HIGH COMMISSIONER FOR HUMAN RIGHTS, EMBEDDING HUMAN RIGHTS IN BUSINESS PRACTICE, 17-18 (2004), available at [http://www.unglobalcompact.org/docs/issues\\_doc/human\\_rights/embedding.pdf](http://www.unglobalcompact.org/docs/issues_doc/human_rights/embedding.pdf) [hereinafter EMBEDDING HUMAN RIGHTS]. This recent joint publication of the U.N. Global Compact and High Commissioner for Human Rights offices is an ambitious step in the promotion of human rights through business. Although it is seen only as educational material, it offers practical meaning on the Global Compact principles for companies by presenting four case studies and a policy report on business practice in different industries. The Global Compact will be further discussed below.

8. *Doe v. Unocal Corp.*, 963 F. Supp. 880 (C.D. Cal. 1997); see Complaint, *Doe v. Unocal Corp.*, No. 96-CV-06959 (C.D. Cal. filed Oct. 3, 1996) [hereinafter *Doe-Unocal Complaint*].

9. UNION OF MYANMAR, MINISTRY OF INDUSTRY, COUNTRY REPORT FOR MYANMAR 8, available at [http://www.petronas.com.my/intranet/ascope/ascope.nsf/3b269571c10e71e5482568960033edc8/d9b2645688f00ced48256b05001451f1/\\$FILE/Myanmar.pdf](http://www.petronas.com.my/intranet/ascope/ascope.nsf/3b269571c10e71e5482568960033edc8/d9b2645688f00ced48256b05001451f1/$FILE/Myanmar.pdf).

10. *Id.*

11. 28 U.S.C. § 1350 (1789).

tium to secure the Yadana pipeline route.<sup>12</sup> In 1997, the District Court ruled, for the first time in U.S. legal history, that a corporation and its executive officers could be held liable under the ATCA for violations of international human rights norms in foreign countries, and that U.S. courts have the authority to adjudicate such claims.<sup>13</sup> An out-of-court settlement was reached in December 2004, on the eve of an en banc hearing of the Ninth Circuit Court of Appeals, after the court had established that

Unocal knew that the military had a record of committing human rights abuses; that the Project hired the military to provide security for the Project, a military that forced villagers to work and entire villages to relocate for the benefit of the Project; that the military, while forcing villagers to work and relocate, committed numerous acts of violence; and that Unocal knew or should have known that the military did commit, was committing and would continue to commit these tortious acts.<sup>14</sup>

According to Donal O'Neill, a retired senior employee of the Royal Dutch/Shell Group of Companies, "[b]usiness changes the environment it operates in. The issue concerns every commercial undertaking from the corner store to the major production plant, yet in none is it as dramatic as in relation to the extractive industries - mining, oil and gas."<sup>15</sup>

Corporate liability for human rights violations resulting from hydrocarbon projects may be rare, but the kind of factual findings in *Doe v. Unocal, Inc.* are all too common. Although multinational corporations commonly speak of corporate social responsibility,<sup>16</sup> the rhetoric rings hollow for the victims of human rights abuses from Ecuador to Chad.<sup>17</sup>

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12. *Id.*; Moore, *supra* note 6.

13. *Unocal Corp.*, 963 F. Supp. 880, *aff'd in part rev'd in part*, 395 F.3d 932 (9th Cir. 2002).

14. *Unocal Corp.*, 395 F.3d. at 956.

15. Donal O'Neill, *Impact Assessments: Preventing Slow-Burn Issues from Bursting into Flames*, 2 COMPACT Q. (2005), available at [http://www.enebuilder.net/globalcompact/e\\_article000375801.cfm](http://www.enebuilder.net/globalcompact/e_article000375801.cfm).

16. See, e.g., Chevron's Social Responsibility, [http://www.chevron.com/social\\_responsibility](http://www.chevron.com/social_responsibility).

17. Consider, for example, the 1971-1992 Trans-Ecuadorian Pipeline Project led by Texaco (now ChevronTexaco). See pages 2-5 of the complaint that initiated the November 1993 lawsuit against Texaco, *Aquinda v. Texaco Inc.*, 945 F. Supp. 625 (S.D.N.Y. 1996), available at <http://www.texacorainforest.com/case/index.htm>. For information regarding ChevronTexaco and Halliburton's projects in Angola, see France's Ministry of Finance Summary Report, *Evaluation of Angolan Petroleum Sector*, [http://www.angola.org/referenc/reports/oil\\_diagnostic\\_eng.pdf](http://www.angola.org/referenc/reports/oil_diagnostic_eng.pdf); *Some Transparency, No Accountability: The Use of Oil Revenue in Angola and Its Impact on Human Rights*, HUM. RTS. WATCH, Vol. 16, No. 1(A), Jan. 2004, available at <http://www.hrw.org/reports/2004/angola0104/angola0104.pdf>. For project details of ExxonMobil's hydrocarbon project in Chad, see The World Bank Group, *The Chad Cameroon Petroleum and Development Project: Project Overview*, 10 April 2003, available at [http://www.worldbank.org/afr/ccproj/project/project\\_overview.htm](http://www.worldbank.org/afr/ccproj/project/project_overview.htm). For information regarding ExxonMobil's project in Indonesia, see Complaint, *Doe v. ExxonMobil*, No. 01-CV-01357 (D.C. Cir. filed Jun. 19, 2001) [hereinafter *Doe-ExxonMobil Complaint*]. To consider accusations against Shell, see Complaint, *Wiwa v. Royal Dutch Petroleum and Shell Transport and Trading Company, P.L.C.*, No. 96-CV-8386 (S.D.N.Y. filed Nov. 8, 1996), available at [http://www.ccr-ny.org/v2/legal/corporate\\_accountability/corporateArticle.asp?ObjID=SRyTC75tj&Content=46](http://www.ccr-ny.org/v2/legal/corporate_accountability/corporateArticle.asp?ObjID=SRyTC75tj&Content=46). For information regarding the Talisman Energy project in Sudan, see Presbyterian Church of

Human rights violations commonly associated with the hydrocarbon industry can be divided into four distinct yet overlapping categories. First, before project construction can commence, developers and their government partners often force indigenous populations to relocate (e.g., Burma, Ecuador, and Chad-Cameroon).<sup>18</sup> Resettlement is rarely accompanied by meaningful and adequate compensation, leaving populations in villages that lack basic infrastructure (e.g., Burma and Chad-Cameroon).<sup>19</sup> As was the case in Burma, local inhabitants are often subjected to abuse by the security forces employed to guard the project facilities.<sup>20</sup> Second, when commercial production begins, a substantial new source of revenue serves to legitimize and empower autocratic and unstable regimes with shameless histories of human rights abuses (e.g., Burma and Chad-Cameroon).<sup>21</sup> Such regimes frequently misappropriate massive project revenues rather than meet the legitimate needs of their populations.<sup>22</sup> Third, once resource extraction and transport has commenced, adverse health issues

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Sudan et al. v. Talisman Energy Inc. and the Republic of Sudan, 244 F. Supp. 2d 289 (S.D.N.Y. 2003). Allegations also arose against ExxonMobil in Ache for human rights abuses perpetrated by Exxon security guards. See Doe-ExxonMobil Complaint. The recent World Bank-sponsored Baku-Tbilisi-Ceyhan (BTC) Main Export Pipeline has also come under criticism as the Host Government Agreement entered into by Turkey and the consortium of participating oil companies requires the former to compensate the government for any laws that "will disturb the economic equilibrium of the project[,] chilling . . . Turkey's ability to improve its general human rights record." AMNESTY INTERNATIONAL, HUMAN RIGHTS ON THE LINE: THE BAKU-TBILISI-CEYHAN PIPELINE PROJECT 5 (2003), available at <http://www.amnestyusa.org/business/humanrightsontheline.pdf>; Paul Brown, *Human Rights Row Over BP Plan to Lay Turkish Pipeline*, THE GUARDIAN, Aug. 31, 2002, available at <http://www.guardian.co.uk/oil/story/0,11319,783937,00.html>. Although British Petroleum (BP) has just been granted approval to begin a gas pipeline project in West Papua on the island of New Guinea, there is growing concern that this project will result in massive human rights violations. See George Monbiot, *In Bed with the Killers*, THE GUARDIAN, May 3, 2005, available at <http://www.monbiot.com/archives/2005/05/03/in-bed-with-the-killers>.

18. See Monbiot, *supra* note 17.

19. Genoveva Hernandez Uriz, *The Application of the World Bank Standards To The Oil Industry*, 28 BROOKLYN J. INT'L L. 77 (2002).

20. See, e.g., *Unocal Corp.*, 963 F. Supp. at 884 (outlining the abuses which the State Law and Order Restoration Council levied against locals in Burma when the group was hired to provide labor and security for the Yadana pipeline project); see also Monbiot, *supra* note 17.

21. See Uriz, *supra* note 19.

22. For example, over the course of the projected twenty-five year pipeline project, beginning July 2003, Chad will receive estimated revenues of \$US 1.8 billion (based on projected production levels of 917 million barrels averaging \$15.25 a barrel). See Martin Plaut, *Chad Hopes for Oil Wealth*, BBC WORLD SERVICE AFRICA, Oct. 3, 2003, available at <http://news.bbc.co.uk/1/hi/business/3161216.stm>. To date, however, Chad remains one of the five most impoverished countries according to the United Nations 2002 Human Development Index. *Id.* Although an Oil Revenues Control and Monitoring Board was created to oversee the allocation of revenue, the Chadian government used a \$25 million "welcome" bonus to refurbish the ministers' offices and purchase arms and other military equipment to fight rebel groups. *Chad's New Oil Bonanza Buys Guns, Not Schools*, THE DAILY TELEGRAPH, Oct. 10, 2003, available at <http://www.telegraph.co.uk/news/main.jhtml?xml=/News/2003/10/11/wchad11.xml>. Chad also ranked last in Transparency International's 2005 Corruption Perceptions Index, [http://www.transparency.org/policy\\_research/surveys\\_indices/cpi/2005](http://www.transparency.org/policy_research/surveys_indices/cpi/2005).

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commonly arise from environmental pollution.<sup>23</sup> Toxic leaks, gas flares, and dumping have created public health catastrophes in villages, contaminating vital food and drinking sources and causing cancerous tumors.<sup>24</sup> This amalgam of impacts stems from sudden, drastic changes in the local economy—commonly referred to as boomtown effects or “Dutch Disease”<sup>25</sup>—as the project gets underway. The costs of domestic goods and services rise sharply, HIV/AIDS follows on the tails of flourishing drug markets and prostitution, and labor is drawn away from traditional public and private sectors such as education and subsistence agriculture.<sup>26</sup> Once the project matures, economic activity and labor demand plateau or decline, leaving dependent workers in an under-diversified economy.<sup>27</sup> The relationship between communities in the developing world and the hydrocarbon industry can be complex and devastating. To protect the citizens of these countries, to promote long-term sustainable development, and to legitimize corporate-led globalization, we must apply human rights concepts to these business projects.

## II. Whose Business is Human Rights Compliance?

Out of the ashes of World War II emerged a law of international human rights designed to protect the dignity of the individual from arbitrary abuse at the hands of the state.<sup>28</sup> However, where non-state actors were in violation of human rights, unless their crimes put them in a class with those tried at Nuremberg, non-state actors could not be held liable.<sup>29</sup> As the underwriters of the cornerstone human rights treaties, states assumed primary responsibility for the realization of human rights.<sup>30</sup> Consequently, human rights law largely relies upon implementation by domestic legislatures and courts, while the regulation of corporations—traditionally not viewed as legal subjects in international law—remains the

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23. ChevronTexaco's operation in Ecuador dumped approximately 4.3 million gallons of toxic wastewater into the Ecuadorian rainforest *per day*. MIGUEL SAN SEBASTIAN & JUAN CORDOBA ANTONIO, YANA CURI REPORT: THE IMPACT OF OIL DEVELOPMENT ON THE HEALTH OF THE PEOPLE OF THE ECUADORIAN AMAZON (1999), [http://www.amazonwatch.org/amazon/EC/toxico/downloads/yanacuri\\_eng.pdf](http://www.amazonwatch.org/amazon/EC/toxico/downloads/yanacuri_eng.pdf).

24. See generally *id.*

25. The term “Dutch Disease” originated during the 1960s in reference to the natural gas discoveries in the North Sea which led to an appreciation of Dutch real exchange rates and subsequent adverse effects on Dutch manufacturing. See W.M. Corden, *Booming Sector and Dutch Disease Economics: Survey and Consolidation*, OXFORD ECONOMIC PAPERS 16 (1984).

26. See PLATFORM RESEARCH, PUMPING POVERTY: BRITAIN'S DEPARTMENT FOR INTERNATIONAL DEVELOPMENT AND THE OIL INDUSTRY, [http://www.bankwatch.org/documents/Pumping\\_poverty\\_full\\_web.pdf](http://www.bankwatch.org/documents/Pumping_poverty_full_web.pdf).

27. See Christin Ebrahimzadeh, *Dutch Disease: Too Much Wealth Managed Unwisely*, 40 FIN. AND DEV. 1 (2003).

28. See Henry J. Steiner & Philip Alston, INTERNATIONAL HUMAN RIGHTS IN CONTEXT 112-35 (2d ed. 2000); see also Thomas Buergenthal, *The Normative and Institutional Evolution of International Human Rights*, 19 HUM. RTS. Q. 705-08 (1997).

29. Kinley & Tadaki, *supra* note 3, at 937.

30. LOUIS HENKIN, THE AGE OF RIGHTS 1-10 (1990); see also Louis Henkin, *The Age of Rights*, in HUMAN RIGHTS 2-6 (Louis Henkin et al. eds., 1999).

sole province of states.<sup>31</sup> Indeed, many states have developed a corpus of workplace health and safety, environmental, labor, public nuisance, consumer protection, anti-discrimination, and disclosure laws that imposes a vicarious patchwork of human rights duties on corporations within their jurisdiction.<sup>32</sup>

Not surprisingly, the corporate human rights violations of greatest concern occur in poor and developing states where regulatory capacity is weak and heavily compromised by the “host state’s unbalanced relationships with [transnational corporations].”<sup>33</sup> Even when a developed country’s laws wield extra-territorial jurisdiction—as most conspicuously exemplified by the Alien Tort Claims Act of 1789 in the United States<sup>34</sup>—corporate liability is usually left to the glacial advance of international law. While “there is a clear basis in international law for extending international legal obligations to companies in relation to human rights,”<sup>35</sup> Kinley and Tadaki concede:

The current scope of what might be loosely called the international human rights law duties of TNCs is wide, but spread thinly and unevenly. It encompasses examples of supposed customary international law, treaty obligations, and so-called “soft law” codes of conduct, guidelines, and compacts. The actual legal cover these initiatives provide is meager or non-existent.

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31. Kinley & Tadaki, *supra* note 3, at 937.

32. *Id.*

33. *Id.* at 938. Kinley and Tadaki go on to describe the infamous “race to the bottom,” in which states vie to attract desperately needed foreign corporate investment by lowering their environmental and labor standards. *Id.* at n.12.

34. ATCA allows U.S. district courts to hear “any civil action by an alien for a tort only, committed in violation of the law of nations . . . .” 28 U.S.C. § 1350 (1789). Despite its successes, ATCA suffers from a number of shortcomings, such as (1) ambiguity and narrowness in the modern interpretation of “the law of nations”; (2) the limitations of the “state action” requirement; (3) the difficulty of establishing personal jurisdiction over foreign defendants; (4) the doctrine of *forum non conveniens*, providing judicial discretion to turn down a case that is deemed more appropriately tried in another forum; and (5) separation of powers issues arising from judicial interference in the Executive’s authority over foreign relations. See Kinley & Tadaki, *supra* note 3, at 940-43. Other examples of extraterritoriality include the U.S. Racketeer Influenced and Corrupt Organizations statute and Torture Victim Protection Act, *id.* at 939, both of much narrower scope, as well as Belgium’s brief interlude with a “universal competence” law that empowered courts to hear human rights cases by anyone, against anyone. *Id.* at 940. Along with the Belgian law, other recent attempts at domestic extraterritorial legislation in the United States, the United Kingdom, and Australia that specifically targeted corporations’ overseas conduct have fallen by the wayside. *Id.* at 939.

35. BEYOND VOLUNTARISM, *supra* note 3, at 165. Just as individuals, rebel groups, and international institutions have all been found to bear an international legal personality, there is no theoretical constraint on conferring international legal duties on corporations as well. *Id.* at 55-58. In some instances corporations already enjoy supranational rights, including the right to privacy, a fair trial, and free expression. See *Autronic AG v. Switzerland*, Eur. Ct. H.R. (ser. A) at 178 (1990), 12 E.H.R.R. 485 ¶ 47 (1990). Moreover, the preamble to the Universal Declaration of Human Rights declares that “every individual and every organ of society . . . shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance . . . .” Universal Declaration of Human Rights, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 10, 1948) (emphasis added).

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The legal (or quasi-legal) duties imposed on corporations have some potential authority, but as yet they remain ill-defined and ineffective. In short, the rudiments of an international legal framework may be discernable, but the legal content of the law is almost wholly absent.<sup>36</sup>

As a result, corporations in the developing world operate within a legal lacuna, leading to the kind of unchecked abuses described above.

Under pressure to be more accountable, many corporations have taken up the banner of Corporate Social Responsibility (CSR), adopting various voluntary initiatives, including those described above by Kinley and Tadaki, as well as private codes of conduct, both internal and industry-wide.<sup>37</sup> In doing so, businesses do not fill the role of government but rather help promote human rights in their own sphere of competence. As corporations like Unocal have learned the hard way, neglecting to act responsibly can ultimately put their reputation and bottom line at risk.<sup>38</sup> While this should be reason enough for corporations to care about human rights, some corporations have nonetheless resisted specific and compulsory measures.<sup>39</sup> Many corporations continue to be magnanimous in their charity towards society; however, it is exactly this voluntary character of philanthropy that corporations likely prefer, as it allows them to gain in reputation without being bound to their commitments. This resistance to compulsory measures has resulted in a variety of vague and unenforceable multilateral initiatives, from the Global Compact to the U.N. Human Rights Business Norms,<sup>40</sup> which are perceived, at best, as toothless paper tigers and, at worst, as public relations “whitewashing.”<sup>41</sup> In any case, corporate human rights abuses persist. Ultimately, the ideal legal framework for effectively guaranteeing corporate compliance with fundamental human rights will be an integrated two-track regime, centered on the state’s responsibility to safeguard its own populace yet supplemented by international mechanisms defining minimum standards applicable to a corporation’s “sphere of influence” when the state is unwilling or unable to do so.<sup>42</sup> However, long before such international legal structures can be

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36. Kinley & Tadaki, *supra* note 3, at 948; *see also* Engstrom, *supra* note 4, at 50.

37. *See* Corporate Social Responsibility Initiative, The Initiative Partners, [http://sparky.harvard.edu/m-rcbg/CSRI/init\\_partners.html](http://sparky.harvard.edu/m-rcbg/CSRI/init_partners.html) (listing supporters of the Corporate Social Responsibility Initiative, including Chevron Corporation, The Coca-Cola Company, General Motors, etc.).

38. *See* American Petroleum Institute, *Avila Beach: A New Beginning* (2003), <http://www.api.org> (search for “avila beach”); *see also* Press Release, *Socially Responsible Companies Rank High with Job Seekers*, <http://www.csrwire.com/PressRelease/php?id=6046>, Aug. 2, 2006.

39. Mary Robinson, *The Business Case for Human Rights*, in *VISIONS OF ETHICAL BUSINESS* (1998).

40. *See* U.N. Econ. & Soc. Council [ECOSOC], Subcomm. on the Promotion and Protection of Human Rights, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (Aug. 26, 2003) [hereinafter “the Norms”]; *see also* U.N. Global Compact website, <http://unglobalcompact.org/>.

41. *See* Larry Cata Backer, *Multinational Corporations*, *Transnational Law*, 37 *COLUM. HUM. RTS. L. REV.* 287, 357 (2006).

42. *See* Kinley & Tadaki, *supra* note 3, at 993-1020.

erected to fill the void, corporate human rights norms must mature beyond their present thin and uneven infancy. While states are reluctant to share the international legal stage and develop well-defined and compulsory norms of corporate conduct,<sup>43</sup> these norms may still emerge from the bottom up.<sup>44</sup>

Building on this strategic insight, this paper proposes using environmental and social impact assessment (IA)<sup>45</sup> to transition from voluntary to involuntary human rights compliance regimes. IA is a disclosure tool that governments and corporations have long accepted, involving informational and participatory components of informed decision-making, which we consider fundamental.<sup>46</sup> While leaving the corporation's hands legally untied and the basic international legal structures intact, IA guides the market-based groundswell for corporate social responsibility towards substantive norms that will eventually emerge from the "bottom up" as international human rights law binding on corporations.<sup>47</sup>

### III. Building on Solid Rigging: Environmental and Social Impact Assessment

This paper explores the history, significance, main principles, and processes of IA. Environmental Impact Assessment (EIA) sprung from the cross-fertilized fields of land use planning, cost/benefit analysis, multiple objective analysis, modeling, and simulation.<sup>48</sup> The 1969 U.S. National Environmental Policy Act (NEPA) heralded the first manifestation of a national EIA regime and continues to be the primary implementing legislation in the United States, supplemented by a handful of similar state-level enactments.<sup>49</sup> Although such assessments had been previously contemplated, NEPA contributed to the systematic assessment and presentation of environmental impacts, alternatives, and mitigation possibilities. The Foreign Assistance Act of 1979 effectively extended NEPA's reach to U.S. foreign aid activities.<sup>50</sup> Since NEPA's inception, similar provisions have been

43. Fleur Johns, *The Invisibility of the Transnational Corporation*, 19 MELB. U. L. REV. 893, 900 (1994).

44. See Anne-Marie Slaughter, *A Liberal Theory of International Law*, 94 AM. SOC'Y INT'L L. PROC. 240, 242 (2000) ("Proponents of a liberal theory of international relations identify] multiple bodies of rules, norms and processes that contribute to international order, beginning with voluntary codes of conduct adopted by individual and corporate actors operating in transnational society and working up through transnational and transgovernmental law to traditional public international law . . .").

45. See C.J. BARROW, ENVIRONMENTAL AND SOCIAL IMPACT ASSESSMENT 65 (1997).

46. See, e.g., International Covenant on Civil and Political Rights arts. 19, 25, Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]; European Convention for the Protection of Human Rights and Fundamental Freedoms art. 10, Nov. 4, 1950, 213 U.N.T.S. 222 [hereinafter European Convention]; American Convention on Human Rights arts. 13, 23, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 144; African Charter on Human and Peoples' Rights arts. 9, 13, June 27, 1981, 1520 U.N.T.S. 245.

47. See BARROW, *supra* note 45, at 172 (stating that corporations have already begun to use their own impact assessment models).

48. *Id.* at 166.

49. *Id.* at 167 (discussing "little NEPAs" enacted by states).

50. *Id.* at 170.

widely adopted by many countries, often with considerable modifications to the procedures and processes involved,<sup>51</sup> the most robust transplants of which are found in Australia,<sup>52</sup> Canada,<sup>53</sup> and the Netherlands.<sup>54</sup> Increasingly, interest has turned global and focused on transboundary IA, such as those dealing with climate change.<sup>55</sup>

In 1991, the U.N. Economic Commission for Europe launched the Convention on Environmental Impact Assessment in a Transboundary Context, signed by 28 countries in Espoo, Finland.<sup>56</sup> The Convention goes beyond making provisions for a project-level IA to encourage program- and policy-level assessments.<sup>57</sup> Despite its successes, the Convention still exemplifies a high-level, international IA tool based on local legislation that is voluntary in nature and, therefore, difficult to enforce at the business level. A further development in the recognition and use of IA comes from the international financial institutions, many of which now require the submission of impact statements prior to financing projects.<sup>58</sup> Stemming from EIA, the World Bank, for example, has developed and propagated a "Strategic Environmental Assessment (SEA)."<sup>59</sup> In contrast to EIA, which is usually applied to site-specific projects, SEA is best suited to analyze policies, sectoral or regional strategic plans, and sub-regional investment programs. Since SEA focuses solely on the big picture, it cannot replace the precision of a site-specific EIA.<sup>60</sup> In any case, these achievements of the Espoo Convention and the World Bank provide an impetus and framework for the adoption of the HRIA at the state level.

Another important form of IA is Social (and Cultural) Impact Assessment (SIA). According to Burge and Vanclay, "social impacts include all . . . consequences to a human population . . . that alter the ways in which people live, work, play, relate to one another, organize to meet their needs and generally cope as members of society," while "cultural impacts involve

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51. *Id.*

52. See Australian Government Department of the Environment and Heritage, Referrals, Assessments, and Approvals, <http://www.deh.gov.au/epbc/assessmentsapprovals/> (2006).

53. See Kamta Prasad, *Environmental Impact Assessment: An Analysis of the Canadian Experience*, 30 INT'L STUDIES 299 (1993).

54. See Cass R. Sunstein, *Irreversible and Catastrophic*, 91 CORNELL L. REV. 841, 853 (2006), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=70532](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=70532).

55. BARROW, *supra* note 45, at 171; see also International Association for Impact Assessment, <http://www.iaia.org/>.

56. See Convention on Environmental Impact Assessment in a Transboundary Context, [www.unece.org/env/eia/convratif.html](http://www.unece.org/env/eia/convratif.html).

57. BARROW, *supra* note 45, at 170-72.

58. See, e.g., Inter-American Development Bank, <http://www.iadb.org/exr/pic/environmental/environmental.cfm>.

59. The World Bank, <http://www.worldbank.org>.

60. MARIA TERESA SERRA, WHY/WHEN DO WE NEED SEA?, <http://info.worldbank.org/etools/docs/library/107861/sea/sea/materials.html> (select "presentation script" link). The differences between SEAs and EIAs revolve around three main issues: the timing of decisions, the nature of decisions, and the level of information, all of which occur at much higher levels of generality in the SEA. Maria Partidario, *History, Trend, and Drivers of SEA*, available at [http://info.worldbank.org/etools/docs/library/107861/sea/sea/pdf/transcript/m1\\_partidario.pdf?33540](http://info.worldbank.org/etools/docs/library/107861/sea/sea/pdf/transcript/m1_partidario.pdf?33540).

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changes to the norms, values, and beliefs of individuals that guide and rationalize their cognition of themselves and their society.”<sup>61</sup> SIA can therefore be defined as “the study of the potential effects of natural physical phenomena, activities of government and business, or of any succession of events on specific groups of people.”<sup>62</sup> Focusing on the impact of business on human society, yet mindful of the relevant governmental and environmental interactions that may shape this impact, this paper will predominantly take SIA, and the principles and processes that animate it, as its point of reference.

SIA was formalized with the passage of the NEPA, when it became evident that modifying a natural ecosystem also altered the culture and social organization of contiguous and embedded human populations.<sup>63</sup> SIA soon constituted an important part of EIA, carrying increasing weight alongside economic and environmental considerations in the decision-making process.<sup>64</sup> Both SIA and EIA represent proactive and structured approaches to gathering objective and comprehensive information about a project or policy, including viable alternatives, in a way that involves the public in the planning and decision-making process. For both IA types, production of a clear, concise, and unbiased impact statement is the means; sustainable development is the end.<sup>65</sup> Nonetheless, SIA remains on historically uneven footing, typically subsumed within the relevant state environmental policy framework.<sup>66</sup> Yet, this need not be the case; SIA as a freestanding process and methodology has the potential to contribute greatly to the planning process of organizations and institutions across many sectors, both governmental and non-governmental.<sup>67</sup>

One of the most notable events in SIA history has been the agreement upon and subsequent publication of the Guidelines and Principles for Social Impact Assessment by the Interorganizational Committee on Guidelines and Principles for SIA.<sup>68</sup> This publication is a milestone because it represents a body of learned wisdom and established procedure that can serve as a starting point for adaptation and adoption by land management

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61. Rabel J. Burge & Frank Vanclay, *Social Impact Assessment*, in ENVIRONMENTAL AND SOCIAL IMPACT ASSESSMENT 31 (Frank Vanclay & Daniel A. Bronstein eds., 1995) (emphasis added).

62. C.P. Wolf, *What is Social Impact Assessment?*, in SOCIAL IMPACT ASSESSMENT 83-84 (1983) (emphasis added).

63. Burge & Vanclay, *supra* note 61, at 34.

64. *Id.* at 36.

65. BARROW, *supra* note 45.

66. See Burge & Vanclay, *supra* note 61, at 59.

67. *Id.* at 32.

68. See generally The Interorganizational Committee on Guidelines and Principles for Social Impact Assessment, *Guidelines and Principles for Social Impact Assessment* (1994) [hereinafter “Guidelines and Principles”] (formed to assist NEPA officials in carrying out their mandate, the Interorganizational Committee includes representatives from several government agencies, academic disciplines, and professional associations), available at <http://www.st.nmfs.gov/tm/spo/spo16.pdf>; see also Jessica Glicken Turnley, *Social, Cultural, Economic Impacts: A Literature Review* (Oct. 2002) (prepared for the Environmental Protection Agency), available at <http://www.epa.gov/superfund/action/guidance/SILitRevFinal.pdf>.

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and regulatory agencies, as well as international aid organizations.<sup>69</sup> The principles governing effective SIA, as generated by the Interorganizational Committee, are mapped out in Figure 1. The principles emphasize the involvement of all potentially affected stakeholders with a clear identification of winners and losers and the vulnerability of under-represented groups.<sup>70</sup> Furthermore, the assessment must be focused, dealing with the issues and public concerns that “really count,” not those that are just “easy to count.”<sup>71</sup> The principles, operative definitions, methods, and assumptions applied in the SIA should be determined in advance and revisited throughout the process.<sup>72</sup> Also, SIA demands reliable sources of data, such as published social science literature and primary field studies, along with the trained social scientists familiar with this information.<sup>73</sup> Feedback on expected social implications is essential, allowing project planners to weigh the competing social costs and benefits of the proposed action and its alternatives.<sup>74</sup> Finally, monitoring and mitigation programs help manage uncertainty and minimize adverse effects as the project proceeds.<sup>75</sup>

The basic SIA process model,<sup>76</sup> grounded in that of the Interorganizational Committee,<sup>77</sup> is comparative and progresses in three consecutive steps, as depicted in Figure 2.

Whereas EIA has offered one of the most far-ranging and significant methodologies for improving projects and policies, there are few examples where the use of SIA has made a significant difference. Successful integration of SIA into the institutionalized policy and decision-making process will depend on a proven record of accomplishment.<sup>78</sup> However, SIA has been difficult to apply because it is performed by outside experts serving their employing organizations. In such circumstances, conflicts of interest frequently emerge, dimming the comprehensive understanding and objective reporting of local community issues.<sup>79</sup> Critics of SIA also claim that it is imprecise, overly theoretical, descriptive rather than explanatory, limited to local application, and expensive.<sup>80</sup> An additional criticism is that few of the theories upon which it is based are clearly defined or reliable.<sup>81</sup> The response to these critics may prove instructive in the development of an effective HRIA regime.

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69. See Burge & Vanclay, *supra* note 61, at 31.

70. Guidelines and Principles, *supra* note 68, at 18.

71. *Id.* at 20.

72. *See id.*

73. *Id.* at 22, 24.

74. *See id.* at 21.

75. See Burge & Vanclay, *supra* note 61, at 57-60.

76. *Id.* at 38-39.

77. Guidelines and Principles, *supra* note 68, at 10-16.

78. See Burge & Vanclay, *supra* note 61, at 37-38.

79. *Id.*

80. BARROW, *supra* note 45, at 230; see also R.M. Muth, & R.G. Lee, *Social Impact Assessment in Natural Resource Decision-making: Toward the Structural Paradigm*, 4 IMPACT ASSESSMENT BULLETIN 168, 168-83 (1986).

81. BARROW, *supra* note 45, at 230.

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Figure 1: Principles Governing Social Impact Assessment



Source: Frank Vanclay and Daniel A. Bronstein (1995).

A final set of problems illustrates that such weaknesses may not be unique to SIA. Currently, the greatest obstacles businesses face are the time required to perform IA<sup>82</sup> and the difficulty of finding sensible ways to implement its recommendations.<sup>83</sup> IA needs better public participation, improved circulation of information, and a firm legislative schedule. Also cited as crucial to successful IA implementation are improvements in data, planning, environmental management, participant integrity, and avenues of appeal.<sup>84</sup> Finally, political will and the ability to act on the resulting recommendations are essential to the success of IA.

While EIA and SIA techniques are now considered mature, with reputable entities available to execute them, the temptation to cut corners to save time and money is powerful.<sup>85</sup> This has raised concerns among environmental groups. For example, some fear that the timeframe is too short for a baseline environmental impact study for the proposed oil and gas

82. O'Neill, *supra* note 15.

83. See ALAN GILPIN, ENVIRONMENTAL IMPACT ASSESSMENT (EIA) 158 (1995).

84. *Id.*

85. O'Neill, *supra* note 15.

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Figure 2: Social Impact Assessment Process Model

1	<i>Assessment and Prediction</i>	Determination of the potential impact of a specific action affecting a community before commencing any change.
2	<i>Mitigation and Monitoring</i>	Mitigation involves the initial statement about potential negative consequences and how they may be averted, as well as an ongoing role in the development process by all parties in order to minimize negative impacts. Monitoring is checking that any change that occurs has been anticipated, and that appropriate mitigation strategies are adopted to deal with unexpected consequences.
3	<i>Audit and Analysis</i>	Evaluating the methods and prediction techniques underlying the SIA is crucial, as they vary greatly across cultures. This also improves understanding of the particular study area through the analysis of the social effects of past actions.

Source: Frank Vanclay and Daniel A. Bronstein (1995).

exploration in the Arctic National Wildlife Refuge (ANWR).<sup>86</sup> As a result, a quick and superficial IA, possibly accompanied by a few token mitigation measures, may be implemented in individual communities directly affected, while the major structural issues—revenue, employment, boom-towns, unintended migration—will not be addressed. These larger, “slow burn” issues, now ignored, threaten to explode years into the future when mitigation and remediation is all but impossible.<sup>87</sup>

In developing countries, the appropriation of common resources by individuals, special-interest groups, multinational corporations, or central governments feeds the “slow burn,” posing an increasingly common problem.<sup>88</sup> In response, a socially oriented IA would alter this trajectory and safeguard the traditional rights of local people.<sup>89</sup> It may also reduce the uncertainty and social stress frequently attendant development projects, building trust through communication and community involvement.<sup>90</sup> Therefore, the collective long-term economic benefits of sound environmental and social IA, if successfully adopted, may greatly overshadow its associated costs. Graham Smith argues that the social, economic, physical and biological aspects of the environment are so interconnected that IA should not treat them separately but should link them.<sup>91</sup> In practice, such a total social impact assessment is more of a goal than a reality, although

86. U.S. FISH & WILDLIFE SERVICE, DRAFT ENVIRONMENTAL IMPACT STATEMENT AND DRAFT REGULATIONS: PROPOSED OIL AND GAS EXPLORATION WITHIN COASTAL PLAIN OF THE ARCTIC NATIONAL WILDLIFE REFUGE S-3 (1982).

87. O'Neill, *supra* note 15.

88. *Id.*

89. L. GRAHAM SMITH, IMPACT ASSESSMENT AND SUSTAINABLE RESOURCE MANAGEMENT 125 (1993).

90. A.L. Rydant, *A Methodology for Successful Public Involvement*, in SOCIAL IMPACT ASSESSMENT 96-98 (1984); Burge & Vanclay, *supra* note 61, at 60.

91. SMITH, *supra* note 89, at 4.

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support for it is growing. In this light, we consider a new breed of total social impact assessment: the human rights impact assessment.

#### IV. In the Pipeline: A Human Rights Impact Assessment

Environmental and social impact assessments have been a keystone of environmental and social protection in wealthy, developed countries.<sup>92</sup> Their success is due to their functional role in importing oft-neglected information about the effects of a given project or policy into the decision-making process without command-and-control regulation. Nonetheless, because IA springs from the regulatory systems of the developed world, it has a number of characteristics that limit its applicability to corporate-run hydrocarbon projects in the under-regulated developing world. IA often applies only to the activities of federal agencies or is territorially restricted and not applicable to private corporations operating overseas.<sup>93</sup> Moreover, as discussed above, IA fails to address the totality of potential consequences, especially political, cultural, and economic rights.<sup>94</sup> While traditional state regulatory mechanisms compensate for this deficiency in the developed world, their absence in places like Burma counsels for a more effective and comprehensive regime.

A Human Rights Impact Assessment incorporates the human rights rubric into the decision-making process attendant under-regulated operations of corporations in the developing world. It focuses on human rights impacts occurring within a corporation's sphere of influence. The effects may either contribute to or detract from the fulfillment and progressive realization of international human rights standards. Unlike domestic regulation, HRIA considers human rights "indivisible and interdependent"<sup>95</sup> and integrates positive and negative effects into a dynamic whole. Alongside the increasing legal and normative authority of human rights standards, a growing body of scholarship and jurisprudence is bringing to bear a more sophisticated and salutary understanding of their substance.

##### A. The Nuts and Bolts of HRIA

Despite its human rights frame of reference, an HRIA regime extends many of the main principles and methodologies animating SIA.<sup>96</sup> Adapted to address corporate impacts on human rights in the developing world, the guiding principles should be:

1. *Involve the Public*: Identify all potentially affected and under-represented stakeholders, especially workers and members of the local community. This is especially difficult, but essential, when the state politically marginalizes its minorities or lacks accountable, democratic governance.

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92. *Id.* at 8-9.

93. *Id.*

94. *See supra* note 83 and accompanying text.

95. Vienna Declaration and Programme of Action, U.N. Doc. A/CONF.157/23 (July 12, 1993).

96. *See supra* Figure 1.

In the latter case, a large-revenue hydrocarbon project calls for public consultation throughout the country.

2. *Analyze Impact Equity*: Recognize and address the uneven distribution of positive and negative effects. This is consonant with the spirit of non-discrimination underlying all human rights. By minimizing the perception of preferential treatment of particular ethnic groups or economic classes, this also avoids communal strife.
3. *Identify Relevant Definitions, Methods, and Assumptions in Advance (Set Parameters)*: Reflect ahead of time on what constitutes significance, reversibility, and mitigation potential, as well as the methods and underlying assumptions. This will concretize and legitimize the impact assessment and promote transparency.
4. *Internalize the HRIA in Decision-Making*: It is understood that an HRIA, and the critical insights derived from it (however unappealing to some), should not be treated as a mere formality but rather as an integral source of feedback informing the central decision-making process. Moreover, the HRIA and its lessons should be institutionalized into corporate practice through internal codes of conduct and explicit policies addressing discrimination, labor, security, and indigenous peoples that include mechanisms for monitoring, non-retaliation, appeals, staff training, and enforcement with contractors.<sup>97</sup>
5. *Use Competent HRIA Practitioners*: HRIA auditors should exhibit independence and familiarity in their dealings with the HRIA process and corporate decision makers. Financial and institutional independence is imperative to avoid actual and perceived conflicts of interest. Familiarity and faithful exception require employing and consulting with qualified and cooperative social scientists and human rights practitioners.
6. *Employ Data with Integrity*: For reliable and current information, HRIA auditors should use rigorous fieldwork along with credible sources of data from published social science literature and human rights reports. They should plan for data gaps wisely.
7. *Transparency*: Honestly disclose both the process and results of a project's HRIA, to the extent consistent with the protection of vital trade secrets. This strengthens the legitimacy of corporate decision-making and public participation.<sup>98</sup>

These principles are necessarily intertwined. For example, sound data collection and incorporating predictions of impact equity will rely on active public participation and competent HRIA practitioners. Furthermore, this information will mean little if it is left out of corporate decision-making, shorn of the relevant definitions, methods, and assumptions, or confined to a closed dossier.

These principles guide the proposed HRIA process, as represented in Figure 3 below, a process that is rooted in the work of the Interorganizational Committee on Guidelines and Principles for Social Impact Assessment<sup>99</sup> and the Humanist Committee on Human Rights.<sup>100</sup>

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97. See Global Reporting Initiative, *Sustainability Reporting Guidelines* 53-54 (2002), available at <http://www.globalreporting.org/ReportingFramework/G3Online/>.

98. See *id.* at 24.

99. Guidelines and Principles, *supra* note 68, at 10-16.

100. The Humanist Committee on Human Rights is a Dutch organization, founded in 1981, with considerable influence on Dutch and European human rights issues, partly

Figure 3: The Proposed HRIA Process

Step	Description	Applicable Principles
1. <i>Preliminary Review: Scoping and Screening</i>	<i>Scoping</i> —conduct a preliminary assessment of what human rights implications, if any, are likely to arise. <i>Screening</i> —assign HRIA coverage accordingly.	Public Involvement; Parameter Setting; HRIA Internalization; Competent Practitioners; Data Integrity; Transparency
2. <i>Baseline Assessment</i>	Determine the actual current human rights situation, from which the potential impacts can be predicted and actual effects can be gauged. <sup>101</sup>	Public Involvement; Parameter Setting; Competent Practitioners; Data Integrity; Transparency
3. <i>Impact Projection</i>	Predict potential impacts (and responses), both positive and negative, and identify whether and how they are significant, reversible, and/or mitigable. <sup>102</sup>	Public Involvement; Impact Equity Analysis; Parameter Setting; Competent Practitioners; Data Integrity; Transparency
4. <i>Decision-making</i>	Use the above findings to formulate a menu of alternatives and mitigation measures; then consider all possible options, weighing the positive and negative human rights impacts (and their significance, reversibility, and mitigability) and public input in the final business decision.	Public Involvement; Impact Equity Analysis; Parameter Setting; HRIA Internalization; Transparency
<i>Implementation</i>	Implement the best option, possibly the “no project option”, along with all associated mitigation and policy measures.	
5. <i>Post-Implementation: Ongoing Monitoring, Mitigation, and Evaluation</i>	<i>Monitoring and Mitigation</i> - once the project has been initiated, follow through with ongoing monitoring of human rights consequences <sup>103</sup> and appropriate mitigation measures. <i>Evaluation</i> - evaluate the performance and parameters of the HRIA to refine the model.	Public Involvement; Impact Equity Analysis; Parameter Setting; HRIA Internalization; Competent Practitioners; Data Integrity; Transparency

through its facilitation of a dialogue among experts. At a workshop in March 2004, they devised the following steps to an HRIA: i) assessment of the actual human rights situation; ii) political analysis; iii) development of a view on the desired situation; iv) selection of essential questions; v) formulation of policy options and activities; vi) decision on policy and activities; vii) monitoring; and viii) evaluation. Marike Radstaake & Jan de Vries, “Reinvigorating Human Rights in the Barcelona Process”: *Using Human Rights Impact Assessment to Enhance Mainstreaming of Human Rights* 14-15 (March 2004) (presented at the Fifth Mediterranean Social and Political Research Meeting, Workshop XIV), available at [http://www.hom.nl/publicaties/Morocco\\_paper\\_and\\_bibliography.pdf](http://www.hom.nl/publicaties/Morocco_paper_and_bibliography.pdf).

101. For a helpful approach for evaluating baseline conditions, see the Danish Institute for Human Rights’ Human Rights Compliance Assessment [hereinafter “the HRCA”]; M. Jungk, *Building a Tool for Better Business Practice: The Human Rights Compliance Assessment* (2003).

102. These classifications, drawn from the IA tradition, are fairly intuitive and will help organize decision-making according to relevant criteria. Nonetheless, their application to human rights will require substantial clarification and harmonization. The Human Rights Richter scale discussed in *Embedding Human Rights*, *supra* note 7, at 59, offers a useful starting point for an analysis of significance.

103. The HRCA, *supra* note 101, a tool for assessing on-going human rights compliance, is instructive in this respect as well.

In summary, HRIA's directive to assess systematically and openly a project's impact on human rights, to propose feasible alternatives, and to consider feedback from the impacted communities will improve decision-making by the corporation by assuring informed participation and empowering stakeholders. Furthermore, by recognizing positive contributions towards the fulfillment of human rights, the HRIA promotes and rewards the beneficial effects of corporate activity. As a broader social innovation, the HRIA will play a critical role in raising awareness about human rights, identifying business practices and policies that further human rights and sustainable economic development, translating general human rights objectives into specific priorities and concrete measures, and illuminating the causal links between specific economic activities or policies and human rights.<sup>104</sup> Finally, through constant iteration, evaluation, and adaptation, the HRIA will have a self-reflexive and evolutionary quality, allowing it to improve through use.

Two closely related concepts fall conspicuously outside of the human rights framework and will need to be assimilated by the HRIA to enhance its effectiveness. The first of these deals with the right to a clean environment. Historically, environmental and human rights movements were perfect strangers. Even presently, policymakers and advocates rarely invoke a human right to a healthy environment, which is subject to criticisms of anthropocentrism. Nonetheless, the importance of environmental integrity to the realization of fundamental human rights suggests that the HRIA cannot forego this traditional EIA component.

The second proposed supplement to the HRIA framework addresses the damage to development and good governance wrought by political corruption.<sup>105</sup> Although freedom from bribery is not a recognized human right, it is intimately linked to transparency and indispensable to the fulfillment of all genres of human rights.<sup>106</sup> As such, an HRIA needs to account for the impact of business activities on corrupt practices, as this often falls within the corporate sphere of influence. Integrating these indices of environmental and corruption-related impacts, an HRIA offers a comprehensive tool for improving corporate human rights compliance and decision-making, which simultaneously reinforces and fortifies the human rights system.

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104. Radstaake & de Vries, *supra* note 100, at 13.

105. Daniel Kaufmann, *Corruption: The Facts*, 107 FOREIGN POL'Y 114, 114 (1997); see also Susan Rose-Ackerman, *The Political Economy of Corruption - Causes and Consequences*, WORLD BANK, Apr. 1996; Mark Stevenson, *U.N. Countries Reveal Costs of Corruption*, ASSOCIATED PRESS NEWS WIRE, Dec. 10, 2003.

106. The intellectual seeds for a human right to be free from corruption are nonetheless being sown. See Nihal Jayawickrama, *Corruption: A Violation of Human Rights?* (Transparency Int'l Working Paper, 1998), available at [http://www.transparency.org/working\\_papers/jayawickrama/jayawickrama.html](http://www.transparency.org/working_papers/jayawickrama/jayawickrama.html); Ndiva Koefele-Kale, *The Right to a Corruption-Free Society as an Individual and Collective Human Right*, 34 INT'L LAWYER 1, 152-53 (2000).

B. Underwriting HRIA: The Global Compact, U.N. Business Norms, and Other Initiatives

Aside from these conceptual justifications, an HRIA regime benefits from a number of other sources of legitimacy more familiar to the business community. Realizing the many ways in which business profoundly affects the dignity and well-being of individuals and communities, there is a growing commitment to establishing benchmarks, promoting best practices, and adopting codes of conduct. As mentioned above, a variety of joint initiatives addressing human rights issues in the business context have emerged, ranging from the two hortatory principles of the United Nations' Global Compact to the more recent and portentous U.N. Norms for Business.<sup>107</sup> While certainly not binding, these initiatives remain good-faith promises by the business community and reflect the evolving expectations of the international community. Furthermore, these initiatives, both implicitly and explicitly, embrace the principles, processes, and human rights rubric of the HRIA, and thus foreshadow its coming of age. In an address to the World Economic Forum on January 31, 1999, U.N. Secretary-General Kofi Annan extended an invitation to business leaders to join an international initiative, the Global Compact, which would bring companies together with U.N. agencies, governments, labor, and civil society to support ten principles in the areas of human rights, labor, the environment, and anti-corruption.<sup>108</sup> Through policy dialogues, mutual learning and engagement, and collective action, this initiative seeks to advance responsible corporate citizenship so that business can be part of the solution to the challenges of globalization.<sup>109</sup> Despite nearly 2,000 companies and other stakeholders operating in more than 70 countries, it is important to keep in mind that commitments to the Global Compact's Principles are non-binding and, therefore, to be effective, they must rely on public accountability, transparency, and the enlightened self-interest of companies.<sup>110</sup>

The first two principles of the Compact, which specifically refer to human rights issues, proclaim that “[b]usiness should support and respect the protection of internationally proclaimed human rights” and that “business should make sure it is not complicit in human rights abuses.”<sup>111</sup> The first principle highlights key issues in the corporate sphere of influence, such as compliance with local and international laws, addressing consumer concerns, selecting appropriate business partners along the supply chain, increasing worker productivity and retention, and building good community relationships—all aimed at integrating human rights into cor-

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107. UNITED NATIONS, THE GLOBAL COMPACT (2004), available at [http://www.unglobalcompact.org/docs/about\\_the\\_gc/2.0.1.pdf](http://www.unglobalcompact.org/docs/about_the_gc/2.0.1.pdf).

108. The Norms, *supra* note 40.

109. Press Release, Secretary-General, *Secretary-General Proposes Global Compact on Human Rights, Labour, Environment, in Address to World Economic Forum in Davos*, U.N. Doc. SG/SM/6881 (Feb. 1, 1999).

110. THE GLOBAL COMPACT, *supra* note 107.

111. The Ten Principles of the UN Global Compact, <http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/>.

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porate policy and culture.<sup>112</sup>

The second principle characterizes different forms of business complicity (direct, beneficial, and silent) as they relate to various contemporary issues, such as globalization, growth of civil society, transparency, and accountability.<sup>113</sup> Even though each principle is followed by implementation recommendations,<sup>114</sup> opponents find them inconsequential, even misleading, because they lack proper enforcement mechanisms and are too general to generate accountability.<sup>115</sup> Partly in response to these charges, the Global Compact Office issued a new policy, Communication on Progress, which “asks participants to [report their] progress in implementing the principles through their annual financial reports, sustainability reports, other prominent public reports, websites and/or other communication channels on an annual basis.”<sup>116</sup> When measuring and reporting progress, companies are encouraged to use the Global Reporting Initiative (GRI) indicators presented in Figure 4. Clearly, an HRIA is a necessary, though not sufficient, element of satisfying the human rights commitments of the Compact and its emergent reporting requirements.

The United Nations further incorporated human rights issues into business practices when the Sub-Commission on the Promotion and Protection of Human Rights adopted the United Nations Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights in August 2003.<sup>117</sup> Also known as the U.N. Human Rights Norms for Business, these guidelines are “soft laws” that offer a comprehensive vision of a company’s responsibilities. The Norms provide more clarity and credibility than competing and vague voluntary codes.<sup>118</sup> The Norms detail specific obligations vis-à-vis rights to equal opportunity, non-discriminatory treatment, security of persons, and

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112. Global Compact Principle One, <http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/principle1.html>.

113. Global Compact Principle Two, <http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/principle2.html>.

114. See *id.*; see also Global Compact Principle One, *supra* note 112.

115. Mahmood Monshipouri et al., *Multinational Corporations and the Ethics of Global Responsibility*, 25 HUM. RTS. Q. 965, 980 (2003).

116. See Communication on Progress Overview, <http://unglobalcompact.org/communicatingprogress> (2003). In order to protect the integrity of the United Nations and the GC, rigorous and transparent procedures were developed to communicate progress. Participants failing to submit the mandated progress reports by June 30, 2005 have been considered inactive until such submission is made (GC Integrity Measures). Global Compact also actively consults with its members on how to enhance the quality of its engagement mechanisms and ensure continuous quality improvement, integrity, and accountability. Another independent initiative on promoting human rights in business practices culminated on January 28, 2005 with the launching of world’s first website devoted to the topic of business and human rights. See Business & Human Rights the Resource Centre, [www.business-humanrights.org](http://www.business-humanrights.org).

117. The Norms, *supra* note 40.

118. AMNESTY INTERNATIONAL, THE UN HUMAN RIGHTS NORMS FOR BUSINESS: TOWARDS LEGAL ACCOUNTABILITY 4 (2004), available at [http://web.amnesty.org/aidoc/aidoc\\_pdf.nsf/Index/IOR420022004ENGLISH/\\$File/IOR4200204.pdf](http://web.amnesty.org/aidoc/aidoc_pdf.nsf/Index/IOR420022004ENGLISH/$File/IOR4200204.pdf).

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**Figure 4: Global Reporting Initiative (GRI) Indicators for reporting the progress on Global Compact’s Human Rights (Principles 1 and 2)**

Human Rights	Relevant GRI Indicators
1. Businesses are asked to support and respect the protection of international human rights within their sphere of influence;	HR1 Description of policies, guidelines, corporate structure, and procedures to deal with all aspects of human rights relevant to operations, including monitoring mechanisms and results.
	HR2 Evidence of consideration of human rights impacts as part of investment and procurement decisions, including selection of suppliers/contractors.
	HR3 Description of policies and procedures to evaluate and address human rights performance within the supply chain and contractors, including monitoring systems and results of monitoring.
	HR4 Description of global policy and procedures/programmes preventing all forms of discrimination in operations, including monitoring systems and results of monitoring.
2. The are also asked to ensure that they are not complicit in human rights abuses.	HR2 Evidence of considerations of human rights impacts as a part of investment and procurement decisions, including selection of suppliers/contractors.
	HR3 Description of policies and procedures to evaluate and address human rights performance within the supply chain and contractors, including monitoring systems and results of monitoring.

Source: About the GC; How to Participate, [www.unglobalcompact.org](http://www.unglobalcompact.org).

labor.<sup>119</sup> In their implementing provisions, the Norms note that “transnational corporations and other business enterprises shall conduct periodic evaluations concerning the impact of their own activities on human rights” among various other obligations to “disseminate and implement internal rules of operation” and “periodically report on and take other measures” with a view towards compliance with the Norms.<sup>120</sup> This language suggests a central role for the HRIA in meeting evolving human rights obligations.

While the Norms are still a long way from constituting a legally binding international instrument, or representing international customary law, they have initiated a number of promising developments at the U.N. In 2004, the Norms proceeded to the Office of the High Commissioner for Human Rights (OHCHR), who subsequently issued a report describing existing initiatives related to business and human rights and identifying any outstanding issues.<sup>121</sup> One of the recommendations put forward by

119. The Norms, *supra* note 40, ¶¶ 2-19 (further describing TNCs’ obligations with respect to national sovereignty, human rights, consumer protection and environmental protection, followed by five general provisions of implementation).

120. *Id.* ¶¶ 15-16.

121. U.N. Econ. & Soc. Council [ECOSOC], Subcomm. on the Promotion and Protection of Human Rights, *Report on the Responsibilities of Transnational Corporations and*

the High Commissioner states: “There is a significant need to develop ‘tools’ to assist businesses in implementing their responsibilities, in particular through the development of training materials and of methodologies for undertaking human rights impact assessments of current and future business activities.”<sup>122</sup> A month later, the U.N. Commission on Human Rights requested the Secretary-General to appoint a Special Representative on the Issue of Human Rights and Transnational Corporations with a mandate to follow through on this recommendation.<sup>123</sup> In his recent interim report to the 62nd Session of the Human Rights Commission, newly appointed special representative John Ruggie acknowledged that “no ready-made human rights impact assessment tools exist” but found that the important task of developing one was beyond the resources and time constraints of his mandate.<sup>124</sup> This notwithstanding, in December 2005 the Office of the High Commissioner, the Business Leaders Initiative on Human Rights, and the United Nations Global Compact jointly released a consultation draft of *A Guide to Integrating Human Rights in Business Practice*, which forcefully reiterated the need for a coherent HRIA framework.<sup>125</sup> The Extractive Industries Transparency Initiative (EITI), spearheaded by the U.K. Department for International Development (DFID) and launched by U.K. Prime Minister Tony Blair at the World Summit on Sustainable Development in Johannesburg in September 2002, ambitiously aims for increased transparency of cash flows between companies and governments.<sup>126</sup> EITI is based on the understanding that reve-

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*Related Business Enterprises with Regard to Human Rights*, U.N. Doc. E/CN.4/2005/91 (Feb. 15, 2005), available at <http://www.business-humanrights.org/Categories/UNIntergovernmentalorgs/UN/SubmissionstoUN-2004consultation-business-humanrights>. Following a day of consultation with a wide range of actors, including businesses, inter-governmental organizations, and NGOs, the report was submitted to the Commission on Human Rights in February 2005.

122. *Id.* ¶ 52.

123. U.N. Econ. & Soc. Council [ECOSOC], Comm. on Human Rights, *Human Rights and Transnational Corporations and Other Business Enterprises*, U.N. Doc. E/CN.4/2005/L.87 (Apr. 15, 2005).

124. U.N. Econ. & Soc. Council [ECOSOC], Comm. on Human Rights, *Interim Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, ¶¶ 35, 76, U.N. Doc. E/CN.4/2006/97 (Feb. 22, 2006).

125. BUSINESS LEADERS INITIATIVE ON HUMAN RIGHTS, *A GUIDE FOR INTEGRATING HUMAN RIGHTS INTO BUSINESS MANAGEMENT* (2005), available at [http://www.unglobalcompact.org/docs/issues\\_doc/human\\_rights/guide\\_hr.pdf](http://www.unglobalcompact.org/docs/issues_doc/human_rights/guide_hr.pdf). Consider the following subheadings for the Guide’s chapter on “Measuring impact and auditing: key steps for your business”

6.1 Set relevant performance indicators for measuring human rights impact across the different functions of your business

6.2 Undertake human rights-based audits

6.3 Analyze the results of audits and use results to inform strategic development of your business

*Id.* at 32.

126. U.K. Department for International Development, *Launch of Extractive Industries Transparency Initiative*, [http://www.dfid.gov.uk/news/files/eiti\\_website\\_launch.asp](http://www.dfid.gov.uk/news/files/eiti_website_launch.asp) [hereinafter “Launch”]; Extractive Industries Transparency Initiative, *About EITI*, <http://www.eitransparency.org/section/abouteiti> [hereinafter “EITI”].

nues from oil, gas, and mining companies should serve as a powerful engine of growth in developing countries, sustaining livelihoods and alleviating poverty.<sup>127</sup> Unfortunately, a lack of accountability and transparency almost certainly leads to corruption, conflict, and poverty.<sup>128</sup> With the basic model of EITI established, “it now needs the political will and resources to become universal.”<sup>129</sup> The commitment “is shared with the companies that extract resources, the countries that import them, and the international institutions that lend to the developing world.”<sup>130</sup> Once invigorated, this model will support the inclusion of a corruption component in the HRIA, as well as underscore the principle of transparency constitutive of the right to information.

Another promising initiative that expands the reach of human rights commitments beyond the corporation itself is the International Financial Corporation’s Equator Principles.<sup>131</sup> International financial institutions, both public and private, play a crucial role in supporting extractive operations in developing countries through the loan approval process. Hydrocarbon projects have high up-front costs and are predominantly long-term investments, so the decision to finance a proposal is a significant commitment. Acknowledging this influence, in October 2002 the International Finance Corporation convened ten major banks in London to draft the Equator Principles, an industry-wide framework for addressing environmental and social risks in project financing.<sup>132</sup> Presaging the HRIA, the Equator Principles require developers to prepare assessments addressing involuntary resettlement, the impact on indigenous peoples and communities, human health, pollution, and socioeconomic factors, and then fully incorporate their results into project decisions by crafting management plans.<sup>133</sup> The Equator Principles also contemplate mitigation, monitoring, baseline studies, participation of affected parties (including indigenous peoples and local NGOs, in the design, review and implementation of the

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127. EITI, *supra* note 126.

128. Launch, *supra* note 126.

129. Press Release, Global Witness, *EITI on the Right Track: Let’s Go Further and Faster*, Mar. 16, 2005, available at [http://www.globalwitness.org/press\\_releases/display2.php?id=280](http://www.globalwitness.org/press_releases/display2.php?id=280).

130. For example, the World Bank Group is extensively involved in this initiative. See *id.*

131. See Allens Arthur Robinson, *The Equator Principles - Guidelines for Responsible Project Financing*, in FOCUS: PROJECT FINANCE (Aug. 2005), available at [http://www.equator-principles.com/documents/aar\\_article.pdf](http://www.equator-principles.com/documents/aar_article.pdf).

132. See Press Release, International Finance Corporation, *Leading Banks Announce Adoption of Equator Principle* (June 4, 2003), available at <http://ifcln001.worldbank.org/ifcext/pressroom/ifcpressroom.nsf/pressrelease?openform&9BD14621E26623B785256D3A0071E0A4>; see also Frequently Asked Questions about the Equator Principles, <http://www.equator-principles.com/faq.shtml>. On April 5, 2005, JPMorgan Chase became “the third U.S. bank and the 30th financial institution globally to adopt the Equator Principles.” Press Release, *The Equator Principles, JPMorgan Chase Adopts the Equator Principles* (Apr. 25, 2005), available at <http://www.equator-principles.com/index.html>.

133. See *The “Equator Principles”: A Financial Industry Benchmark for Determining, Assessing and Managing Social & Environmental Risk in Project Financing* (Jul. 2006), available at [http://www.equator-principles.com/documents/Equator\\_Principles.pdf](http://www.equator-principles.com/documents/Equator_Principles.pdf).

project), and consideration of environmentally and socially preferable alternatives.<sup>134</sup> As the Equator Principles gain momentum, increasing pressure on corporations to perform an HRIA will be leveraged by one of their most powerful stakeholders.

Other voluntary corporate human rights commitments underscore the need and responsibility of corporations to carry out an HRIA, including the Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, the Declaration on Fundamental Principles and Rights at Work of the International Labor Organizations, and the Guidelines for Multinational Enterprises and the Committee on International Investment and Multinational Enterprises of the Organization for Economic Cooperation and Development.<sup>135</sup> Swept up in the rising tide of expectations of corporate human rights compliance, such multilateral initiatives call for universal tools with international clout in order to refine corporate decision-making.

### C. The Business Case

“[S]uccessful companies are those that focus on responsibility rather than power, on long-term success and societal reputation rather than piling short-term results one on top of the other.”<sup>136</sup> Corporate human rights responsibility may seem like a marked paradigm shift from traditional shareholder duties and the fixation on bottom line, yet this need not be so. There are two pragmatic justifications that resonate forcefully in the boardroom: reputation and long-term returns.

Our globalizing society is only beginning to appreciate the immense potential for corporations to do both good and harm.<sup>137</sup> The private sector plays an indispensable role in fostering economic prosperity, development, and technological progress, enabling the international community to realize its ambitious sustainable development objectives, such as the Millennium Development Goals.<sup>138</sup> On the other hand, the sensational abuses

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134. *Id.*

135. Int'l Labor Org. [ILO], Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, 204th Sess., 83 I.L.O. Official Bull. (2000), available at <http://www.ilo.org/public/english/employment/multi/download/english.pdf>; ILO Declaration on Fundamental Principles and Rights at Work, Document CIT/1998/PR20A (June 1998), available at [http://www.ilo.org/dyn/declaris/declarationweb.static\\_jump?var\\_pagename=DECLARATIONTEXT](http://www.ilo.org/dyn/declaris/declarationweb.static_jump?var_pagename=DECLARATIONTEXT); The Organization for Economic Co-Operation and Development, *The OECD Guidelines for Multinational Enterprises* (2000), available at <http://www.oecd.org/dataoecd/56/36/1922428.pdf>.

136. Embedding Human Rights, *supra* note 7. See also Business Leaders' Initiative on Human Rights, U.N. Global Compact, and Office of the U.N. High Commissioner for Human Rights, *A Guide to Integrating Human Rights in Business Management* (December 2005) for a persuasive presentation of the “business case.”

137. The Norms, *supra* note 40, Preamble.

138. Potential development of HRIA would help to overcome the main weaknesses in current approaches to CSR, as identified by the Chatham House Report: excessive of CSR initiatives at the international level; a lack of clarity about how these initiatives relate to each other; an excessive focus on getting businesses to make commitments to CSR without follow-up assistance on implementing them; and finally, an absence of credible monitoring and verification processes. See FANNY CALDER & MALAIKA

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and ravages of corporate activity have attracted the scrutiny of mass media, human rights watchdogs, scholars, and international lawyers.<sup>139</sup> Accompanying this global spotlight on corporations are new expectations of “corporate citizenship,” often articulated in the language of human rights, which shape the depth and character of the corporate image.<sup>140</sup> While corporations are not strangers to constructing and marketing an image in order to boost consumer appeal and public approval, consumer and societal expectations that reach beyond the traditional concerns of product quality and safety increasingly circumscribe this ability. For this reason, corporations, particularly large TNCs sensitive to societal image, are looking for the best way to incorporate human rights and social impacts into policy and practice.<sup>141</sup> As such, voluntarily adopting regimes such as the HRIA helps the pioneering corporation gain “a good name.”<sup>142</sup> In fact, a hand-in-hand assessment focused on the positive as well as the negative will partly allay existing corporate concerns that the positive contribution of TNCs would go largely unnoticed. Furthermore, those corporations that foresee an inevitable drift of corporate responsibility into the international human rights framework are not only able to capitalize on the market appeal of ethical business leadership but are also likely to take part in, and thus help shape, the identity and obligations of the good corporate citizen.

In addition to demand-side pressures, corporations have supply-side incentives to be actively involved in an HRIA. One of the main business motivations is accurately predicting the risks related to human rights, which can often translate into unforeseen expenses, including kidnappings, sabotage, civil war, and litigation. An HRIA helps corporations mitigate these risks and achieve sustainability over the long term.<sup>143</sup> Extractive industries inevitably make long-term investments and, left to geology’s whim, enjoy little choice in where to operate, making it very costly, if not impossible, to withdraw from a troubled area. Similarly, maximizing the positive impact of private sector operations on the host communities and developing countries in which they operate may lead the corporation to reap the unexpected rewards in business performance attendant a “good human rights record”:<sup>144</sup> increased labor productivity, community support and participation, local consumer demand, stability and the rule of law, and sustainable resource supplies.<sup>145</sup> As former U.N. High Commissioner for Human Rights Mary Robinson puts it:

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CULVERWELL, FOLLOWING UP THE WORLD SUMMIT ON SUSTAINABLE DEVELOPMENT COMMITMENTS ON CORPORATE SOCIAL RESPONSIBILITY 7 (Final Report, 2005), available at <http://www.chathamhouse.org.uk/pdf/research/sdp/CSRWSSDf.pdf>.

139. See Debora L Spar, *Creating Corporate Social Responsibility*, BLUEPRINT MAGAZINE, June 1, 2000, available at [http://www.ppionline.org/ppi\\_ci.cfm?contentid=964&Knl-gAreaID=0](http://www.ppionline.org/ppi_ci.cfm?contentid=964&Knl-gAreaID=0).

140. See CALDER & CULVERWELL, *supra* note 138, at 50.

141. See Spar, *supra* note 139.

142. See Robinson, *supra* note 39.

143. See *id.*

144. Global Compact Principle One, *supra* note 112.

145. *Id.*

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[B]usiness needs human rights and human rights needs business. . . . [W]ithout knowing the risks, and taking action to mitigate these risks in the longer term, will it be sustainable? This is the essence of the “Business Case for Human Rights”: going beyond the question of businesses protecting their reputation – while not ignoring the potential cost of a damaged reputation – and looking at the other, both positive and negative reasons, for business corporations to care about human rights. The challenge is to turn this commitment into action, to respect and promote human rights.<sup>146</sup>

## V. Unocal Refined: A Human Rights Impact Assessment in Burma

“[M]y conclusion is that egregious human rights violations have occurred, and are occurring now, in southern Burma. The most common are forced relocation without compensation of families from land near/along the pipeline route; forced labor to work on infrastructure projects supporting the pipeline (the SLORC calls this government service in lieu of payment of taxes); and imprisonment and/or execution by the army of those opposing such actions. Unocal, by seeming to have accepted SLORC’s version of events, appears at best naïve and at worst a willing partner in the situation.<sup>147</sup>

The Burma case is the first monetary settlement arising from a claim against a TNC for complicity in massive human rights violations within a foreign regime.<sup>148</sup> With dozens of cases still pending in the federal courts,<sup>149</sup> this precedent may have a significant impact on the outcomes of those cases still on the docket. While the hydrocarbon sector boasts some of the most formidable corporations in the world, the Burma settlement has proven a nuisance to the industry. In addition to bad publicity and the potential impact on shareholder equity, the settlement itself was costly. Although the amount of the settlement is confidential, both sides have said that the fifteen villagers from Burma have received hefty compensation.<sup>150</sup> The magnitude of the compensation became evident when Unocal sued its insurance companies (which together insured Unocal for up to \$60 million in damages) to cover a portion of the case expenses.<sup>151</sup> Unocal claimed that “the allegations of forced labor, murder, rape, torture, battery, forced relocation and detention throughout the Myanmar litigation fall within the policies’ ‘personal injuries coverage.’”<sup>152</sup> Unocal sued its primary insurers and re-insurers and was only reimbursed claims beyond an initial loss of

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146. Robinson, *supra* note 39.

147. A letter excerpt from a Consultant to Unocal, 1995. Doe v. Unocal Corp., 110 F. Supp. 2d 1294, 1299-1300 (C.D. Cal. 2000).

148. Terry Collingsworth, *Separating Fact from Fiction in the Debate over Application of the Alien Tort Claims Act to Violations of Fundamental Human Rights by Corporations*, 37 U.S.F.L. REV. 563, 564 (2002).

149. See *id.* at 578-86.

150. Cynthia A. Williams & John M. Conley, *Is There an Emerging Fiduciary Duty to Consider Human Rights?*, 74 U. CIN. L. REV. 75, 92 (2005).

151. Daphne Eviatar, *A Big Win for Human Rights*, THE NATION, May 9, 2005, available at <http://www.thenation.com/doc/20050509/eviatar>.

152. These were Unocal’s words in the lawsuit against its insurance companies. *Id.*

\$15 million.<sup>153</sup> The attorney fees alone are estimated at over \$15 million.<sup>154</sup>

This section (1) applies the proposed HRIA process [Figure 3] to the Burma case and (2) explores how the HRIA process could have led to better decisions and averted the tragic spectacle that befell both the local people of Burma and Unocal itself.

In 1982, natural gas was discovered in what is now known as the Yadana field.<sup>155</sup> Unocal explored the area throughout the 1980s and 1990s,<sup>156</sup> a time of significant political unrest.<sup>157</sup> In 1988, Burma's military government murdered and imprisoned thousands of pro-democracy protesters.<sup>158</sup> A new military regime took control shortly thereafter, calling itself the State Law and Order Restoration Council (SLORC)<sup>159</sup> and renaming the country Myanmar.<sup>160</sup> Two years later the SLORC held elections and the National League for Democracy, the primary opposition party, won 82 percent of the parliamentary seats.<sup>161</sup> However, the SLORC refused to relinquish power and murdered and imprisoned many of the pro-democratic leaders.<sup>162</sup> In 1992, Unocal acquired the rights to the production, transport, and sale of gas from the government's newly established Myanmar Oil and Gas Enterprise (MOGE).<sup>163</sup> If it had been in place, the HRIA process would have proceeded in the manner detailed below.

#### A. Preliminary Review: Scoping and Screening

An HRIA in 1992 would have involved a preliminary assessment to determine whether the pipeline project would potentially impact human rights. Due to the volatile political situation, human rights violations could have been expected in the absence of steps to protect the Burmese citizens. In keeping with our proposed HRIA Principle 1 (Involve the Public), it would have been essential to locate reliable local NGOs for reports and to consult with international humanitarian organizations such as Amnesty International and Human Rights Watch to identify areas requiring further consideration in the succeeding stages of the HRIA. Reflecting on Principle 3 (Identify Relevant Definitions, Methods, and Assumptions in

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153. *Id.*

154. *Id.*

155. Kenny Bruno & Jim Valette, *Cheney & Halliburton: Where the Oil Is*, 22 MULTINATIONAL MONITOR 22 (2001).

156. Lisa Girion, *Pipeline to Justice?*, L.A. TIMES, June 15, 2003, at A32.

157. See U.S. Department of State, *2005 Investment Climate Statement – Burma*, available at <http://www.state.gov/e/eb/afd/2005/41990.htm>.

158. See *Unocal Corp.*, 110 F. Supp. 2d at 1296.

159. See *id.* (stating that Burma's ruling military government has changed its name to the State Peace and Development Council).

160. See *id.*

161. See Stephen Erlanger, *Slim Chance Is Seen for Burmese Democracy*, N.Y. TIMES, Mar. 28, 1991, at A15.

162. SLORC Coup in Burma (2006), <http://www.globalsecurity.org/military/world/war/slorc.htm>.

163. *Id.*

Advance), it would have become apparent that there were significant, potential human rights violations that could result from the project. The consulting company hired by Unocal to assess its investment risk in Burma reported:

Throughout Burma the government habitually makes use of forced labour to construct roads. In Karen and Mon states the army is forcing villagers to move to more secure sites (similar to the "strategic hamlets" employed by the U.S. army in Vietnam) in the hope of cutting off their links with the guerrillas. There are [also] credible reports of military attacks on civilians in the regions.<sup>164</sup>

In the case of Burma, the Scoping and Screening step would have revealed that the security component of the project would have significant human rights implications. The security-related issues would have been easy to discern in this case since the Government's military units were already engaging in forced labor, forced relocation, and torture. For this reason, the remainder of this case study focuses on human rights violations resulting from the security issue, though other human rights violations could have been recognized during the Scoping and Screening step of a formal HRIA.

#### B. Baseline Assessment

In the Baseline Assessment, it is essential first to determine the actual current human rights situation and then to determine what risk factors might result from a project. The Yadana Pipeline Project was proposed to run east through Burma's rural Tenasserim region.<sup>165</sup> When determining the current human rights situation in this area, it would have been apparent that local populations opposed to the SLORC inhabited this area. U.S. State Department Reports on Human Rights Practices produced throughout the 1990s noted that arbitrary arrest and detention of political dissenters persisted.<sup>166</sup> The U.S. Department of State also reported that

[i]n recent years, the Government has increasingly supplemented declining investment with uncompensated people's "contributions," chiefly of forced labor, to build or maintain irrigation, transportation, and tourism infrastructure projects. The army continued to force citizens to work as porters, which led to mistreatment, illness, and death. Citizens, including women and children, were forced to labor under harsh working conditions on construction projects throughout the country.<sup>167</sup>

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164. *Unocal Corp.*, 110 F. Supp. 2d at 1297.

165. *Id.*

166. U.S. Department of State, *Burma Report on Human Rights Practices for 1996* (1997), [http://www.state.gov/www/global/human\\_rights/1996\\_hrp\\_report/burma.html](http://www.state.gov/www/global/human_rights/1996_hrp_report/burma.html).

167. *See id.* The report continues: "The Government's statistics on these contributions and infrastructure projects suggest that the market value of these uncompensated 'contributions' has increased since 1992. According to the Prison Department exhibit in the Defense Services Museum in Rangoon, the quantity of stone quarried by prisoners increased more than fourfold between fiscal year 1988/89 and fiscal year 1994/95." *Id.*

Both Unocal and the government wanted to protect the potential pipeline, and the government agreed to provide security forces. Given the political climate, it was clear that pipeline security provided by the Government's military might threaten the safety of the local population. Since the project required infrastructure in the Tenasserim region, applying this step would have led to the conclusion that the security forces might force the citizens to create that infrastructure, resulting in abuses and possibly torture.

### C. Impact Projection

Applying Principle 2 (Analyze Impact Equity) would have revealed the uneven distribution of positive and negative consequences resulting from the project. Cognizant that the Burmese military was committing human rights atrocities, an HRIA would have predicted that the pipeline security provided by the military could result in forced labor, forced relocation, and abuse. Military involvement could also hamper opportunities for small businesses and a nascent labor market to emerge. Furthermore, the pipeline revenue would provide the SLORC with monies to purchase arms, enabling them to oppress the population at large. While the potential revenue from a large-scale project like this could provide great benefits to Burma, it is very common for such military regimes to mismanage funds. An HRIA would have recommended that Unocal require Burma to design a revenue allocation mechanism with the assistance of experts to prevent misappropriation of the revenue (although, as is apparent in Chad, this is not necessarily a foolproof solution).<sup>168</sup>

Another possible recommendation might have been an alternative security arrangement, which would have infused surplus capital into local economies and encouraged the transfer of technological expertise. A Unocal report issued in April 1994 after six trips by Unocal representatives read: "Total and Unocal will insist upon western style construction practices including fair labor rates and the use of an internationally recognized contractor."<sup>169</sup> A fully integrated HRIA may have helped realize this

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168. Although experience from the Chad-Cameroon Pipeline Project has not brought about the desired result, the World Bank Group took unique steps to create a project that would give Chad control of its own profits while maintaining accountability and fostering opportunities for growth. Signs of corruption and mismanagement are already apparent in Chad, but with modification this model could prove beneficial in future projects. In the Chad case, all oil royalties are first placed in a transparent escrow account from which various organizations receive loan repayments. The remaining profits are subject to the newly created Oil Revenues Control and Monitoring Board (part of the World Bank created Petroleum Revenue Management Law). This nine-member Chadian committee is composed of various members of society and government and is to allocate funds from the escrow account. The rules specify that 10% of the Chadian money be set aside for future generations and that 5% go to the oil producing regions for social development programs. 80% of the royalties are to be applied to education, health, infrastructure, rural development, environment, water and other various social projects. The remaining money is to be allocated to government operating costs. See The World Bank Group, *The Chad-Cameroon Pipeline: What is the Revenue Management Program?* (2006), available at <http://www.worldbank.org/afr/ccproj/> (select "Revenue Management" link).

169. *Unocal Corp.*, 110 F. Supp. 2d at 1299.

explicit policy.

For these recommendations to work, however, competent independent HRIA auditors willing to engage corporate decision makers and the affected communities (Principle 5) are necessary. This would result in the creation of an essential and comprehensive human rights impact statement that could be released to the decision makers, the host community, the stockholders, the host government, and human rights organizations (Principle 7, Transparency).

#### D. Decision-making

The results of the impact statement should be internalized during the decision-making stage (Principle 4). An optimal project design must be created at this stage with the project design team, taking into account not only how the project or its alternatives can maximize their positive impact, but also whether or not the project should continue. Potentially positive effects must be protected in the project design. Potentially negative effects must be addressed to determine how these effects can be reversed or mitigated and integrated into the final decision-making process. In Burma, the HRIA would have projected a significant negative impact unless steps were taken to mitigate the military's involvement with the project, ensure fair compensation of displaced residents, and oversee resource revenue allocation by the government. The HRIA process could have entailed collaborating with external consulting firms such as Jane's Strategic Advisory Services and Rand Policy Research to present alternative security measures for the pipeline project.<sup>170</sup> Moreover an HRIA in Burma would have engaged the local communities surrounding the proposed pipeline in a series of translated interviews and detailed questionnaires to seek out their concerns, evaluate their current living and political situation, and build a trusting relationship with the local citizens. This would have ensured that an effective and ongoing monitoring, mitigation, and evaluation process could be implemented. Although the pipeline would have required some relocation, the effects could have been minimized with an HRIA. It was critical to engage local NGOs and experts in this process to design appropriate questions and ensure that the locals trusted those administering the interviews and questionnaires.<sup>171</sup> In the case of Burma, the HRIA would have demonstrated to Unocal that the cost of importing or training security

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170. For more information regarding these independent consulting corporations, see Jane's Strategic Advisory Services, [http://www2.janes.com/public/trans\\_news\\_analysis.html](http://www2.janes.com/public/trans_news_analysis.html), and Rand Policy Research, <http://www.rand.org/>.

171. Although questionnaires were conducted in the Chad/Cameroon pipeline project, the military that had committed recent atrocities accompanied the interviewers, which scared the local population and interfered with an accurate assessment of the situation. See Genoveva Hernandez Uriz, *To Lend or Not to Lend: Oil, Human Rights, and the World Bank's Internal Contradictions*, 14 HARV. HUM. RTS. J. 197, 221 (2001).

E. Post-Implementation: Ongoing Monitoring, Mitigation, and Evaluation

Had Unocal used an HRIA, the issues that were not addressed through mitigation in stages 1 through 4 before the process commenced could have been confronted during the Post-Implementation stage. In May 1995, a U.S. State Department cable from the U.S. Embassy in Rangoon, Burma stated:

On the general issue of the close working relationship between Total/Unocal and the Burmese Military, [Joel] Robinson [of Unocal] had no apologies to make. He stated forthrightly that the companies have hired the Burmese military to provide security for the Project and pay for this through the Myanmar Oil and Gas Enterprise (MOGE). He said three truckloads of soldiers accompany Project officials as they conduct survey work and visit villages.<sup>172</sup>

Documentation shows that Unocal was receiving on-the-ground reports but did not address this information.<sup>173</sup> If HRIA Principle 6 (Employ Data with Integrity) had been applied at this time, Unocal could have taken steps to mitigate forced labor and various abuses in Burma. A State Department cable dated May 20, 1996 reported that “[f]orced labor is currently being channeled, according to NGO reports, to service roads for the pipeline to Thailand. . . . When foreigners come on daily helicopter trips to inspect work sites, involuntary laborers are forced into the bush outside camera range.”<sup>174</sup> With effective monitoring, these growing human rights atrocities could have been detected and then reversed or mitigated. An effective HRIA would have taken this documentation, disclosed the pertinent information, and recommended a course of action to curtail the abuses.

On February 1, 1996, Total official Herve Chagnoux wrote to Unocal that his recent answers to the press were not necessarily accurate:

By stating that I could not guarantee that the army is not using forced labour, I certainly imply that they might, (and they might) but I am saying that we do not have to monitor army's behaviour: we have our responsibilities; they have their responsibilities; and we refuse to be pushed into assuming more than what we can really guarantee. About forced labour used by the troops assigned to provide security on our pipeline project, let us admit between Unocal and Total that we might be in a grey zone.<sup>175</sup>

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172. *Unocal Inc.*, 110 F. Supp. 2d at 1301.

173. *Id.* (“In June 1995 Amnesty International sent David Garcia, a Unocal employee, a copy of its 1994 Human Rights Report on Burma. Attached was a personal cover note addressed to Mr. Garcia which warns that there is a disturbing quote from Thein Oo Po Saw, director of the Scientific and Technology Research Department of the Ministry of Industry. His comment could mean that the government plans to use ‘voluntary’ labor in conjunction with the pipeline. We know that from long experience with this regime that what they call ‘voluntary’ labor is called forced labor in other parts of the world; and forced labor not of convicts, but of ordinary citizens. Myanmar forced labor conditions have been documented to be brutal and even deadly.”).

174. *Id.* at 1302.

175. *Id.*

Although there was documentation of some potential human rights violations in this case, it was neither well-organized, nor transparent, nor integrated into the decision-making process. An HRIA would have provided more information, structure, and transparency and would have prompted the formulation of the mitigation measures and alternatives. Even if these abuses would not have been anticipated in early stages of an HRIA, Unocal could still have benefited from an HRIA during the Post-Implementation stage, by addressing these human rights violations and effectively minimizing its liability.

Unocal divided the Yadana Pipeline Project into three phases, each focusing exclusively on the commerciality of the gas.<sup>176</sup> While economic considerations are certainly essential, the HRIA would have been able to run parallel to the Unocal phases of development and been cost-efficient. By following the HRIA process, the atrocities that occurred in Burma as a result of the pipeline project could have been substantially reduced or eliminated. It could have even been argued that going forward was not worth the challenges of redesigning the project in early stages, and that the best alternative was to withdraw. Unocal's decision to ignore reports of massive human rights violations proved expensive, unnecessary, and deadly. In the end, the documentation that Unocal solicited but chose to disregard proved to be essential evidence in the plaintiffs' case.

## Conclusion

Traditionally, businesses view[ed] the social sector as a dumping ground for spare cash, obsolete equipment, and tired executives. . . . [Today the private sector tends] to approach the social sector not as an object of charity but as an opportunity for. . . a partnership between private enterprise and public interest that produces profitable and sustainable change for both sides.<sup>177</sup>

Building on commitments to develop guidelines and initiatives that place human rights on the business ledger, an HRIA has the potential to enrich the decision-making process of hydrocarbon industries operating in developing countries where they enjoy little or no regulatory guidance. Despite the restricted focus of this paper on oil and gas projects, this informed and participatory decision-making mechanism may prove useful in any sector characterized by large potential human rights implications, both positive and negative, such as mining, hydroelectric, infrastructure, utilities, chemical, heavy manufacturing, and so on. While EIAs and SIAs offer sound models to learn from, they lack the scope, integrated approach, and international legitimacy of the human rights framework. Indeed, international law may soon confer upon corporations the rights and responsibilities of international legal personality, rendering the development of a human-rights-oriented impact assessment unavoidable.

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176. *Id.* at 1297.

177. Rosabeth Moss Kanter, *From Spare Change to Real Change: The Social Sector as Beta Site for Business Innovation*, 77 HARV. BUS. REV. 122, 124 (1999).

In this article we propose a model HRIA that can be used to mainstream human rights into corporate decision-making. Fundamentally, this HRIA is grounded in seven important principles: Public Involvement; Impact Equity Analysis; Parameter Setting; HRIA Internalization; Competent Practitioners; Data Integrity; and Transparency. These principles color the whole HRIA process, from the Preliminary Review Scoping and Screening, Baseline Assessment Impact Projection, and Decision-making (on Implementation and Mitigation), through to the Post-Implementation Monitoring, Mitigation, and Evaluation.

From the corporate point of view, embracing and addressing human rights issues related to their operations is a matter of maintaining a sound reputation and exercising sound business judgment. External expectations of good corporate citizenship call for the inclusion of human rights in the corporate calculation. At the same time, long-term revenue considerations require an analysis of the human risks that may burn slowly for years, ultimately exploding years later in disaster, severe losses, and bad publicity. The long-term social benefits attendant good corporate conduct further incentivize business to consider its human rights footprint.

The additional outlays in time and money required by an HRIA are among the main sources of resistance to be anticipated from the business community. Indeed, the costs of an HRIA both in terms of extra investment and preparation time are likely to be significant. However, corporations already take years to finalize large-scale business decisions: negotiating contracts, running in-depth economic analyses, and conducting feasibility studies take time. Incorporating an HRIA into this preliminary stage may not significantly strain the timeline. Furthermore, when dealing with major investments such as a \$1 billion pipeline, a proper HRIA would be just a drop in the barrel. However significant the expenses associated with an HRIA, as our case study has illustrated, corporations still focus too narrowly on short-term costs rather than on the long-term benefits of sound decision-making.

It may be argued that corporations, if not properly regulated, will cut corners on an HRIA by ignoring its implications or by choosing to mitigate only the easiest problems while exaggerating positive effects. This not only rewards the misbehaving corporation, but it simultaneously places the honest companies, sincerely applying the HRIA, at a competitive disadvantage. Yet, the transparent character of the HRIA and the existing high level of public scrutiny from civil society largely moderate this problem. As long as decision-makers fail to present a complete and comprehensive HRIA in a public forum, stakeholders will have ample reason to suspect inaccuracy or lack of transparency; as a result, the corporation will suffer, perhaps even more than it would have had it chosen to forego the HRIA altogether. This effect will preserve the reputation of the “honest” corporations and ensure the integrity of the HRIA regime, slowly forcing more and more corporations to follow the fold, thereby diminishing the competitive disadvantage of the HRIA.

There are powerful arguments compelling businesses to embrace and promote the HRIA, from following through on the commitments and expectations of corporate social responsibility to promoting their own long-term business success. At the same time, HRIA retains a corporation's freedom of decision, making it a more palatable alternative than compulsory codes of conduct. Indeed, the knowledge gained through an HRIA provides a win-win situation for both corporations and the society that it affects. Nonetheless, adopting the HRIA will help incorporate human rights into corporate culture, reinforce human rights among local host populations and global civil society, create an expanding body of sound project and policy decision-making, support the development of human rights jurisprudence, and ultimately pave the way for real corporate responsibility under the aegis of international law. While the primary obligation to protect human rights will continue to rest on the state, the failure of the state to act should no longer be an excuse for inaction on the part of a corporation whose power ought to require a greater level of responsibility.

The HRIA dovetails with progress made by others in the area of human rights and corporate responsibility. After a two-year consultation process, the Human Rights & Business Project of the Danish Institute for Human Rights recently launched its diagnostic Human Rights Compliance Assessment (HRCA), which provides many of the operational details missing in our HRIA framework.<sup>178</sup> Created by the Canadian Parliament, the International Center for Human Rights and Democratic Development is undertaking a three-year human rights impact assessment project that "aims to improve the capacity of civil society organisations to evaluate the impacts of foreign direct investment on human rights."<sup>179</sup> Similarly, *Reinvigorating Human Rights in the Barcelona Process: Using Human Rights Impact Assessment to Enhance Mainstreaming of Human Rights* proposes a parallel HRIA framework to be integrated into European Union human rights policy.<sup>180</sup> Focusing on Public International Financial Institutions (PIFIs), a paper presented by the Working Group of the Halifax Initiative outlines a way for corporate and PIFI processes to be practically entrenched in international human rights law.<sup>181</sup> Drawing from this body of work, we sketch

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178. See HRCA, *supra* note 101. The four-year research project to develop the Human Rights Compliance Assessment was sponsored by the Danish Foreign Ministry (DANIDA), the Confederation of Danish Industries (DI), and the Danish Industrialization Fund for Developing Countries (IFU). User's Guide to the HRCA Quick Check, [http://www.humanrightsbusiness.org/pdf\\_files/Introduction%20to%20HRCA%20Quick%20Check.pdf](http://www.humanrightsbusiness.org/pdf_files/Introduction%20to%20HRCA%20Quick%20Check.pdf). HRCA comprises "approximately 350 questions and more than 1,000 corresponding human rights indicators, developed from the Universal Declaration of Human Rights and over 80 other major human rights treaties and ILO conventions." Human Rights Compliance Assessment, [http://www.humanrightsbusiness.org/040\\_hrca.htm](http://www.humanrightsbusiness.org/040_hrca.htm).

179. Rights & Democracy Initiative on Human Rights Impact Assessment, [http://www.dd-rd.ca/site/what\\_we\\_do/index.php?subsection=projects&lang=EN&id=1489](http://www.dd-rd.ca/site/what_we_do/index.php?subsection=projects&lang=EN&id=1489).

180. Radstaake & de Vries, *supra* note 100.

181. NGO Working Group on EDC, *Risk, Responsibility and Human Rights: Taking a Rights-based Approach to Trade and Project Finance* (July 2004), available at [http://www.halifaxinitiative.org/updir/Final\\_HR\\_discussion\\_paper.pdf](http://www.halifaxinitiative.org/updir/Final_HR_discussion_paper.pdf). The International Finance Corporation is also funding the development of "an actual impact assessment guide."

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a broad strategy below.

- To support further integration of various initiatives into a standard HRIA model, applicable across multiple sectors, through a collaborative international body of government representatives, human rights advocates, business leaders, labor groups, and civil society such as the International Association of Impact Assessment, which can delegate work to a taskforce of reputable specialists, we recommended the following:
  1. Creating a user-friendly HRIA forum and internet and print accessible to both corporations and host communities, which can provide a transparent database of completed HRIAs, along with model HRIAs, matrices and techniques, best practices, and other HRIA resources;
  2. Assembling an independent and competent body of auditors, and/or developing a professional auditor certification scheme, to provide corporations with reliable and timely HRIAs. Here, it is advisable to establish a centralized payment mechanism to ensure the financial integrity of the process;
- To urge adoption of the HRIA at four levels:
  1. At the corporate level, in voluntary internal and cross-sector corporate codes such as urged by the GRI indicators of the Global Compact human rights principles;
  2. At the national level, as legislation placing the HRIA within the domestic regulatory framework, and expanding any existing IA framework to include human rights impacts overseas;
  3. At the supranational level, as guidelines for the World Bank, IMF, and other major institutions, such as advanced by the Equator Principles; and
  4. At the international level, as an agreement among states holding corporations directly liable for their HRIA obligations in the absence of domestic recourse; and
- To organize expert HRIA training teams for corporations and governments wishing to adopt HRIA principles and procedures.

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According to its authors the guide will review the entire spectrum of human rights, focusing on the areas where the responsibilities of companies are clearest but reminding companies that they should review all areas of rights relevant to their operations. Human rights issues will be addressed at both country and project levels. The country assessment will focus on what impact human rights challenges can have on projects and vice versa. At the project level the guide will take companies through a methodology that includes outlining each step of a typical impact assessment, identifying what human rights considerations should be taken into account at each step, and explaining the implications of a human rights approach for the impact assessment process.

U.N. Econ. & Soc. Council [ECOSOC], Comm'n on Human Rights, Promotion and Protection of Human Rights: *Interim Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, ¶ 19, U.N. Doc. E/CN.4/2006/97 (Feb. 22, 2006).

