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# Human Rights Impact Assessment in Conflict-Affected Societies: From Avoiding Harm to Doing Good

Author: Ashley Reynolds

Supervisor: Dr. Ciarán O'Kelly

# Abstract

Human rights impact assessments (HRIAs) assess the effects of business activity on the realization of human rights in local communities. Businesses are increasingly using HRIA to meet human rights due diligence (HRDD) requirements set by the UN Guiding Principles and domestic legislation. However, existing HRIA tools rarely elaborate on exactly how HRIAs should address conflicts, and what additional considerations businesses must take into account in conflict-affected contexts.

This thesis seeks to fill the gap in existing HRIA tools by identifying special considerations that businesses must take into account when conducting HRDD in conflict zones. The thesis analyzes not only how businesses can negatively impact human rights in conflict-affected countries, but also how they can identify positive opportunities to promote human rights and contribute to conflict transformation.

The thesis focuses on five major areas: existing HRIA methods; the links between business, human rights, and conflict; arguments for including positive impacts into HRIA; how other forms of impact assessment function in conflict zones; and the experiences of practitioners who work in conflict-affected societies. Findings draw on interviews with practitioners, supplemented by existing research on war economics and peacebuilding. The thesis concludes with a proposed model for HRIA in conflict-affected societies.

## Abbreviations and Short Forms

ACAPS: Assessments Capacities Project  
ATS: Alien Tort Statute (U.S.)  
CBI: (Northern Ireland) Confederation of British Industry  
CSR: corporate social responsibility  
CSHRIA: conflict sensitive human rights impact assessment (proposed model)  
DIHR: Danish Institute for Human Rights  
Draft LBI: Draft Legally Binding Instrument on Business and Human Rights  
EIA: environmental impact assessment  
ESIA: environmental and social impact assessment  
EU: European Union  
HNA: humanitarian needs assessment  
HRDD: human rights due diligence  
HRIA: human rights impact assessment  
IA: impact assessment  
IAIA: International Association for Impact Assessment  
ICMM: International Council on Mining & Minerals  
ICoCA: International Code of Conduct Association (associated with the International Code of Conduct for Private Security Providers)  
IFI: international financial institution  
IMF: International Monetary Fund  
NAP: National Action Plan (associated with the UNGPs)  
NCP: National Contact Point (associated with the OECD Guidelines)  
NHRI: national human rights institute  
ODI: Overseas Development Institute  
OECD: Organisation for Economic Co-operation and Development  
OECD Guidelines: OECD Guidelines for Multinational Enterprises  
PCIA: peace and conflict impact assessment  
REA: rapid environmental assessment  
SIA: social impact assessment  
TNC: transnational corporation  
TOR: terms of reference  
UN: United Nations  
UNGPs: UN Guiding Principles on Business and Human Rights  
UNHCR: UN High Commissioner for Refugees  
USAID: United States Agency for International Development  
WB: World Bank  
WTO: World Trade Organization

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# Introduction

In recent years, the international community has increasingly focused on the role of transnational corporations (TNCs) and business enterprises in protecting or undermining human rights. As powerful global actors, TNCs often play a key role in the lives of workers, local communities, and the countries in which they operate. Sometimes, these effects are positive; TNCs assist in developing national economies, promoting education and skills training, and improving infrastructure. However, businesses often contribute to adverse impacts such as environmental degradation, forced migration, violation of indigenous rights, and poor labor standards. Additionally, businesses may promote human rights in one area while simultaneously undermining them in another. For instance, Coca-Cola's 5by20 initiative contributed to economic empowerment for more than 2.4 million women across 60 countries between 2010 and 2017.<sup>1</sup> However, Coca-Cola continues to face criticism for violating workers' rights, maintaining poor working conditions, and violating labor law.<sup>2</sup>

As a result of these considerations, a number of guidelines, principles, and soft law instruments have emerged to encourage businesses to adhere to international human rights standards. The most notable of these instruments, the UN Guiding Principles on Business and Human Rights (UNGPs) outline businesses' responsibility to respect human rights and states' duty to protect their citizens from human rights violations committed by corporations. The UNGPs emphasize the importance of human rights due diligence (HRDD), a process whereby businesses identify, prevent, mitigate and account for their impacts on human rights.<sup>3</sup> HRDD has been further developed by a number of different organizations, and is a key component of the Draft Treaty on Business and Human Rights currently under debate in Geneva.<sup>4</sup>

One primary means for conducting HRDD is human rights impact assessment (HRIA), a tool that can predict and monitor the effects of business activities on human rights. HRIsAs are

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<sup>1</sup> 'Coca-Cola's 5by20 Recipe to Empower 5 Million Women by 2020' (*Ethical Corporation*, 20 June 2018) <<http://www.ethicalcorp.com/coca-colas-5by20-recipe-empower-5-million-women-2020>> accessed 3 March 2019

<sup>2</sup> 'GMB Slam Human Rights Record of Coca-Cola Company' (*GMB*, 28 June 2018) <<https://www.gmblondon.org.uk/news/gmb-slam-human-rights-record-of-coca-cola-company>> accessed 3 March 2019

<sup>3</sup> John Ruggie, *Guiding Principles on Business and Human Rights* (United Nations 2011) 7

<sup>4</sup> Draft LBI, OHCHR (16 July 2018) 5

not just limited to business enterprises; they can also be used to assess the effects of trade agreements, laws, policies, and development strategies. HRIAs provide detailed information on key human rights risks that companies may encounter in their operations, including potential threats to right to health, freedom of assembly, fair working conditions, and right to property. These assessments identify the potential severity of impacts based on scale, scope, and irremediability.

Many HRIA toolkits and UN documents acknowledge the need for additional consideration and protection of human rights in conflict-affected areas. Since uneven development, business activities, and short-sighted economic policies can all fuel or reignite conflict, there is the need for additional focus on HRIAs in conflict-affected, post-conflict, and conflict-prone societies. However, existing tools rarely elaborate on exactly how HRIAs should address conflicts and what additional considerations businesses must take into account in these contexts. Additionally, large amounts of research have focused on business' potential for negative impact in violating human rights and exacerbating conflict; however, few have identified business' potential for positive impact in promoting human rights and contributing to peace.

This thesis seeks to fill the gap in existing human rights impact assessments by identifying special considerations that businesses must take into account when conducting human rights due diligence in conflict zones. The thesis analyzes not only how businesses can negatively impact human rights in conflict-affected countries, but also how they can identify positive opportunities to promote human rights and contribute to conflict transformation.

## Statement of the Issue

Armed conflict is characterized by the destruction of communities, loss of life, and severe human rights violations. All human rights are inherently threatened in armed conflict, including right to food, security of person, and freedom from torture. Because of this, the role of business in exacerbating or funding armed conflict must be closely analyzed. Businesses who have contributed to human rights violations in conflict zones have been condemned by the international community, and human rights actors are increasingly looking for ways of holding these businesses legally accountable.

However, tools designed to help businesses avoid infringing on human rights do not always examine the connections between business, conflict, and human rights, or only do so on a superficial level. As a result, many businesses do not fully understand how their operations fuel armed conflict and rights violations. Salil Tripathi eloquently explains that although businesses usually understand conflict dynamics before engaging in a project, they rarely understand their own role within those dynamics: “Many large companies make major investments only after undertaking detailed studies of the country’s political and legal infrastructure. They have analyzed the risks of expropriation, repatriation, and taxation. They know if they are investing in a country in conflict; they have enough information and analysis to ascertain whether crimes against humanity, war crimes, or genocide are being, or have been, committed. However they are not clear about the extent of their role in supporting it, and what they should do to prevent it.”<sup>5</sup> This quandary illustrates the need for greater assessment of how businesses relate to the conflicts around them and what they should do in response to these dynamics.

HRIA, the main tool for conducting human rights due diligence, is the natural fit for examining how businesses influence human rights in conflict zones. However, existing methodologies have largely failed to account for the unique characteristics of conflict-affected societies. One of the most stark indications that conflict is not a main focus of HRIA is the lack of information on conflict in toolboxes and training guides. Conflict is only mentioned eleven times in the 139-page Danish Institute HRIA toolbox<sup>6</sup> and five times in Oxfam’s 77-page HRIA training manual.<sup>7</sup> Neither goes into conflict in depth, and neither explains how business, human rights, and conflict are inherently linked. Conflict is mentioned, but its implications are not explored. This is a critical oversight given the gravity of conflict’s impacts on human rights.

That being said, there have been some efforts to incorporate conflict into HRIA. NomoGaia includes information on conflict in its annex, and its human rights topic catalogs list several indicators related to conflict.<sup>8</sup> Most notably, International Alert’s report on HRDD in conflict-affected settings provides specialized guidance for extractives companies operating in

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<sup>5</sup> Salil Tripathi, ‘Business in Armed Conflict Zones: How to Avoid Complicity and Comply with International Standards’ (2010) 50 *Politorbis* 131 135

<sup>6</sup> Nora Götzmann and others, *Human Rights Impact Assessment Guidance and Toolbox* (Danish Institute for Human Rights 2016)

<sup>7</sup> Caroline Brodeur, ‘Community-Based Human Rights Impact Assessment: The Getting It Right Tool Training Manual’ (Oxfam 2016)

<sup>8</sup> Mark Wielga and others, ‘Human Rights Impact Assessment: A Toolkit for Practitioners Conducting Corporate



conflict zones. This guidance features a conflict-sensitivity principles checklist, analysis of key mobilizers and resilience factors, and advice regarding unintended consequences of mitigation strategies.<sup>9</sup> The report is an excellent source for HRIA practitioners operating in conflict-affected settings, and thoroughly considers how practitioners should carry out HRDD processes. While International Alert’s guidance is applicable to a wide range of sectors, it is particularly targeted to the extractives industry and focuses on the impacts of mining projects. However, more analysis remains to be done, as no single report can account for every aspect of business and human rights in conflict-affected societies, no matter how thorough it is.

This thesis seeks to build on the work started by International Alert and NomoGaia by supplementing their efforts with additional considerations and identifying points of intersection with other fields which are already conducting similar work in conflict situations. By incorporating lessons from economics, peacebuilding, and other forms of impact assessment, HRIA practitioners can avoid “reinventing the wheel,” so to speak. This thesis synthesizes these lessons and promotes a multidisciplinary approach which draws on existing work in a number of different fields. The thesis concludes with an original model which proposes how HRIA can adapt to conflict and more fully address the needs of conflict-affected societies.

## Scope and Methodology

This thesis is not a comprehensive guide on how to conduct a full human rights impact assessment. Many institutions and organizations, including the Danish Institute for Human Rights, Oxfam, and NomoGaia, have already created thorough guides and toolkits that can be used when conducting a human rights impact assessment. Instead, this thesis provides an additional set of considerations that NHRIs, NGOs, and businesses can add onto their existing human rights impact assessment methodologies. Consequently, the thesis does not fully elaborate on every detail of the human rights impact assessment process.<sup>10</sup>

This thesis uses the Danish Institute’s HRIA toolkit as a basis for additional questions

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HRIAs’ (NomoGaia 2012)

<sup>9</sup> Yadaira Orsini and Roper Cleland, ‘Human Rights Due Diligence in Conflict-Affected Settings: Guidance for Extractives Industries’ (International Alert 2018)

<sup>10</sup> Interested readers can find more information on these processes through the Danish Institute for Human Rights, NomoGaia, Oxfam, and the UN Guide to Human Rights Impact Assessment and Management.

and considerations when conducting human rights impact assessment in conflict-affected societies. It also incorporates data from the toolkits developed by Oxfam, International Alert, and NomoGaia. As such, the thesis builds on the work already completed by HRDD practitioners and researchers in the field.

Additionally, it is important to note that the HRIA methods elaborated in this thesis focus on project-level assessments. While the research presented may be useful for HRIA teams analyzing austerity measures, trade deals, and macrolevel economic policies, the methodologies and proposed model are designed specifically for projects and sites.

The thesis primarily relies on an assessment of existing research in HRDD, law, peace studies, development, corporate social responsibility, and war economics. A thorough literature review synthesizes ideas in these fields to propose new approaches to conducting HRIAs.

To support these conclusions, the thesis includes interviews conducted with impact assessment professionals associated with NomoGaia, the International Association for Impact Assessment, corporations, human rights institutions, and USAID. These interviews include information on practitioners' experiences when conducting due diligence in conflict-affected societies and areas of social unrest.

## Structure

The thesis focuses features three parts, divided into five chapters. The first part explains which HRIA methods already exist in order to provide foundational knowledge for the proposed changes and original model. The second part discusses potential ideological shifts for HRIA, including increased focus on economic systems, opportunities for peacebuilding, and enhanced integration of positive outcomes. The third part identifies methodologies for implementing these ideological changes. This portion draws questions and practical considerations from other forms of assessment. The final portion of the thesis features a proposed original model for conducting HRIA in conflict-affected societies.

# **Part 1: Human Rights Impact Assessment: Existing Approaches**

Before going into depth about adapting HRDD to conflict zones, it is important to know which approaches already exist, as well as how HRIA typically functions. Practitioners must thoroughly understand HRIA processes and indicators before they can effectively adapt existing tools to conflict situations. This portion of the thesis gives background on the HRIA process, as well as its business and legal justifications. The rest of the thesis builds on this foundation.

# Chapter 1: What Is Human Rights Impact Assessment?

The Business and Human Rights Resource Centre defines HRIA as “a process for identifying, understanding, assessing and addressing the adverse effects of programmes, projects and activities on the human rights enjoyment of workers, communities, consumers or other rights-holders.”<sup>11</sup> Simply put, HRIA attempts to identify how a particular project or business activity affects – or will affect – human rights. For instance, an extractives company seeking to open a mine in Chile may commission an HRIA to determine how its activities will affect indigenous peoples, right to water, labor standards, and other rights.

Several different HRIA toolkits and methodologies already exist. However, as HRIA is an emerging field, research and techniques are constantly being developed to meet new challenges and address shortcomings. Regardless of the specific methodology, HRIAs focus on local communities and rights-holders. Consequently, community engagement is a key aspect of the impact assessment process.

While a wide number of rights have been enumerated in human rights treaties, HRIA tends to focus on the rights listed in a few key instruments: the International Covenant on Civil and Political Rights; the International Covenant on Economic, Social, and Cultural Rights; and the eight core International Labor Organization conventions. Depending on state obligations and salient issues, impact assessments also integrate human rights enshrined in instruments such as the Declaration of the Rights of Indigenous Peoples and the African Charter on Human and Peoples Rights.<sup>12</sup>

Businesses should ideally undertake an assessment before the project begins, but may, for various reasons, decide to conduct HRDD once activities are already underway.<sup>13</sup> Regardless of the exact process, all HRIAs (and HRDD) focus on identifying, preventing, mitigating, and remediating adverse impacts on human rights.<sup>14</sup>

This chapter outlines a few key characteristics of HRIA, including the basic HRIA

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<sup>11</sup> ‘Human Rights Impact Assessments’ (Business & Human Rights Resource Centre, 2019) <<https://www.business-humanrights.org/en/un-guiding-principles/implementation-tools-examples/implementation-by-companies/type-of-step-taken/human-rights-impact-assessments>> accessed 5 March 2019

<sup>12</sup> Wielga and others, NomoGaia (n 8) 5

<sup>13</sup> Götzmann and others, DIHR (n 6) 52

<sup>14</sup> Ruggie (n 3) 13

process and community engagement. The chapter also includes two forms of justification for undertaking HRIA: the business case and the legal case.

## 1.1 The HRIA Process

James Harrison once quipped, “the HRIA landscape is littered with guidance and toolkits. In fact there are almost as many toolkits as there are actual HRIAs.”<sup>15</sup> However, a few notable methodologies have risen to prominence. Of note are the Danish Institute for Human Rights toolbox, Oxfam’s Getting It Right tool (developed with Rights & Democracy), and NomoGaia’s toolkit. Despite variations between methodologies, the World Bank has identified a few essential steps common across all HRIA processes: preparation; screening; scoping; evidence gathering; consultation; analysis; recommendation and conclusions; evaluation and monitoring; and preparation of the report.<sup>16</sup>

This thesis uses the Danish Institute’s methodology as a basis for further exploration. The Danish Institute methodology was chosen because of its highly structured and detailed approach. The toolbox includes vast amounts of information, with practitioner supplements to help guide HRIA teams through every stage of the process. Additionally, the Danish Institute is well-respected in the field of business and human rights and has extensive experience conducting HRIAs around the world. That being said, the thesis occasionally refers to other methods, including those developed by NomoGaia and Oxfam.

Although it is not possible to fully elaborate on every aspect of the HRIA process here, it is worth noting the basic steps. The Danish Institute identifies five phases: planning and scoping; data collection and baseline development; analyzing impacts; impact mitigation and management; and reporting and evaluation.<sup>17</sup> Throughout every step, assessors should consult with stakeholders — “[people], group[s] or organisation[s] with an interest in, or influence on, a business project or activity, as well as those potentially affected by it.”<sup>18</sup>

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<sup>15</sup> James Harrison, ‘Establishing a Meaningful Human Rights Due Diligence Process for Corporations: Learning from Experience of Human Rights Impact Assessment’ (2013) 31 *Impact Assessment and Project Appraisal* 107 181

<sup>16</sup> ‘Human Rights Impact Assessments: A Review of the Literature’ (World Bank 2013) 22

<sup>17</sup> Götzmann and others, DIHR (n 6) 8

<sup>18</sup> *ibid* 92



Stages in the HRIA process. Source: Danish Institute for Human Rights

The impact assessment begins with desktop research on: the business project or activities; the country, regional, and local human rights context; and preliminary identification of relevant stakeholders.<sup>19</sup> Assessors begin by reviewing data from publicly available sources, as well as data from the business itself.

The desktop research is then followed up by field work, during which HRIA practitioners talk directly to the communities affected by the project. In order to effectively conduct community engagement and consultation, impact assessors must identify rights-holders and other stakeholders who might be affected by the project being assessed. Potential rights-holders may include: project employees, indigenous communities, residents who live near the project site or on impacted land, protesters, union members, victims of prior or ongoing human rights abuses, contractors, and families who are displaced by project activities.<sup>20</sup> Gender perspectives are also key, and must be incorporated into every stage of the analysis rather than as an afterthought. As Oxfam explains, “The effects of private investment schemes often impact the human rights of men and women differently. All data collection and analysis should factor in these

<sup>19</sup> *ibid* 41

<sup>20</sup> Wielga and others, *NomoGaia* (n 8) 9

differences.”<sup>21</sup>

Oxfam’s toolkit, *Getting it Right*, focuses especially on the community engagement process, including creating alliances with local leaders, engaging with local experts, establishing shared objectives with the community, promoting local ownership over the assessment process, and adapting human rights language to local realities. In Oxfam’s process, impact assessment professionals focus on identifying the human rights concerns most important to the local community, rather than those identified by outside experts or stakeholders.<sup>22</sup>

**Table 1**  
Summary table of human rights, drawn from the International Bill of Rights.

Rights topics	Right/freedom	Article # from source doc.			
		ILO	UD	ESC	CP
UD = <i>Universal Declaration of Human Rights</i> ESC = <i>Convention on Economic Social and Cultural Rights</i> CP = <i>Convention on Civil and Political Rights</i> ILO = <i>International Labour Organization Core Conventions</i>					
<b>I. Labour</b>					
A. Working conditions	1. Right to favourable working conditions		23	7	
	2. Right to work		23	6	
B. Child labour	1. Freedom from exploitive child labour	138		10	
C. Non-discrimination	1. Non-discrimination	100, 111	1, 2, 6	2, 7	Var.
	2. Equal pay for equal work	100	7, 23	7	
	3. Freedom of religion		2	2	26
D. Unions	1. Freedom of association	87, 98	20	8	22
	2. Right to belong to a trade union	87, 98	23	8	22
	3. Right to strike			8	
E. Fair pay	1. Right to just remuneration	100	23	7	
	2. Right to holidays with pay		24		
<b>II. Security</b>					
A. Freedom from violence and coercion	1. Life, liberty, security of person		3		Var.
	2. Freedom from degrading treatment/torture/slavery		4, 5		7, 8
	3. Freedom from arbitrary arrest, imprisonment		9		9
B. Free speech	1. Freedom of thought		18		18
	2. Freedom of expression		19		19, 25
	3. Freedom of assembly, movement		20		21
<b>III. Health and welfare</b>					
A. Environment	1. Right to adequate supply of water		3	11, 12	
	2. Right to clean environment			12	
B. Health	1. Right to health		26	12	
C. Housing	1. Freedom of residence, movement		13		
	2. Right to housing		25	11	
D. Livelihood	1. Right to an adequate standard of living		25	12	
E. Property	1. Right to property		17		
F. Privacy	1. Right to privacy (non-interference)		12		17
G. Food	1. Right to food, freedom from hunger		25	11	
<b>IV. Political and civil</b>					
A. Education	1. Right to education		26	13	
B. Childhood	1. Rights of children				24
C. Corruption	1. Right to public and political participation				17
<b>V. Indigenous and cultural rights</b>					
A. Informed consent	1. Right of self determination, subsistence			1	1
B. Culture	1. Right to cultural participation		27		27

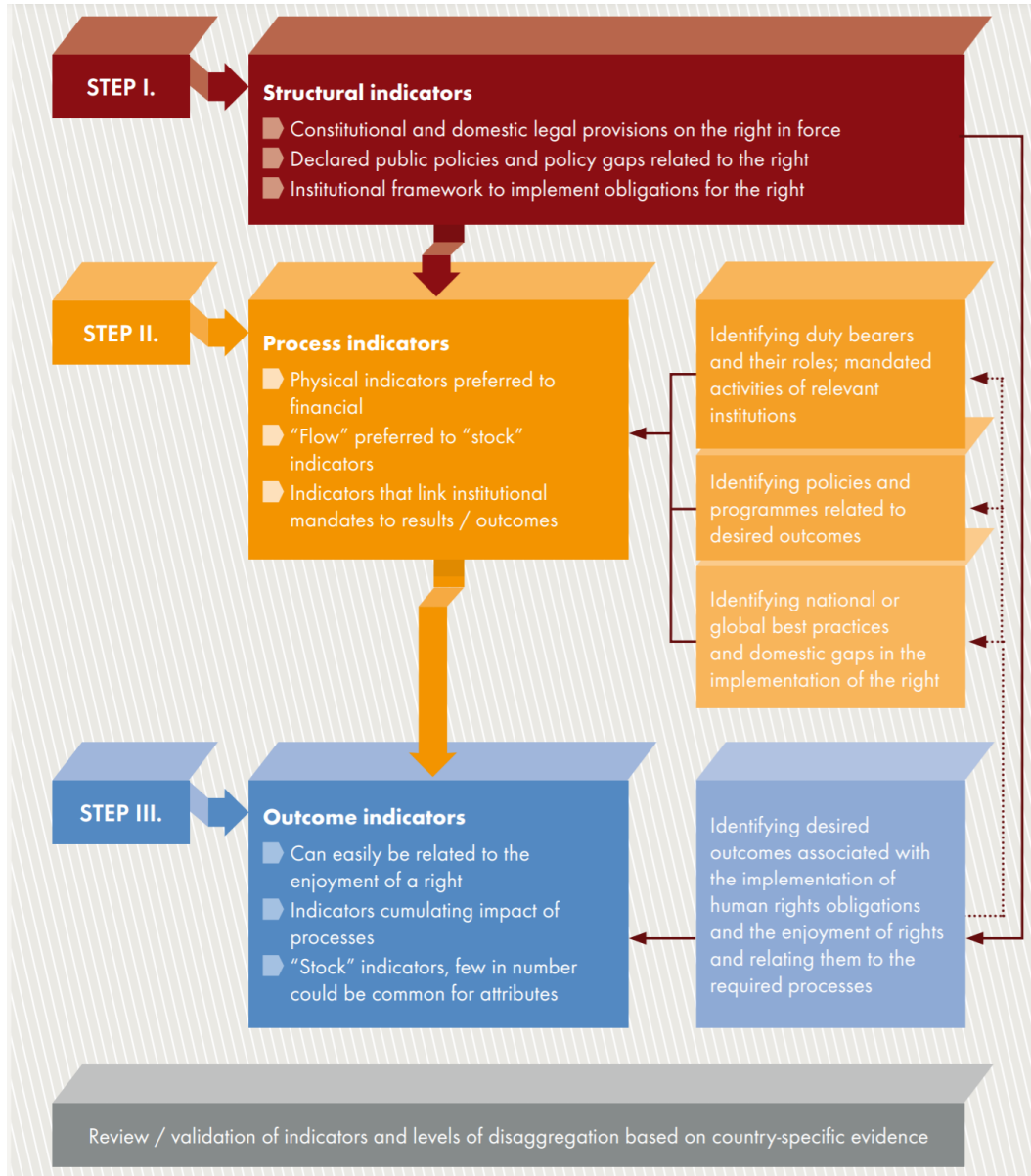
An example of rights assessed in HRIA. Source: Salcito 2013

Indicators play an important role in both data collection and impact analysis. Simply put, an indicator is a means of measuring the realization of a particular human right. Indicators may be quantitative (e.g., number of workplace injuries, number of individuals displaced) or

<sup>21</sup> ‘Community-Based Human Rights Impact Assessments: Practical Lessons’ (Oxfam 2010) 9

<sup>22</sup> *ibid* 10

qualitative (e.g., interviews, descriptions of living conditions). The OHCHR’s comprehensive guide on selecting human rights indicators features three main categories: structural indicators (including laws and policies), process indicators (linking institutions to on-the-ground results), and outcome indicators (actual enjoyment of rights).<sup>23</sup>



Categories of indicators. Source: OHCHR

For example, when assessing the right to adequate food, an assessor might choose to

<sup>23</sup> *Human Rights Indicators: A Guide to Measurement and Implementation* (United Nations 2013) 78



examine nutrition, food safety, food availability, and food accessibility. Each of these categories can be broken down further into specific structural, process, and outcome indicators. At the structural level, assessors can review relevant human rights treaties, national agricultural and food safety policies, and disaster management strategies. At the process level, assessors can examine received complaints on right to food, uneven distribution between populations, budgets related to food safety and strengthening agriculture, unemployment rate, and public spending on food assistance. At the outcome level, assessors can collect data on number of underweight and stunted children, proportion of adults with low BMI, per capita availability of major food items for local consumption, death rates, and prevalence of malnutrition.<sup>24</sup>

After collecting data and examining indicators, HRIA teams begin analyzing the actual and potential impacts that a project may directly cause, contribute to, or link to. At this level, assessors also evaluate cumulative impacts, impacts which may seem incremental when part of one project, but when combined with other projects or exacerbating factors, produce strong negative effects. Cumulative impacts indicate how a series of minor impacts can add up to severe impacts, especially when dealing with interconnected rights. For example, one tourism project may draw a limited amount of water, but the combined water use from all tourism development may lead to reduced resources and drought, which in turn have severe impact on right to water, sanitation, and food security in local communities.<sup>25</sup> At this stage, assessors also gauge the severity and probability of potential impacts.

HRIA teams and businesses then use this information to create a plan for addressing actual and potential impacts on human rights. Businesses should collaborate with rights-holders, state actors, stakeholders, and other relevant parties to design and implement management strategies. Mitigation plans should follow a hierarchy: avoid, reduce, restore, compensate. In other words, companies should prioritize eliminating potential impacts over compensating victims after the damage has already occurred.<sup>26</sup> Businesses should prioritize addressing the most severe and widespread human rights issues identified during the impact analysis phase. Businesses should also cooperate in remediation and mitigation efforts when they contribute to,

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<sup>24</sup> *ibid* 89

<sup>25</sup> Götzmann and others, DIHR (n 6) 65-6

<sup>26</sup> *ibid* 75

but do not directly cause, adverse impacts.<sup>27</sup>

When adverse impacts are caused by suppliers, contractors, state partners, or other actors the business is linked to, businesses should exert leverage to stop violations from occurring; if this fails, businesses should consider terminating the relationship.<sup>28, 29</sup>

Publicly reporting on HRIA findings can help improve corporate accountability, provide a platform for dialogue, and build trust with the local community. The UN and the Danish Institute both encourage businesses to publicly disclose the findings of impact assessments; however, in reality, full public disclosure could cause risks to stakeholders or rights-holders.<sup>30</sup> As a result, many HRIsAs remain fully or partially confidential. In addition to—or instead of, in cases of sensitivity—a report, companies may communicate their findings through a number of means, including meetings, online posts, and community engagement.<sup>31</sup> Businesses and HRIA teams should take care that findings are actually accessible and available to local communities. Results should be available in all local languages, and the research team may orally communicate findings with communities with low literacy or limited access to the internet.<sup>32</sup> Oxfam encourages the distribution of findings not only to rights-holders and stakeholders, but also relevant governments, other companies in the region, regional and international human rights bodies, journalists, and civil society organizations.<sup>33</sup>

Impact mitigation and management is not static; it is ongoing and should be continually monitored. Businesses can monitor the ongoing rights situation by establishing grievance mechanisms, consulting regularly with rights-holders, and investigating complaints.<sup>34</sup> It is also important to maintain grievance mechanisms and implement the impact management plans established during phase four of the HRIA process. Oxfam’s process encourages HRIA teams and their clients to engage in additional follow-up actions, including: organizing roundtables between the company and rights-holders; lobbying company shareholders to draw attention to violations; producing advocacy and media campaigns; providing human rights training to local

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<sup>27</sup> *ibid* 77

<sup>28</sup> Orsini and Cleland (n 9) 59

<sup>29</sup> Leverage is discussed in greater depth in a later chapter of this thesis.

<sup>30</sup> *ibid* 85

<sup>31</sup> *ibid* 86

<sup>32</sup> ‘Community-based human rights impact assessments: Practical lessons’ (n 22) 9

<sup>33</sup> *ibid* 12

<sup>34</sup> Götzmann and others, DIHR (n 6) 80

communities and other stakeholders; and supporting conflict resolution and mediation efforts.<sup>35</sup>

## 1.2 The Business Case for HRIA

While this thesis does not have enough time to consider the entire business case for human rights and corporate social responsibility, a few things are worth mentioning in the context of human rights due diligence and human rights impact assessment. First and perhaps most importantly, HRDD serves as a form of risk management for corporations. Simply put, risk management processes allow businesses to avoid financial, reputational, and legal damages.<sup>36</sup> The International Council on Mining and Metals (ICMM) summarizes some of the main reasons for incorporating HRDD into risk assessment:

It is increasingly evident that failure to effectively manage human rights issues effectively – as part of a broader corporate commitment towards respectful engagement with communities, employees and other key stakeholders – carries significant financial, legal and reputational risks. Such risks may manifest themselves in production shutdowns due to health and safety concerns, disruption of business and potential harm to employees and others due to community protest. There may be reputational and legal risks related to the actions of security forces in responding to such situations. Failure to effectively address human rights risks can lead to significant costs in terms of the management time required to respond to crises, and may impact a company's ability to access resources elsewhere or receive funding/insurance from some financial institutions or export credit agencies. Company practices and approaches will be judged by stakeholders (including investors).<sup>37</sup>

In the past, corporations have assessed financial and technical feasibility, but not social feasibility. One company operating in Sudan failed to assess social considerations as part of its business projects, and as a result, was charged of complicity in violations of human rights and humanitarian law. After the company was embroiled in a series of costly lawsuits, it realized that assessing social impacts, including human rights, is an important part of risk management strategy. The company has since hired human rights analysts to create a new series of human rights guidelines for the company and train staff in human rights compliance.<sup>38</sup>

HRDD constitutes a form of risk management because it increases knowledge of actual

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<sup>35</sup> Brodeur (n 7) 53

<sup>36</sup> *Integrating Human Rights Due Diligence into Corporate Risk Management Processes* (ICMM 2012) 6

<sup>37</sup> *ibid* 6

and potential human rights impacts so that businesses can identify how to prevent and mitigate them before they cause damage to the community, project, and/or company itself.<sup>39</sup> Scholars argue that HRDD itself was modeled on existing corporate risk management strategies, particularly environmental risk assessment. However, conventional risk management strategies such as EIA and SIA alone do not adequately take into account human rights risks based on the international legal framework.<sup>40</sup> Nevertheless, corporations can use data and resources from their existing ESIA's to conduct or inform HRDD.<sup>41</sup>

Secondly, promoting and protecting human rights is profitable. Although much academic literature on the profitability of CSR is inconclusive, consumers are increasingly paying attention to corporate respect for human rights, the environment, and other social issues. The 2015 Nielsen Sustainability Report found that brands with a commitment to sustainability outperformed other brands (4% growth versus 1% growth).<sup>42</sup> Consumers are also willing to pay more for sustainable goods. Millennials, the largest living adult generation after Baby Boomers, are particularly focused on sustainability; nearly three-quarters are willing to pay extra for sustainable brands.<sup>43</sup> Considering that Millennials account for approximately \$1 trillion of U.S. consumer spending and their economic power is expected to increase exponentially, their preferences are not inconsequential.<sup>44</sup> Brands such as TOMS have built their customer base through promoting social causes, an effort which has ultimately led to increased revenues.<sup>45</sup>

Although there are additional arguments for how CSR and human rights contribute to profitability, they are outside the scope of this thesis. The main point stands that HRDD—and by extension, HRIA—are both rooted in solid, financially sound business strategy.

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<sup>38</sup> Interview 2

<sup>39</sup> Björn FASTERLING, 'Human Rights Due Diligence as Risk Management: Social Risk Versus Human Rights Risk' (2017) 2 *Business and Human Rights Journal* 225 228

<sup>40</sup> *ibid* 229

<sup>41</sup> More information on other impact assessments in chapter 4.

<sup>42</sup> 'The Sustainability Imperative' (Nielsen 2015) 2

<sup>43</sup> *ibid* 9

<sup>44</sup> Ryan Rudominer, 'Corporate Social Responsibility Matters' (Georgetown University, no date) <<http://csic.georgetown.edu/magazine/corporate-social-responsibility-matters-ignore-millennials-peril/>> accessed 8 April 2019

<sup>45</sup> Arezou Naeini and others, 'A Shoe for a Shoe, And a Smile' [2015] *Business Today*

### 1.3 The Legal Basis for HRIA and HRDD

The obligation for corporations to adequately undertake due diligence has been well documented in the UN Guiding Principles, OECD Guidelines, EU Non-Financial Reporting Directive, and other instruments. While these documents usually do not call for HRIA directly, they establish requirements that are often fulfilled through HRIA processes. For instance, HRDD procedures in the UN Guiding Principles closely resemble the elements of HRIA. As a result, it is likely corporations will increasingly use HRIA as a primary mechanism for complying with HRDD requirements.<sup>46</sup> The United Nations Committee on Economic, Social and Cultural Rights affirmed the usefulness of human rights impact assessment for due diligence in General Comment 24, which states: “State parties should ensure that, where appropriate, the impacts of business activities [...] are incorporated into human rights impact assessments.”<sup>47</sup>

This section outlines hard law and soft law instruments that call for HRDD and HRIA. While not strictly law-based, this section also briefly describes voluntary initiatives that promote HRIA and encourage responsible practices in business and human rights.

#### “Hard” Law: International and Domestic Obligations

International human rights law clearly outlines states’ obligation to protect human rights, including from nonstate actors such as businesses. In effect, this means that state parties must implement legislative, administrative, and other measures to ensure that businesses do not commit human rights abuses. If they do not do so, they can be held in violation of their obligations under international treaties such as the International Covenant on Economic, Social, and Cultural Rights.<sup>48</sup> Regional human rights courts have affirmed this state duty in several legal rulings. In *Velásquez-Rodríguez v. Honduras*, the Inter-American Court of Human Rights expressed the importance of state obligation to protect citizens from nonstate actors: “An illegal act which violates human rights and which is not directly imputable to a state [...] can lead to international responsibility of the state [...] because of the lack of due diligence to prevent the

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<sup>46</sup> Harrison (n 15) 107

<sup>47</sup> ‘CESCR General Comment No. 24’ (United Nations 10 August 2017) 5

<sup>48</sup> *ibid* 5, 24, 10

violation or respond to it.”<sup>49</sup> In the famous Ogoni case, the African Commission on Human and Peoples’ Rights found Nigeria in violation of the African Charter for complicity in human rights abuses committed by Shell, as well as failure to protect the Ogoni population from harm.<sup>50</sup> The African Commission went on to state: “the State is obliged to protect rights-holders against other subjects by legislation and provision of effective remedies. This obligation requires the State to take measures to protect beneficiaries of the protected rights against political, economic and social interferences.”<sup>51</sup> The European Court of Human Rights also ruled that member states have a duty to protect rights-holders from nonstate actors: “If a violation of one of those rights and freedoms is the result of non-observance of that obligation in the enactment of domestic legislation, the responsibility of the State for that violation is engaged.”<sup>52</sup> States thus have a duty under international law to take steps to prevent and enact legislation against corporate human rights abuses. Nations such as France have enacted mandatory corporate due diligence laws in line with this obligation, and organizations such as the European Coalition for Corporate Justice are advocating for other states to adopt similar laws.<sup>53</sup>

Although typically international law is perceived as only applying to state parties and not directly on corporations, this is not always the case. Businesspersons can be held directly liable for gross human rights abuses that amount to a violation of international humanitarian law. As the OHCHR explained, “International humanitarian law grants protection to business personnel—provided they do not take part directly in armed hostilities—as well as to the assets and capital investments of enterprises. [However], it imposes obligations on managers and staff not to breach international humanitarian law and exposes them—and the enterprises themselves—to the risk of criminal or civil liability in the event that they do so.”<sup>54</sup> During the Nuremberg Trials, the directors of I.G. Farben, a German chemical conglomerate, were indicted on charges of war crimes and crimes against humanity for their role in using concentration camp

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<sup>49</sup> Olivier De Schutter, ‘Regulating Transnational Corporations: A Duty under International Human Rights Law’ (United Nations 2014) 3

<sup>50</sup> *155/96: Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v Nigeria* (African Union achpr 2001) para 46

<sup>51</sup> *ibid* para 46

<sup>52</sup> *Young, James and Webster v UK* (Council of Europe echr 1981)

<sup>53</sup> ‘Key Features of Mandatory Human Rights Due Diligence Legislation’ (ECCJ June 2018)

<sup>54</sup> *Corporate Responsibility to Respect Human Rights* (United Nations 2012) 11

inmates as slave workers.<sup>55</sup> While the business itself was not held accountable, decision-makers within the business were. This case, among others, demonstrates that businesses can be held liable in the case of severe human rights violations committed during armed conflict.

Businesses may feel that they must comply with government requests, even if they violate human rights or humanitarian law. However, the Nuremberg Trials and other cases have shown that this reasoning cannot excuse companies from violations.<sup>56</sup>

Notably, the international community shifted away from placing direct obligations and liability on businesses after the Nuremberg Trials. However, this attitude has again shifted in recent years. International criminal law has demonstrated increasing willingness to hold businesses accountable for international human rights violations. The International Special Tribunal for Lebanon explicitly stated, “Corporate criminal liability is on the verge of attaining, at the very least, the status of a general principle of law applicable under international law.”<sup>57</sup>

While international human rights law does not apply directly to businesses as of yet, the states where they operate must regulate their activity in compliance with international human rights standards. In line with these international obligations, states and regional bodies have started enacting legislation which requires businesses to conduct HRDD. For instance, Directive 2014/95/EU of the European Parliament and of the Council, also known as the EU Non-Financial Reporting Law, requires large undertakings and groups to disclose information about human rights, social and employee-related matters, anti-corruption, and environmental matters. These statements must include information on due diligence processes and their outcomes.<sup>58</sup>

While not yet part of the international legal order, the proposed legally binding instrument on business and human rights (Draft LBI) would further elaborate on state duty to impose due diligence requirements on businesses within their jurisdiction. Article 9 of the 2018 Zero Draft states: “State Parties shall ensure in their domestic legislation that all persons with business activities of transnational character within such State Parties’ territory or otherwise under their jurisdiction or control shall undertake due diligence obligations throughout such

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<sup>55</sup> UN War Crimes Commission, *Law Reports of Trials of War Criminals: The I.G. Farben and Krupp Trials* (H Fertig 1992)

<sup>56</sup> Tripathi (n 5) 132

<sup>57</sup> Quoted in Mohammed Suleh-yusuf, ‘Corporate Criminal Liability: Reviewing the Adequacy of Wilful Blindness as Mens Rea’ (2017) 3 24

business activities, taking into consideration the potential impact on human rights...”<sup>59</sup> Article 9(3)e explicitly states that human rights impact assessments form a key part of the due diligence process. The Draft LBI goes on to state: “Failure to comply with due diligence duties under this article shall result in commensurate liability and compensation.”<sup>60</sup>

While it is implied that this provision applies to state parties, the current wording of the Draft LBI leaves businesses open to liability if they fail to conduct due diligence, potentially directly under international law. Transnational corporations which fail to conduct due diligence would be subject to regulation and legal action by several states, including: the state where violations occur, the state where the business is domiciled, states where the corporation has “substantial business interest,” and states where the business has a subsidiary or branch office.<sup>61</sup> However, the treaty is still under debate and all proposed articles are subject to change. Additionally, in light of continued dissent between parties and discussions of the EU backing out of the treaty, the Draft LBI may not pass at all.

Of course, human rights law is not limited to international obligations and treaties; it is primarily applied through domestic laws and judicial proceedings. The U.S. Alien Tort Statute is one such example of a domestic legal tool that can hold businesses accountable for their actions overseas. *Doe v. Unocal*, settled in 2003, a human rights lawsuit against a transnational corporation, successfully ended in compensation for victims.<sup>62</sup> However, the power of the ATS has been limited somewhat in light of *Kiobel v Royal Dutch Petroleum* and *Jesner v. Arab Bank*. In the *Kiobel* case, the Supreme Court limited ATS claims to cases that “touch and concern the territory of the United States,” while in the *Jesner* case, the Court decided that foreign corporations may not be defendants in ATS suits. Despite these setbacks, the Supreme Court has not entirely struck down the possibility of suits against U.S. corporations.<sup>63</sup> Other domestic courts have made slow progress towards corporate liability for human right abuses. England, for instance, permits claimants to sue foreign subsidiaries of UK-domiciled parent companies under

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<sup>58</sup> Directive 2014/24/EU 094 (European Union CONSIL, EP 2014)

<sup>59</sup> Draft LBI (n 4) 5

<sup>60</sup> *ibid* 6

<sup>61</sup> *ibid* 9

<sup>62</sup> ‘Doe v. Unocal’ (EarthRights International, no date) <<https://earthrights.org/case/doe-v-unocal/>> accessed 4 May 2019

<sup>63</sup> William S Dodge, ‘Corporate Liability Under the US Alien Tort Statute: A Comment on *Jesner v Arab Bank*’ (2019) 4 *Business and Human Rights Journal* 131



certain conditions.<sup>64</sup> Similarly, France has enacted a law mandating corporate duty of vigilance for parent companies.<sup>65</sup> The trend of domestic legal orders holding corporations accountable is likely to increase, making HRDD part of sound risk management for businesses.

To summarize this section, due diligence is an important aspect of international human rights law. States have the duty to regulate businesses and hold them accountable for human rights violations. Businesses that do not comply with human rights standards cannot currently be held directly accountable under international human rights law; however, they may be found liable in domestic courts, international criminal tribunals, or under humanitarian law. In light of the risks of liability and the danger to human rights, both states and businesses have an interest in ensuring that due diligence is effectively followed. Lack of effective due diligence can lead to liability and risk both on the part of the state and the business, especially if the Draft LBI passes. Human rights impact assessments are one way for states and businesses to manage this risk and comply with legal obligations.

### “Soft Law”: Voluntary Principles and Guidelines

Several soft law instruments and nonbinding guidelines provide businesses with guidance on how to adequately adhere to human rights standards and conduct due diligence. Up to this point, corporate social responsibility and business and human rights initiatives have primarily used soft instruments and voluntary guidelines rather than hard law. While the soft law approach has undergone a fair amount of criticism from academics, civil society organizations, and NGOs, proponents argue it has gone further in advancing the normative framework, gaining buy-in from corporations, and establishing consensus in the field than hard law has.

The UN Guiding Principles were the first authoritative guidance issued by the UN regarding business and human rights, building on the earlier “respect, protect, remedy” framework. They have therefore played a key role in clarifying the different obligations and responsibilities of states and businesses. This important aspect should not be overlooked; before the UNGPs, a number of other efforts had attempted to delineate state and business responsibility, including the defunct Norms on the Responsibilities of Transnational

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<sup>64</sup> Andrew Sanger, ‘Transnational Corporate Responsibility in Domestic Courts’ (2019) 113 AJIL Unbound AJIL Unbound 4 5

<sup>65</sup> Stéphane Brabant and Elsa Savourey, ‘French Law on the Corporate Duty of Vigilance’ (2017) 50 Revue

Corporations and Other Business Enterprises with Regard to Human Rights. The UNGPs have achieved a certain level of consensus in the international community, and were accepted relatively quickly and widely. TNCs, states, and NGOs have all supported the UNGPs, giving them a large “buy in” from different sectors of society. The UNGPs were universally endorsed by the Human Rights Council, showing their wide support at the political level. At the non-state level, civil society organizations and national human rights institutions have collaborated with states to support National Action Plans and develop corporate accountability initiatives.<sup>66</sup> This level of support is rare, especially with regards to business issues.

The UNGPs feature extensive guidance on HRDD in principles 4, 15, 17, 18, 19, 20, 21, and 24.<sup>67</sup> Guiding principle 17 is the most explicit about due diligence processes:

In order to identify, prevent, mitigate and account for how they address their adverse human rights impacts, business enterprises should carry out human rights due diligence. The process should include assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed. Human rights due diligence: (a) Should cover adverse human rights impacts that the business enterprise may cause or contribute to through its own activities, or which may be directly linked to its operations, products or services by its business relationships; (b) Will vary in complexity with the size of the business enterprise, the risk of severe human rights impacts, and the nature and context of its operations; (c) Should be ongoing, recognizing that the human rights risks may change over time as the business enterprise’s operations and operating context evolve.<sup>68</sup>

The UNGPs go on to explain that businesses should assess impacts which they may have directly caused, contributed to, or be associated with through business relationships. Additionally, the due diligence process should include meaningful consultation with rights-holders. After identification, businesses should take appropriate action to prevent and mitigate potential and actual impacts, then report on their human rights strategy and track the effectiveness of their

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Internationale de la Compliance 1

<sup>66</sup> Beata Faracik, ‘Implementation of the UN Guiding Principles on Business and Human Rights’ (European Union 2017) 34

<sup>67</sup> Ruggie (n 3)

<sup>68</sup> *ibid* 17

response.<sup>69</sup> While the UNGPs do not explicitly state that HRIA should be part of the due diligence process, the principles outlined in the UNGPs closely correspond to HRIA.

The OECD Guidelines for Multinational Enterprises are another influential soft law tool for business and human rights. The Guidelines were revised several times, including a 2011 revision that brought them into line with the UNGPs.<sup>70</sup> The OECD Guidelines feature a chapter which describes both state duty to protect human rights and corporate responsibility to respect human rights. The Guidelines explicitly call on enterprises to: “Carry out human rights due diligence as appropriate to their size, the nature and context of operations and the severity of the risks of adverse human rights impacts.”<sup>71</sup> In the commentary, the Guidelines further elaborate: “Paragraph 5 recommends that enterprises carry out human rights due diligence. The process entails assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses as well as communicating how impacts are addressed.”<sup>72</sup> Additionally, due diligence processes should result in the establishment of remediation efforts.<sup>73</sup>

Notably, the OECD Guidelines feature a mandatory oversight mechanism, National Contact Points (NCPs). NCPs are “agencies established by adhering governments to promote and implement the Guidelines. NCPs assist enterprises and their stakeholders to take appropriate measures to further the implementation of the Guidelines. They also provide a mediation and conciliation platform for resolving practical issues that may arise.”<sup>74</sup> OECD member states are obliged to establish NCPs; in this way, the OECD Guidelines are a binding requirement for states, although they remain voluntary for corporations.<sup>75</sup> That being said, NCPs are not perfect. Actual implementation and case management vary drastically between states, and as of yet there is no review mechanism that can attribute wrongful conduct to a member state if its NCP does not meet standards. Additionally, the complaint process is “complicated and uncertain,” and relatively few cases have been resolved.<sup>76</sup> Nevertheless, NCPs are one of the few oversight mechanisms for CSR. Presumably, they could find businesses in violation of the OECD

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<sup>69</sup> *ibid* 18

<sup>70</sup> *OECD Guidelines for Multinational Enterprises* (OECD 2011) 3

<sup>71</sup> *ibid* 31

<sup>72</sup> *ibid* 34

<sup>73</sup> *ibid*

<sup>74</sup> *ibid* 3

<sup>75</sup> Scott Robinson, ‘International Obligations, State Responsibility and Judicial Review Under the OECD Guidelines for Multinational Enterprises Regime’ (2014) 30 *Utrecht journal of international and European law* 68

Guidelines for failure to uphold human rights standards, including due diligence requirements.

A number of other voluntary initiatives have also encouraged businesses to adopt HRDD processes, including the UN Global Compact, the International Financial Corporation Sustainability Principles and Performance Standards, the International Code of Conduct for Private Security Service Providers, the Extractive Industries Transparency Initiative, European Commission sector-specific guidance, and the ISO 26000 social responsibility tool.<sup>77</sup> Additionally, ICMM requires members to implement its ICMM Sustainable Development Framework, which includes a due diligence component.<sup>78</sup> These initiatives vary in terms of monitoring and enforcement.

### Business and Human Rights Standards in Conflict-Affected Societies

Some instruments specifically acknowledge the heightened need for human rights protections in conflict-affected societies and other high-risk environments. Ruggie released a special companion report dedicated to business and human rights in conflict-affected regions,<sup>79</sup> and the commentary to the OECD Guidelines specifically identifies the need for businesses to remain vigilant about their impacts in conflict areas: “In situations of armed conflict enterprises should respect the standards of international humanitarian law, which can help enterprises avoid the risks of causing or contributing to adverse impacts when operating in such difficult environments.”<sup>80</sup> Additionally, security-related guidelines such as ICoCA and the Voluntary Principles on Security and Human Rights are especially pertinent in conflict zones. While not all of these instruments explicitly mention due diligence in conflict-affected settings, HRDD is a powerful means for ensuring human rights and humanitarian compliance in these contexts.

UNGP 7 focuses on business operations in conflict affected societies.<sup>81</sup> The principle is below:

Because the risk of gross human rights abuses is heightened in conflict-affected areas, States

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<sup>76</sup> *ibid* 73

<sup>77</sup> De Schutter (n 49) 1

<sup>78</sup> *ICMM* (n 36)

<sup>79</sup> See Ruggie, ‘Business and human rights in conflict-affected regions’ (2011)

<sup>80</sup> *OECD Guidelines* (n 70) 32

<sup>81</sup> Radu Mares, ‘Corporate and State Responsibilities in Conflict-Affected Areas’ (2014) 83 *Nordic Journal of*

should help ensure that business enterprises operating in those contexts are not involved with such abuses, including by: (a) Engaging at the earliest stage possible with business enterprises to help them identify, prevent and mitigate the human rights-related risks of their activities and business relationships; (b) Providing adequate assistance to business enterprises to assess and address the heightened risks of abuses, paying special attention to both gender-based and sexual violence; (c) Denying access to public support and services for a business enterprise that is involved with gross human rights abuses and refuses to cooperate in addressing the situation; (d) Ensuring that their current policies, legislation, regulations and enforcement measures are effective in addressing the risk of business involvement in gross human rights abuses.<sup>82</sup>

While principle 7 emphasizes state duty, it clearly outlines potential consequences for businesses that violate human rights in conflict zones. Part B is particularly notable in the context of HRDD, as it calls on states to help businesses “assess and address the heightened risks of abuses.” While the UNGPs do not use the phrase “due diligence” in this context, the UN’s interpretive guide does: “Perhaps the greatest risks arise in conflict-affected areas, though they are not limited to such regions. Such contexts should automatically raise red flags within the enterprise and trigger human rights due diligence processes that are finely tuned and sensitive to this higher level of risk.”<sup>83</sup>

Even when states are unable or unwilling to enforce this principle, businesses are expected to undertake due diligence and meet minimum standards set out in the UNGPs.<sup>84</sup> The commentary to principle 27 expounds upon this point: “Some operating environments, such as conflict-affected areas, may increase the risks of enterprises being complicit in gross human rights abuses committed by other actors (security forces, for example). Business enterprises should treat this risk as a *legal compliance issue*, given the expanding web of potential corporate legal liability arising from extraterritorial civil claims, and from the incorporation of the provisions of the Rome Statute of the International Criminal Court.”<sup>85</sup> While the UNGPs are soft law, they explicitly warn businesses of legal consequences for their actions, especially through

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International Law 293

<sup>82</sup> Ruggie (n 3) 8

<sup>83</sup> *Responsibility to Protect* (n 54) 80

<sup>84</sup> Mares (n 81) 302

<sup>85</sup> Ruggie (n 3) 25, emphasis added

extraterritorial jurisdiction in domicile states.<sup>86</sup>

## 1.4 Conclusion: Human Rights Impact Assessment: A Survey of the Literature

This chapter has given an overview of existing literature on HRIA and HRDD in order to provide a foundation for original arguments and contributions to the field. It is important to understand which methodologies already exist in order to build on the work of experts and practitioners rather than trying to repeat what has already been accomplished. Additionally, awareness of the business and legal case for HRIA can help current and aspiring HRIA practitioners persuade businesses, states, and other organizations to engage in HRDD processes.

The rest of this thesis builds on the foundation presented in chapter one in order to provide a robust understanding of how HRIA can adapt to conflict settings. The models and guidelines proposed in this thesis build specifically on the Danish Institute toolkit and methodology described within this chapter. Future chapters incorporate lessons from experts in other fields, many of whom already have extensive experience in working in conflict situations.

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<sup>86</sup> Mares (n 81) 325

## Part 2: Ideological Shifts: Adapting HRIA in Theory

Now that readers have a basic idea of how HRIA works, a more thorough discussion of its shortcomings in conflict-affected societies is warranted. As earlier stated, HRIA methodologies have not fully elaborated on the multiple ways conflict, business, and human rights influence one another, as well as the implications of these interactions. While some HRIA methodologies include questions about different forms of conflict, a systematic approach to analyzing the economic systems which drive war has not been introduced.

At the fundamental level, existing HRIA methods do not account for the altered economic conditions present in armed conflict. Economies characterized by conflict inherently operate differently than economies in more stable environments. As Nick Killick, expert on human rights and business in conflict zones, explains: “Destruction of infrastructure, loss of skilled workforce, reduction or complete collapse of foreign investment, prohibitive security and insurance costs, loss of markets, regulatory confusion, and diminished support from the government all make doing business in conflict zones a matter of survival rather than growth.”<sup>87</sup> In these contexts, normal risk management processes and impact assessments are not adequate for understanding the actual impact of conflict on business and vice versa.

Since conflict alters every aspect of affected communities, including economic structures, methods which do not bring conflict to the center of every stage are not adequate. Conflict is an entirely different social system with its own rules of operation, connections between actors, and resource flows. Assessment techniques which do not take this into account therefore risk failing to portray the full picture of how businesses influence both human rights and conflict in a given society.

In light of these considerations, HRIA practitioners must take special care to examine how businesses affect not only human rights, but also the surrounding conflict. Existing HRIA toolkits acknowledge the need for special care in conflict-affected societies, but do not always elaborate on what this means on both a theoretical and practical level.

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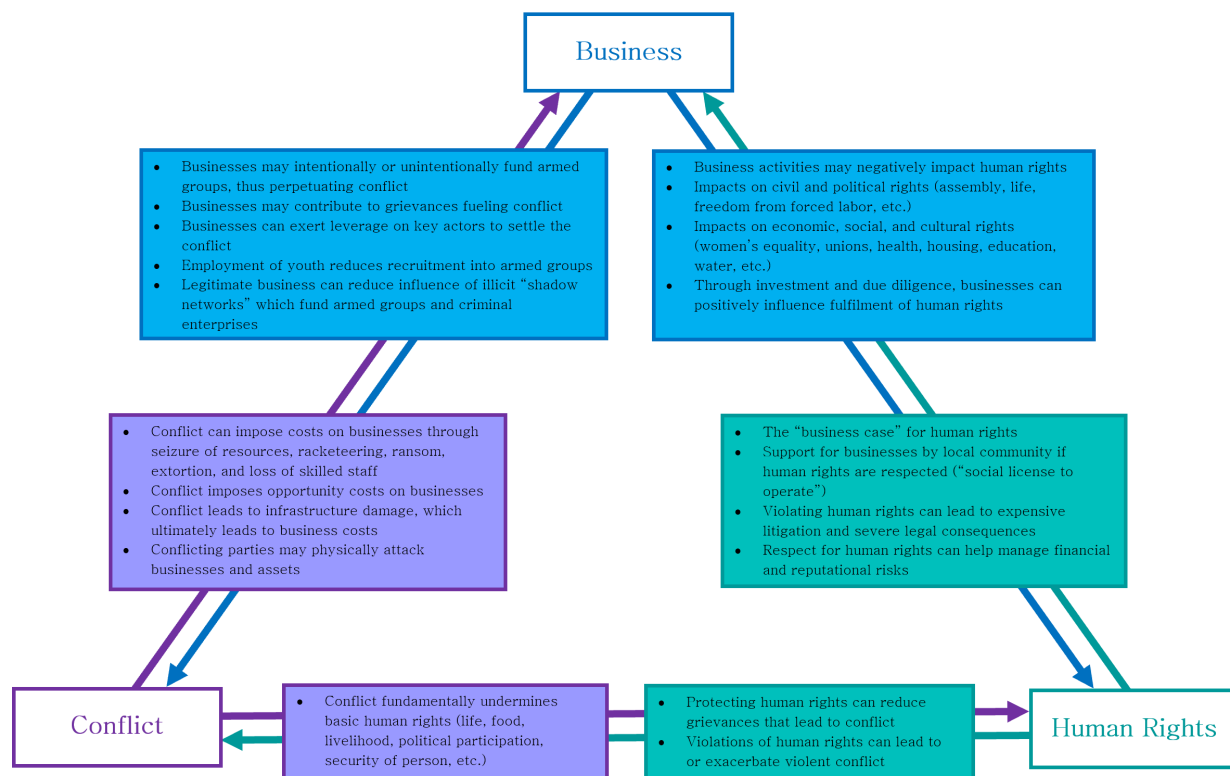
<sup>87</sup> Nick Killick and others, ‘The Role of Local Business in Peacebuilding’ [2005] Berghof Handbook 4

This portion of the thesis features two chapters, both of which seek to shift the ideology of HRIA to take these factors into account. The first chapter argues that HRIA should place greater emphasis on examining the economic systems present during armed conflict in order to understand how businesses can advertently or inadvertently fuel conflict. This chapter also explores the role of business in peacebuilding. The final section of the chapter assesses corporate philanthropy in conflict-affected societies, including how it can contribute either to peace or to further conflict. The second chapter in this portion of the thesis contends that HRIA should not only assess negative impacts, but also positive outcomes and opportunities for change.



## Chapter 2: Business, Human Rights, and Conflict: Interconnected Phenomena

Conflict, human rights, and development (including business) are inherently linked to one another in complex ways. Human rights advocates are well aware of the impacts that businesses can have on human rights. Corporate human rights abuses have severely harmed communities in nations around the globe, both in wealthy and underdeveloped contexts. On the other side, positive and innovative approaches taken by businesses can help with the full realization and fulfillment of human rights. Similarly, the links between human rights and conflict are well documented by academics and practitioners alike.<sup>88</sup> Links between conflict and business are somewhat less researched, although literature does exist on the subject.<sup>89</sup> However, links between all three phenomena are rarely analyzed in a holistic, interconnected manner.



<sup>88</sup> See Mertus & Helsing, *Human Rights and Conflict* (USIP 2006) and Parlevliet 'Human Rights and Conflict' (Berghof 2011)

<sup>89</sup> See Zandvliet 'Conflict Transformation and the Corporate Agenda' (Berghof 2011) and Killick and others 'Role of Local Business in Peacebuilding' (Berghof 2005).

Because of the complex and interconnected nature of conflict, human rights, and business, HRIA practitioners can benefit from examining the various ways in which these phenomena influence one another. After all, a business intentionally or unintentionally fueling armed conflict will have severe human rights implications not just in the local community, but throughout the region. As International Alert points out, “companies need to be aware of the type of conflict they are operating in, the relation of the conflict to the project, and what this means for their human rights impacts.”<sup>91</sup> Additionally, “standard” human rights impacts can become more severe in conflict-affected settings, as shown in the table below.

**Table 2: Considerations for human rights due diligence in stable and conflict-affected settings**

HRDD in more stable environments	HRDD considerations in CAS
Likelihood of human rights violations influenced largely by the local context and the project’s specific activities <sup>23</sup>	Likelihood and severity of human rights violations greater
Risks to business influenced largely by how effectively human rights issues are managed <sup>24</sup>	Risks to business greater because of inherent risk due to conflict, and because managing human rights in conflicts is harder
Stakeholder engagement essential component (across all steps)	Greater barriers and challenges to stakeholder engagement (across all steps)
Human rights impact assessment	Integration of conflict analysis into HRIA
HRIA can be stand-alone or integrated	If HRIA is triggered by a conflict situation or incident, then the preference is towards stand-alone and issue-specific
Business has (relatively) more control over outcomes	Greater chance of – and wider array of – unintended consequences
Stakeholder expectations vary	Stakeholder expectations may be higher and broader in scope
Primarily forward-looking: past impact as predictor of potential impacts	Addressing legacy issues and root causes of conflict as a key step to take
Primarily focused on mitigating negative impacts	Also considers how to enhance positive impacts

How HRDD alters in conflict-affected settings. Source: International Alert

<sup>90</sup> Original model created by thesis author. Data based on *Rethinking the Economics of War* (2005), Parlevliet ‘Human Rights and Conflict’ (Berghof 2011), Zandvliet ‘Conflict Transformation and the Corporate Agenda’ (Berghof 2011), the UNGPs, Killick and others ‘Role of Local Business in Peacebuilding’ (Berghof 2005), Fischer ‘Recovering from Violent Conflict (Berghof 2004).

Because business, human rights, and conflict are so closely connected (as illustrated in the triad model above), understanding how businesses relate to conflict and the war economy is critical for understanding their overall impact on human rights. Corporations which otherwise seem to respect human rights may actually contribute to rights violations through activities such as funding armed groups, selling goods to rights-violating regimes, or exacerbating grievances of conflicting parties. Alternatively, businesses may assist with peace efforts and help communities reconcile with one another. As a result, it is important for HRIA practitioners to examine how businesses affect and are affected by conflict.

This chapter draws connections between conflict, business, and human rights in order to examine the additional considerations that HRIA practitioners might consider in conflict-affected societies. The chapter begins with a brief discussion of war economics and how it applies to HRIA. The following section examines leverage points businesses can use to pressure other actors to protect human rights in conflict settings. The third section of the chapter assesses the role of business in peacebuilding and conflict transformation. The final section examines corporate philanthropy efforts in the context of conflict-affected societies. These sections also discuss case studies of how businesses have influenced human rights and conflict transformation both negatively and positively.

## 2.1 War Economics

Conflict fundamentally changes the economic conditions and systems in affected countries. As David Keen points out, “war is not simply a breakdown in a particular system, but a way of creating an alternate system of profit, power, and even protection.”<sup>92</sup> In these contexts, businesses can inadvertently contribute to war economies and thus fuel conflict, whether or not they directly engage with conflicting parties. Tripathi elaborates on this point: “Armies need money to buy weapons and ammunition; soldiers need food; civilians still need supplies to continue their daily lives; and businesses have to function. Some businesses have played a direct role in conflict by providing the means with which wars are fought. Others have provided

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<sup>91</sup> Orsini and Cleland (n 9) 13

<sup>92</sup> Quoted in Cynthia Arnson, ‘The Political Economy of War: Situating the Debate’ in I William Zartman (ed),

infrastructure support — intentionally or not — that has facilitated the continuation of conflicts. Some have supported their national governments while others have aided armed groups — sometimes by choice, sometimes under duress.”<sup>93</sup> Businesses operating in conflict-affected societies can easily find themselves fueling or contributing to conflict, whether they intend to or not. Therefore, businesses should be aware of their position within the war economy and how their actions may impact or be impacted by conflict. Although much can be said about the economics of war, this section focuses only on a select number of issues of particular relevance for HRIA.<sup>94</sup>

Firstly, understanding the drivers of conflict is vitally important.<sup>95</sup> NomoGaia’s HRIA toolkit considers different forms and drivers of conflict in an effort to understand how human rights, conflict, and business interact with one another in a given context. As the interviewee explained: “Being more savvy about the types of conflict and the way that they are presented is important. The end of the war is one aspect, but the concentration of violence in the state is an entirely different aspect. And the potential for violence for to flare up again is a totally different aspect. [...] We have specific modules for projects in land-conflicted areas, water-conflicted areas, indigenous-conflicted areas, and elevated HIV zones. Because not all conflicts are created equal. So places where it's a territorial dispute, you need a different approach than where it's ethno-religious or where it's more conquest-based.”<sup>96</sup> By understanding the form that conflict takes, as well as its underlying drivers, HRIA teams can focus in on the most salient human rights issues at stake, such as rights to food and water in water-based disputes or right to religious freedom in ethno-religious disputes.

Economic considerations themselves can become important drivers of conflict. Countries with greater inequality, as indicated by the Gini coefficient, often experience higher rates of political conflict and complex humanitarian emergencies, including civil war.<sup>97</sup> According to greed-propelled theory, conflict ignites when rebels believe they can profit more from war than

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Rethinking the economics of war (Johns Hopkins UP 2005) 3

<sup>93</sup> Tripathi (n 5) 132

<sup>94</sup> For further information on war economies, see *Rethinking the Economics of War* (2005), Poast *Economics and War* (2018), and Anderton *Principles of Conflict Economics* (2009)

<sup>95</sup> See information on peace and conflict impact assessment in chapter 4.

<sup>96</sup> Interview 1

<sup>97</sup> Arnson (n 92) 4

peace, although this theory has since been questioned by other academics.<sup>98</sup> Nevertheless, it has been observed that conflicts which begin over legitimate grievances can become fueled by economic considerations if powerful actors believe they can obtain more wealth by perpetuating the conflict than by establishing peace. For instance, during the wars in Angola, Sierra Leone, and Liberia in the 1990s, capture of diamonds and oil at first served as a means of financing rebel forces. However, these resources soon became an object of the conflict as individuals fought for control of the territory and population as an end in and of itself<sup>99</sup>. In these situations, businesses must take particular care that they are not fueling the greed or grievance behind conflicts. To this end, careful monitoring of the supply chain is necessary to ensure businesses are not creating large profits for armed groups. Furthermore, businesses who fail to properly pay their employees, invest in local communities, or distribute a share of profits to host country nationals risk contributing to grievances and an atmosphere of resentment against TNCs. Businesses that exacerbate economic tensions in this manner risk undermining human rights by contributing to further conflict.

HRIA teams must also consider allocation of resources, especially as they relate to the business project. Resource exploitation as a means of financing war has been well documented, including the cases of diamond mining in Angola and Sierra Leone, logging in Liberia and Cambodia, and cocaine production in Colombia.<sup>100</sup> Resource distribution is a key factor in all situations, but becomes even more relevant in conflict situations. Actual or perceived distribution of resources can become a source of tension in conflict-affected societies, particularly in settings with multiple ethnic groups. Rwanda is a key example of this. During colonial occupation, the Tutsi elite increasingly were placed in positions of power and advantage over the Hutu, leading to significant tension and resentment between the two groups.<sup>101</sup> In addition to investment and goods, “resource distribution” can also refer to employment opportunities. In the Rwandan case, higher rates of local unemployment among Hutu directly correlate with increased participation in the genocide.<sup>102</sup>

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<sup>98</sup> *ibid* 5

<sup>99</sup> *ibid* 3

<sup>100</sup> Killick and others (n 87) 3

<sup>101</sup> ‘The Rwandan Genocide: How It Was Prepared’ (*Human Rights Watch*, 2006)

<<https://www.hrw.org/legacy/backgrounder/africa/rwanda0406/1.htm>> accessed 15 July 2019

<sup>102</sup> Willa Helterline Friedman, ‘Local Economic Conditions and Participation in the Rwandan Genocide’ (WGAPE, 2010)

Additionally, because discrimination often drives conflict, businesses must take care to ensure their business practices do not perpetuate inequity. Employing primarily from one group, intentionally or unintentionally, can fuel grievances and intensify feelings of injustice. Businesses should therefore take an active policy of hiring from disadvantaged groups and providing training to groups that may otherwise lack the education to take on privileged roles in a business.<sup>103</sup>

It is therefore important for HRIA teams to analyze how benefits from business projects are allocated, and in turn, how that allocation can exacerbate tensions between groups and trigger conflict. Important questions for HRIA might include: which groups are bearing the brunt of project costs, and are these groups receiving fair compensation? Would an increase in economic activity make the local community more vulnerable to attack from outside groups? Would investment and increased income in a particular community lead to socioeconomic tension?<sup>104</sup> (e.g., within the community, between the community and another community, between the community and wealthy power-holders, between the community and the government, between the community and armed groups) Can careful distribution of benefits mitigate and soothe tensions between groups?

On a related note, assumed resource allocation may differ significantly from actual resource allocation. Questioning assumptions is important in all HRIAs, but especially so in conflict-affected societies. One interviewee described how in Jordan, many local individuals assumed that refugee and migrant populations placed a burden on water usage in the region, leading to tension between groups. However, closer examination uncovered that the vast majority of water was used by farmers growing tomatoes and citrus to sell to Europe. By comparison, the Syrian refugees in Jordan used only a very small portion of water resources.<sup>105</sup> In these cases, HRIA teams can dispel myths about vulnerable groups, which may mitigate sources of tension.

HRIA teams should also pay particular attention to corruption in conflict-affected societies. While most HRIA processes already investigate corruption, the issue is particularly relevant in conflict zones. Corruption is both a symptom and a cause of conflict, and has major

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<sup>103</sup> Killick and others (n 87) 9

<sup>104</sup> Kenneth Bush, 'Peace and Conflict Impact Assessment of Development Projects in Conflict Zones' (1998) 23

<sup>105</sup> Interview 1

implications for businesses, including stifled growth, minimal job creation, and exploitation of the private sector as an agent of repressive regimes.<sup>106</sup> Even the most well-intentioned business which does everything correctly and meets all human rights obligations can become an agent of conflict when corrupt governments use corporate assets for illegitimate or harmful aims.

Additionally, while supply chain responsibility has been extensively discussed in recent years, companies are increasingly expected to consider user chain responsibility as well. User chain responsibility examines how company profits and products are used by purchasers and other beneficiaries.<sup>107</sup> In order to succeed, armed groups must operate as a business: they must control enough money and resources to pay soldiers, meet logistical needs (such as shelter and food), and obtain arms. FARC, for example, was largely successful because of its ability to raise revenue and thus sustain itself over the long-term.<sup>108</sup> Therefore, it is critical for businesses to understand where their resources and profits are going. As a result, examining resource flows, allocation of assets, financial outputs, and the supply chain becomes particularly relevant. In this regard, businesses should: ensure their revenues do not finance conflict; ensure assets and infrastructure (e.g., airstrips, vehicles) are not used by parties to the conflict; ensure their products (e.g., fuel) are not used to wage war in ways that violate international human rights or humanitarian law; and avoid legitimizing warring parties accused of violating human rights or humanitarian law.<sup>109</sup> After all, just because a transaction is legitimate doesn't make it harmless or ethical.

By examining resource and financial flows, HRIA teams may be able to identify if a business is advertently or inadvertently funding conflict, thereby undermining human rights. HRIA teams may consider asking questions such as: which groups and actors are benefiting financially from the project? Are any of these groups or individuals tied to the conflict and how? How are resources for the business sourced? If the government benefits from the project, how is it using the resulting funds? (e.g., infrastructure projects versus arms spending, “guns versus butter”) Are resources from the project ending up in the hands of non-state armed groups? Are investments, financial flows, etc. perpetuating the conflict by providing resources to combatants?

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<sup>106</sup> Killick and others (n 87) 4

<sup>107</sup> Luc Zandvliet, 'Conflict Transformation and the Corporate Agenda' in *Advancing Conflict Transformation: The Berghof Handbook* (2011) 363

<sup>108</sup> Killick and others (n 87) 3

<sup>109</sup> Zandvliet (n 107) 363

Alternately, if the vast majority of benefits and financial resources are going to TNC executives and domicile states instead of local actors, will this become a source of grievance for violence against the company and its partners? Simply put: where does the money go?

HRIA teams should keep in mind that neutral activities that may provide benefits to locals can also have implications for armed conflict. For instance, a company may build a highway in order to better move goods. This may seem beneficial as it allows local communities to have increased mobility for sharing their own goods and services. However, this same highway may allow armed groups to mobilize more quickly and reach areas that were previously inaccessible and thus shielded from fighting.<sup>110</sup> It is important to carefully weigh all potential uses of a resource or project, especially those open to the public, in order to balance potential benefits with potential abuses.

Moreover, companies should be aware of human rights abuses committed on their behalf, even when they have not asked for these actions to occur. Oftentimes, the need for development and economic resources is so high that governments, landlords, and other powerful actors do not care about violating human rights in order to secure business opportunities. Governments may relocate a large number of people or violate labor standards in order to clear land for business projects, even without the corporation's direction or authorization, especially in conflict settings where investment is desperately needed.<sup>111</sup> Corporations should be explicit about their expectations for governments and contractors with regards to human rights or otherwise be seen as a violator of human rights themselves, even if they did not order the actions taken.

However, businesses do not only cause harm in conflict-affected societies; in fact, their actions often benefit local communities and contribute to peace. One particularly notable example is Statoil's operations in the Niger Delta. Statoil not only followed human rights when engaging with local communities, but also initiated development programs proposed and led by rights-holders. The company has been transparent about the limitations as to what it can and cannot do in order to build trust and manage community expectations. As a result, the area where the company works has been known as "an island of peace in a conflict-ridden area."<sup>112</sup>

For one thing, economic opportunities are important for reintegrating ex-combatants and

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<sup>110</sup> Tripathi (n 5) 137

<sup>111</sup> *ibid* 137

<sup>112</sup> *ibid* 140



detering them from pursuing further conflict. Combatants who do not find adequate employment are at high risk of joining criminal organizations, getting involved in the black market, or being recruited into other armed groups. Peacebuilding practitioners in the International Organization for Migration have found self-employment initiatives, needs-based counseling, financial assistance, and support for business start-ups immensely successful in contributing to lasting peace.<sup>113</sup>

Martina Fischer, former acting director of the Berghof Research Center for Constructive Conflict Management, goes into greater depth about how employment opportunities can transform the war economy and contribute to peace in conflict-affected societies:

Underpinning peace and human rights work with income-generating initiatives involving young people is essential for several reasons. If young people generate revenue themselves, this improves their families' financial situation and enhances their self-esteem, as they thus gain a place in the community and a certain measure of respect. It may also improve opportunities for self organisation; for example the youth centre or encounter activities can be co-financed with funds which the young people have generated themselves. This would help to reduce dependence on foreign donors and support the development of a viable local NGO sector, thus benefiting the emergent civil society. [...] And moreover there is the danger that youngsters otherwise get into illegal business or could be recruited by nationalist forces if they are left without viable prospects.<sup>114</sup>

In other words, while businesses can exacerbate conflict by feeding the war economy, they can also contribute to peace simply through their presence. Employment is a major contributor to peace, as it allows individuals to support themselves and can reduce grievances. Employed individuals also face greater opportunity costs for joining armed conflict or shadow economies.

Despite these potential positives, in some cases, war economies are so complex and characterized by seizure, corruption, and conflict that any injection of money and resources into the economy only serves to fuel further violence. In these cases, businesses may cause more harm than good through their presence. Academics and practitioners are divided on when, exactly, it is appropriate for businesses to operate in conflict-affected societies and whether the benefits of their presence outweigh potential implications on conflict. Some argue that it is never acceptable for businesses to engage in conflict zones due to issues with moral complicity. These

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<sup>113</sup> Martina Fischer, 'Recovering from Violent Conflict: Regeneration and (Re-)Integration as Elements of Peacebuilding' in Alex Austin and others (eds), *Transforming Ethnopolitical Conflict* (VS Verlag 2004) 14

<sup>114</sup> *ibid* 13

authors explain that even the best-intentioned companies may become involved in human rights violations and ethical dilemmas in complex conflict-affected and authoritarian settings.<sup>115</sup> While this is certainly true, it is also true that businesses can contribute to the fulfillment of human rights in conflict-affected settings where governments are incapable or unwilling to provide social services and build infrastructure.<sup>116</sup>

Businesses should not only consider whether to enter a country in armed conflict, but also what to do when conflict breaks out in a country where the business has already had operations for a long time. One interviewee expounded on this point: “Do you pull out? But what if you have community relations and you support the human rights realization there? What does that mean in terms of the consequences for human rights if you leave? I would definitely stay this question of avoiding harm and doing good has to be balanced very carefully.”<sup>117</sup> Withdrawal from conflict zones is a complicated issue. Businesses often provide key services and stability to communities that desperately need economic development and investment; however, their presence may increase tensions and lead to even more conflict.<sup>118</sup> Ultimately, HRIA experts must carefully weigh businesses’ place in the war economy and whether increased spending in a particular community would lead to such great risk that the project is not worth starting.

War economies don’t disappear overnight; they persist even after a peace settlement has been negotiated. As Bigdon and Korf explain, instead of linear progress, “Often we experience abrupt shifts from one stage to the other and many countries are characterized by both peace and conflict simultaneously.”<sup>119</sup> In fact, the term “postconflict” is contested, since achievement of a peace treaty does not necessarily eliminate conflict; it merely makes conflict latent, and triggers can cause violence to flare again.<sup>120</sup> Therefore, businesses and their HRIA teams must stay vigilant and continue to monitor the impact of their activities and financial transactions as they relate to conflict, even after a peace agreement. Otherwise, they may inadvertently reignite sources of grievances or continue to fund remaining combatants and violent groups.

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<sup>115</sup> Bush (n 104)

<sup>116</sup> This topic is explored further in the “From Avoiding Harm to Doing Good” chapter of this thesis, but is worth mentioning in the context of economics.

<sup>117</sup> Interview 2

<sup>118</sup> Tripathi (n 5) 134

<sup>119</sup> Christine Bigdon and Benedikt Korf, ‘The Role of Development Aid in Conflict Transformation’ in Alex Austin and others (eds), *Transforming Ethnopolitical Conflict* (VS Verlag 2004) 4

<sup>120</sup> Interview 1

In sum, businesses must carefully consider their place within war economies. Even when a business complies with all human right standards and attempts to contribute to positive peacebuilding efforts, its activities can fuel conflict by funding armed groups, contributing to grievances, or exacerbating tensions between communities due to uneven resource allocation. Since conflict fundamentally prevents the fulfillment of human rights, businesses that fuel conflict also undermine human rights in the host community and the region as a whole. As a result, HRIA must include these considerations. A company with neutral or positive outcomes on standard HRIA indicators may still have detrimental effects on human rights by advertently or inadvertently contributing to conflict in the supply chain or through other impacts. HRIA teams working in conflict-affected societies should therefore take a systematic approach to analyzing businesses' place within the war economy, both in legitimate markets and shadow networks. Killick illustrates this point adeptly: "The problem, therefore, lies not so much with the activity itself (although the behavior of TNCs is obviously an important factor) but with the management and use of the revenues which are generated by it."<sup>121</sup>

## 2.2 Leverage Points

Large businesses, particularly TNCs, exert a large amount of influence at the local, national, and regional levels. Some opportunities to influence other actors are particularly significant; these are known as leverage points. According to the Danish Institute, "'Leverage' is considered to exist where a business has the ability to effect change in the practices of another entity that causes harm."<sup>122</sup> In relationships with low levels of leverage, the Danish Institute encourages businesses to attempt to increase their influence in order to pressure partners to respect, protect, and fulfill human rights.<sup>123</sup>

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<sup>121</sup> Killick and others (n 87) 3

<sup>122</sup> Götzmann and others (n 6) 77

<sup>123</sup> *ibid* 77

Table J: Examples of exercising and increasing leverage to address human rights impacts	
Examples of types of leverage	Examples of exercising leverage
<p><b>Traditional commercial leverage:</b> leverage that sits within the activities the company routinely undertakes in commercial relationships, such as contracting.</p>	<ul style="list-style-type: none"> <li>• Include human rights standards in contracts</li> <li>• Audit for compliance with the human rights standards included in the contract</li> <li>• Include human rights in pre-qualification criteria in bidding processes; and/or</li> <li>• Provide commercial incentives for suppliers that are based on human rights considerations, e.g. targets for local content.</li> </ul>
<p><b>Broader business leverage:</b> leverage that a company can exercise on its own but through activities that are not routine or typical in commercial relationships, such as capacity building.</p>	<ul style="list-style-type: none"> <li>• Build the capacity of suppliers to meet the responsibility to respect human rights</li> <li>• Ensure that procurement and purchasing staff send the same messages on human rights in their conversations with suppliers and decision-making about contracts; and/or</li> <li>• Use relevant international and industry standards to drive expectations by requiring supplier compliance with such standards.</li> </ul>

Table J: Examples of exercising and increasing leverage to address human rights impacts	
Examples of types of leverage	Examples of exercising leverage
<p><b>Leverage together with business partners:</b> leverage created through collective action with other companies in or beyond the same industry.</p>	<ul style="list-style-type: none"> <li>• Work with business peers to establish common requirements of suppliers; and/or</li> <li>• Engage bilaterally with peer companies who may be facing similar supply chain issues to share lessons learnt and to identify possible solutions.</li> </ul>
<p><b>Leverage through bilateral engagement:</b> leverage generated through engaging bilaterally and separately with one or more other actors, such as: government; business peers; an international organisation; or a CSO.</p>	<ul style="list-style-type: none"> <li>• Engage CSOs and relevant international organisations who can provide relevant information on local actors or circumstances in supplier countries; and/or</li> <li>• Engage with a range of actors bilaterally to identify and implement solutions to specific human rights supply chain issues that have been identified.</li> </ul>
<p><b>Leverage through multi-stakeholder collaboration:</b> leverage generated through collaborative action – collectively with business peers, governments, international organisations and/or NGOs or CSOs.</p>	<ul style="list-style-type: none"> <li>• Develop shared standards for suppliers through multi-stakeholder initiatives, thereby enhancing the credibility of the standards; and/or</li> <li>• Use the business's brand and reputation to convene relevant stakeholders to address any systemic issues that have been identified.</li> </ul>
<p>Source: Adapted from: Shift (2013), <i>Using Leverage in Business Relationships to Reduce Human Rights Risks</i>, New York: Shift, pp.14-24.</p>	

Different forms of leverage. Source: Danish Institute for Human Rights

Leverage points are especially important in conflict-affected settings. As neutral parties

with considerable control over resources, businesses have the ability to place pressure on several different groups simultaneously, including: non-state armed groups, local and national governments, other businesses, local communities, humanitarian actors, NGOs, and international organizations. The UNGPs encourage businesses to use this leverage in order to convince partners to respect human rights.<sup>124</sup> In conflict-affected settings, businesses can also exert leverage to help transform conflict and contribute to peace.

Corporate leverage in conflict settings depends on a number of factors, including: whether the conflict takes place in areas where corporate influence has a direct impact; whether contracts have human rights clauses; and stage of the project cycle (e.g., pre-investment negotiation vs. long-term operations).<sup>125</sup> Mobility of resources is also important; telecommunications companies, for instance, usually have an easier time relocating than extractive companies, which are bound to resource-rich areas.

Corporate leverage increases when businesses band together to form a coalition. Oftentimes businesses are hesitant to band together to make demands on behalf of human rights or conflict transformation. However, coalitions have proven effective in many cases, especially when businesses have leverage over key actors. Corporations can use their persuasive power to inform politicians, the media, and the public about the costs of conflict in order to pressure conflicting parties to reach a settlement.

Business leaders engaged in human rights and peacebuilding may also convince other corporations to join their cause by publicizing actual and opportunity costs of the conflict on businesses in a particular environment.<sup>126</sup> In the cases of South Africa, Sri Lanka, and Northern Ireland, businesses realized that conflict had a damaging impact on economics and business activity and that it was in the best interest of corporations to intervene. Published documents which outlined the cost of conflict prompted business leaders to engage in joint strategy and action.<sup>127</sup> These coalitions made a compelling case for peace and were able to increase their leverage by cooperating and pooling their resources.<sup>128</sup>

John Paul Lederach, one of the most prominent theorists in international peace studies,

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<sup>124</sup> Ruggie (n 3)

<sup>125</sup> Zandvliet (n 107) 364

<sup>126</sup> Killick and others (n 87) 6

<sup>127</sup> *ibid* 7

<sup>128</sup> More information on these examples is available in the following section.

posited that there are three levels of actor in conflict prevention and resolution: top leadership (e.g., military, political, and religious leaders); middle-range leadership (e.g., academics, NGO leaders, leaders respected in certain sectors or communities); and grassroots (e.g., civil society actors, community groups, activists).<sup>129</sup> Notably, businesses can exert leverage in all three categories, to different levels of success based on their size and area of operations. Big business and executives can influence top leadership of society through promises of big investment; business associations and national companies can influence mid-range leaders; and local businesses and workers can influence grassroots action<sup>130</sup>. For instance, a small business is unlikely to impact high-level politics, but by using its knowledge and strong place at the grassroots level, it can help address a particular issue within a community. By contrast, executives of TNCs are unlikely to have the strong local-level knowledge necessary to address smaller grassroots-level disputes, or the interest in doing so. However, they can pressure top leadership to reach peace settlements and sit for negotiations. By assessing a business' place within this hierarchy, it is easier to understand where they have the most leverage.



Businesses in the conflict transformation hierarchy. Source: Killick and others (2005)

<sup>129</sup> John Paul Lederach, *Building Peace* (USIP 1997) 39

<sup>130</sup> Killick and others (n 87) 5

Leverage also changes over time, depending on the stage of the project and level of involvement. Luc Zandvliet, a leading expert on corporate-community relations, argues that at the national and regional level, corporations have the most leverage before making an investment decision. During this stage, companies hold relatively high bargaining power. Corporate actors can exert pressure on national governments to find solutions to conflict in order to receive investment funding. Conflict-affected states may be desperate for investment and therefore more open to corporate demands. For example, one company only agreed to start operations in Sudan after the Comprehensive Peace Agreement was signed, effective, and sustainable. During negotiations, corporations can ensure that contracts include human rights clauses. However, after investment is already made, corporate influence decreases and ability to include additional human rights clauses becomes difficult, if not impossible.<sup>131</sup>

By contrast, influence over local conflict actors increases over time as corporations engage in more local business activity. In time, company staff come to understand causes of conflict and familiarize themselves with the local context and key actors. Corporate influence at the local level also strengthens as employment and contracts increase and economic development projects commence. The longer a company stays in an area, the more influence they can exert on local politicians, rebels, governments, and communities to find solutions to conflict.<sup>132</sup> It is prudent, therefore, to continually reassess leverage points as the project moves through different stages.

	Corporate practises affecting macro conflict	Corporate practises affecting local conflict
Prior to investment	Conditional force on macro conflict actors “STRONG POSITION”	Pressure on macro actors to affect local conflict “WEAK POSITION”
During operations	Support/ Encouragement to macro conflict actors “WEAK POSITION”	Constructive engagement with local stakeholders “STRONG POSITION”

How leverage changes over time. Source: Zandvliet (2011)

<sup>131</sup> Zandvliet (n 107) 365

While existing HRIA methodologies already assess leverage over key actors, these spheres of influence become even more important in conflict-affected societies where business actions can either greatly harm human rights and exacerbate conflict (as illustrated in the previous section) or protect human rights and contribute to conflict transformation (as discussed further in the next section). Leverage is dynamic; it changes as the project evolves in stage and scope. HRIA teams should continually reassess how much leverage businesses have over key actors at different points in time in order to encourage businesses to take meaningful action and have the greatest impact on different actors.

## 2.3 Business and Peacebuilding

Despite the increasing focus on economics and war, few academics have focused on the positive role of business in promoting human rights and transforming conflict. Because of the high costs associated with conflict, many businesses have dedicated themselves to finding solutions and encouraging negotiations between parties. Both international and local companies have successfully engaged in peacebuilding, as documented in International Alert's *Local Business, Local Peace* project.<sup>133</sup> For instance, Tiny Rowland, an extremely wealthy business owner in Mozambique, realized that the rising cost of security, negative economic effects of conflict, and continued attacks on his resources were detrimental to his business operations. As an influential and wealthy figure, Rowland leveraged both the rebels and the government to meet for peace talks. Although Rowland's actions derived from self-interest and not exclusively goodwill, his actions positively impacted conflict transformation in the country.<sup>134</sup>

Throughout the course of a human rights impact assessment, HRIA personnel may uncover key leverage points and opportunities for businesses to positively engage in peacebuilding. While this goes beyond the scope of a typical HRIA and businesses are not required to participate in these efforts, they may find it beneficial both for their public image and operating costs. Human rights actors also have an interest in reaching peace and may find

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<sup>132</sup> *ibid* 366

<sup>133</sup> International Alert, 'Local Business, Local Peace: Executive Summary' (2006)

<sup>134</sup> Arnson (n 92)



corporations surprising and helpful partners. As HRIA teams identify causes and drivers of conflict, the information they obtain can be used to not only avoid negative business impacts, but also to help businesses and other key actors contribute to the peace process. This section examines some key examples of business engagement in peacebuilding in order to help HRIA practitioners identify positive opportunities for change.

One of the most significant ways that businesses can impact conflict transformation is by using leverage points such as those described in the previous section. Northern Ireland is a particularly notable example of businesses placing significant pressure on politicians to reach a peace settlement. After decades of conflict, businesses in the region drew connections between protracted ethnic conflict and slow economic growth. Coalitions such as the Northern Ireland Confederation of British Industry (CBI) formed in order to push for peace, both for the benefit of the region and the benefit of the businesses operating there. The CBI engaged with businesses and key actors to emphasize that in order to improve the economic situation of Northern Ireland, businesses must engage in the peace process. To achieve this aim, the coalition released a report known as the “peace dividend paper.” This report outlined the economic costs of conflict, including: increased security costs; decreased foreign investment; and emigration of youth and entrepreneurs. Additionally, an end to the conflict would free up money for public spending and investment in economic growth. The term “peace dividend” became famous due to the CBI’s report and was picked up by academics, the media, and politicians. The CBI joined with other business organizations to lobby for peace and pressure politicians to sit for negotiations<sup>135</sup>. These efforts ultimately led to the Good Friday Agreement. The CBI has continued to engage in Northern Ireland even after a settlement has been reached; currently, the coalition is pushing for an end to the government shutdown in Stormont<sup>136</sup>.

This example highlights the importance of highlighting the economic benefits of peace. Businesses which may not have otherwise gotten involved joined the coalition as a result of publications outlining actual and opportunity costs of The Troubles. Businesses can use their assets and reputations to not only pressure politicians, but also to encourage other businesses to join peace efforts. These corporations realized that they should pool their resources and expertise with one another to increase their influence on key actors. HRIA experts can prove especially

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<sup>135</sup> Killick and others (n 87) 13

<sup>136</sup> ‘Empowering Decision Making in Northern Ireland’ (CBI, 2019)

useful in this regard, as they may uncover information on business costs that arise from conflict and human rights violations. HRIA teams also identify key leverage points which businesses can find useful when establishing such peace coalitions.

On a related note, businesses can use their extensive public relations and marketing resources and expertise to publicly promote peace efforts and gain public support. After an attack on Sri Lanka's only airport, trade associations banded together to urge citizens to voice their support for peace. The Sri Lanka First campaign used businesses' marketing and PR specialists to garner public support for peace efforts. The group emphasized economic costs of war, including how peace would allow the country to invest more money in social services and infrastructure. After peace talks broke down, Sri Lanka First sent business leaders to South Africa to initiate joint talks on how to support peace processes. The campaign also garnered support from TV personalities.<sup>137</sup> The Business for Peace Alliance also leveraged businesses' access to politicians, international organizations, officials, and other decision-makers in order to promote peace.<sup>138</sup> In this way, businesses can mobilize the resources and staff they already have in order to promote peace.

Partnerships and coalitions are not just limited to politicians and other businesses. Corporations may partner with NGOs in order to best understand how to contribute to meaningful conflict transformation, promote human rights, and effectively deliver philanthropy. These partnerships are often beneficial for both parties; in many cases, NGOs have more legitimacy at the grassroots level, while corporations exert more influence over local and national governments. Partnering allows businesses and NGOs to use leverage on multiple different levels in order to push for human rights and peacebuilding.<sup>139</sup>

Some companies have established tripartite partnerships between the government, local communities, and the company itself. In these partnerships, each party contributes towards a particular project. These partnerships encourage governments to use revenues for social services and infrastructure instead of war and arms. By establishing partnerships instead of enacting projects independently, companies reduce risk of local dependence on their philanthropy. These partnerships can also help legitimize governments by increasing their presence in local

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<<https://www.cbi.org.uk/our-campaigns/empowering-decision-making-in-northern-ireland/>> accessed 8 June 2019

<sup>137</sup> Killick and others (n 87) 11

<sup>138</sup> Markus Mayer and Maleeka Salih, 'Sri Lanka: Business as an Agent for Peace' (International Alert 2006)

<sup>139</sup> Killick and others (n 87) 17

communities.<sup>140</sup>

In addition to forming partnerships, businesses can also consider supporting NGOs and governmental offices in other ways. According to Zandvliet, “All governments — even the most oppressive regimes — have a department, an ombudsperson, or a focus group that deals with peace, justice, or human rights.”<sup>141</sup> While these positions usually have little power or funding and are largely symbolic, companies may seek their advice or support their existing efforts. By establishing partnerships with these officials, companies legitimize government peace and human rights efforts.<sup>142</sup> Similarly, companies can support NGOs and IOs contributing to peacebuilding, human rights, and conflict transformation.

In some cases, businesses may contribute to peacebuilding and human rights by creating a space for members of opposing groups to convene. For example, businesses may hire members of different ethnic groups both to avoid creating more tension between communities and to promote reconciliation and cooperation. Businesses may also create a space for clients and customers to speak to one another in a society where such encounters would otherwise be improbable or dangerous. As Killick points out, “Businesses can find themselves in the unique position of being the only place where divided communities actually meet. This does provide opportunities for reconciliation.”<sup>143</sup>

Two examples from Kosovo show how businesses can bridge gaps between divided societies. The city of Metrovica is strictly divided into two communities: Serbian north of the river and Albanian south of the river. Individuals rarely cross from one side to the other and relations are tense between the two communities. With the aim of bridging the divide between youth, International Business College Metrovica (IBCM) works on both sides of the river, with one campus to the north and one to the south. Both campuses are fully integrated, and students attend one or the other based on available courses rather than ethnicity. The only multiethnic college in Kosovo, IBCM offers courses in English instead of Serbian or Albanian. Students at IBCM remarked that they were at first afraid to speak to members of the opposite ethnic group. However, they still chose to attend IBCM due to international recognition of the college’s degrees. Students engage in field trips, internships, challenging projects, and social events

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<sup>140</sup> Zandvliet (n 107) 369

<sup>141</sup> *ibid* 369

<sup>142</sup> *ibid* 363

together in order to bridge the gap between otherwise isolated ethnic groups. Students of the college often make friends with members of the other community and share opinions of politics in Kosovo, a situation which seemed impossible before attending the college. Some students testified that they have tried to change perceptions of friends and family members since joining the school in an effort to build peace and build a multiethnic Kosovo.<sup>144</sup> Nora Ahmetaj, a member of the Regional Coordination Council of Coalition for Regional Truth Commission, also gave the example of a shopping center in Metrovica that offered low prices. Individuals from both communities came to use the center, and as a result, Serbian and Albanian youths met and spoke to one another for the first time. Ahmetaj emphasized that with a better economy, reconciliation between communities will be a natural process.<sup>145</sup>

Another extremely important way businesses contribute to peacebuilding and human rights is through training security forces. Security forces have often been a source of human rights abuses, especially in conflict-affected societies where sensitivities are high and training is low. In many cases, security forces do not know how to comply with human rights standards, and may not even understand the concept of human rights. Simply asking partners to respect human rights without explaining what those rights are is not sufficient. According to one interviewee, “If people don't know that they shouldn't use force for dispersing a demonstration which might come to your operations, then you have to tell them. And how do you tell them? You have to communicate with them and training is part of the good process of communication. If we base ourselves on the premise that security is very much about communication, then obviously how you communicate your standards to those who might commit certain human rights abuses is fundamental.”<sup>146</sup> By training security forces, businesses can help promote human rights standards. In some cases, corporations may extend this training to local and federal police to promote compliance with human rights not just on company property, but throughout the region.

Academics have also taken note of businesses’ capacity for peacebuilding in recent years. Many academics have acknowledged that corporations have the potential to be peace actors alongside NGOs, international organizations, humanitarian aid organizations, and other more

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<sup>143</sup> Killick and others (n 87) 9

<sup>144</sup> IBCM, presentation to EMA students, January 2019

<sup>145</sup> Nora Ahmmetaj, Presentation to EMA students, January 2019

conventional actors. As such, businesses searching for ways to support conflict transformation and peace efforts may look to more conventional actors for inspiration as to how they can help. Fischer suggests four main approaches for establishing peace and preventing armed conflict: political, social, psychological, and economic. A multidimensional approach is necessary for addressing the root causes and contributors of armed conflict; if only one or two areas are addressed while others are not, the drivers and grievances behind conflict may continue.<sup>147</sup> While not all activities are advisable or appropriate for businesses, corporations can help support the efforts of others working in these areas. The table below lists a few examples of how businesses can support efforts in these different dimensions; however, the list is not exhaustive, and businesses may engage in different efforts based on feedback from stakeholders on the ground. Many of these efforts fall under the category of corporate philanthropy and are covered in the next section.

Approach	Peacebuilding Activities	Assistance Appropriate for Business?	Examples of How Business Can Help
<b>Political</b>	Creating public and legal institutions that safeguard legal certainty	No	
	Establishing mechanisms for democratic participation	No	
	Promote good governance	Yes	Training and providing expertise to relevant actors; providing funding to good governance initiatives; hosting workshops for citizens to exchange ideas and discuss governance
	Investigating human rights violations	No	
<b>Social</b>	Physical construction of housing, infrastructure, and health systems	Yes	Investing in public services; providing expert assistance; contributing to reconstruction efforts
	Establishing civil society structures	Yes	Supporting NGOs, women's groups, and other civil society organizations
	Promoting social integration of former combatants	Yes	Providing employment and training; supporting reintegration efforts led by NGOs and other organizations
	Return of refugees and displaced persons	Yes	Supporting UNHCR and refugee resettlement organizations; providing services to refugees; providing employment; helping refugees establish livelihoods
<b>Psychological</b>	Overcoming trauma	Yes	Providing and funding psychological and counseling services
	Reconciliation at the individual and inter-group level	Yes	Funding reconciliation programs; hosting mediated discussions between workers of different groups; supporting local reconciliation efforts and NGOs
	Effectively dealing with the past	No	
	Working on identity issues	No	
<b>Economic</b>	Bringing perpetrators to justice	No	
	Infrastructure recovery (e.g., transport, communications, water, electricity)	Yes	Investing in infrastructure; building roads, communication infrastructure, etc.; funding recovery and development efforts; providing technical expertise
	Transforming war economy into peace economy	Yes	Engaging in tripartite partnerships; investing in the national and local economy; providing job training; supporting education
	Macroeconomic development	Yes	Job creation; supply of essential goods and services

How businesses can support peacebuilding. Source: Thesis Author, Adapted from Fischer (2004)

<sup>146</sup> Interview 2

<sup>147</sup> Fischer (n 113) 4

Relating these initiatives back to human rights impact assessment, HRIA practitioners are in the unique position of gathering data about the causes, implications, and consequences of conflict as they relate to human rights and the business environment. This information can prove beneficial or even crucial to peacebuilding efforts. HRIA findings can help businesses understand why peace is in their best interest, which can in turn incentivize them to build coalitions and partnerships to promote peace. HRIAs can also help businesses understand where they have the most leverage to push for conflict transformation and which actors they can pressure to negotiate. Businesses can also share their findings with other peace actors in order to create better conflict transformation strategies. The “From Avoiding Harm to Doing Good” chapter of this thesis goes into greater depth about how and why HRIA teams should assess capacities for peace and positive opportunities for conflict transformation and human rights. Additionally, as covered in the next section, HRIAs can help businesses identify where corporate philanthropy and projects can have the most positive impact on conflict and human rights.

## 2.4 Corporate Philanthropy in Conflict-Affected Societies

In the past, many corporate peacebuilding efforts have centered on CSR and philanthropy. Oftentimes, businesses provide funding for projects established by NGOs, the UN, and humanitarian aid organizations. While these efforts are admirable, they are not always as effective as they could be. Killick points out that: “There is only limited value in businesses ‘blindly’ contributing. [...] It is not so much development per se but the right kind of development that matters in a conflict context.”<sup>148</sup> That being said, corporate philanthropy efforts often do help local communities, and can lead to the positive fulfillment of rights such as health, work, family, adequate standard of living, and education.

Corporations occupy a unique space when compared to humanitarian aid organizations and development agencies. Humanitarian aid is short-term and often unsustainable, while development organizations are often large and slow to react to changes on the ground and the dynamic needs of affected communities.<sup>149</sup> Businesses, by contrast, are on the ground long term, but are also able to adjust their projects and react to changes more quickly than development

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<sup>148</sup> Killick and others (n 87) 10

<sup>149</sup> Fischer 7

organizations in many cases. Oftentimes, corporations are more invested in the long-term security of a region simply because they intend to operate there for a much longer period of time than development and aid organizations. One interview pointed out that: “When [extractives companies] go into an area, they're not there for two years for a development project. They're there for 20 or 30 years. They're making billion dollar investments in infrastructure and other things. And it's a big expenditure in the beginning and it pays back over a long period of time. So they don't have that payback then it's not going to work. If their facilities are constantly being blown up or local landowners are unhappy with them then it's not going to work. So they need to pay attention.”<sup>150</sup> As a result, corporate philanthropy efforts are often aimed at contributing to peace and stability in a particular area. Peace-focused philanthropy may include: projects to address unemployment (e.g., micro-credit programs, job training, business development workshops), workshops and training on peaceful coexistence, and talks focused on establishing a common agenda between communities.<sup>151, 152</sup>

Because businesses have this unique position, they have great potential to benefit communities through their efforts. In order to do so, they should conduct some sort of analysis of actual needs on the ground, positive opportunities for change, barriers, other similar efforts in the area, and existing local capacities and how to support them rather than undermine them. Humanitarian needs assessments and similar methodologies can be particularly useful for determining where philanthropy projects can do the most good, especially in crisis and conflict situations.

These assessments should always involve the local community. One article on development aid in conflict transformation presented the problem of assessment without community engagement: “Project management and staff will often be caught in an endless process of analyzing the local problems and immediately constructing short-term solutions, without spending much time talking to the local population and listening to their opinion. There is a very real danger that donor agencies will in the end impose solutions instead of creating safe spaces for local capacity building and decision-making.”<sup>153</sup> Consulting various social groups, especially marginalized populations, is an important aspect of development planning. Through

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<sup>150</sup> Interview 3

<sup>151</sup> Zandvliet (n 107) 371

<sup>152</sup> For more peace-focused philanthropy possibilities, see the table in the previous section.

the consultation process, marginalized communities experience recognition and empowerment and can build on local capacities for peace.<sup>154</sup> Empowerment is especially important for challenging repressive power structures and achieving social justice in conflict-affected settings. Empowering marginalized groups allows them to develop their own power to change society and influence their local communities.<sup>155</sup> Certain development agencies use participatory processes to design aid and intervention efforts. In these cases, facilitators help the local population to analyze the situation, investigate local needs, and plan projects on their own. The local population then has ownership over the project, decreasing likelihood of dependency.<sup>156</sup> This concept of local involvement is in line with basic HRIA principles, especially Oxfam’s community-based process.

Even with adequate assessment and community engagement, corporate philanthropy projects may undermine peace efforts. Bigdon and Korf warn: “Without intending to, donor agencies might easily, by their interventions, find themselves strengthening the socio-cultural, economic, or political position of one or other warring group.”<sup>157</sup> In Sri Lanka, a savings project intended to empower vulnerable war-affected communities eventually came under the influence of the LTTE, indirectly strengthening one party to the conflict. The donor agency had to work through the dilemma of whether to abort the project, thereby leaving war-affected groups disempowered and vulnerable, or accept that aid was also being used for war-making purposes.<sup>158</sup> Cases such as these illustrate the importance of having an exit strategy. As one expert put it, “At what point must [donors] face the fact that they are doing more harm than good, and in effect legitimizing particular groups in power? Intervenors must always be conscious of which groups are supported by their efforts and which are left out.”<sup>159</sup> Just as with business projects and economic development, corporate philanthropy can both support conflict transformation or lead to further conflict.

On a similar note, corporate philanthropy projects may actually undermine the human rights they claim to support. For example, a company may build health centers within local

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<sup>153</sup> Bigdon and Korf (n 119) 10

<sup>154</sup> *ibid* 7

<sup>155</sup> *ibid* 11

<sup>156</sup> *ibid* 14

<sup>157</sup> *ibid* 18

<sup>158</sup> *ibid* 20



communities in order improve right to health. However, if these centers are not properly stocked or staffed, they may actually create greater harm on the populations they are intended to serve, especially in areas with high HIV/AIDS rates.<sup>160</sup> It is therefore critically important to thoroughly assess the potential impacts of such projects on human rights and conflict, especially as they relate to the war economy.

Human rights impact assessment can help in this regard. While the Danish Institute does not focus on the positive impacts corporations have on human rights, NomoGaia examines both the positive and negative impacts of businesses, including the outcomes of their corporate philanthropy projects.<sup>161</sup> This thorough review not only can help businesses avoid inadvertent harm, but also can show them how to make their corporate philanthropy efforts more effective. In the earlier case of the health clinics, a business could use the HRIA findings to seek out staff with the training necessary to make the philanthropy effort more helpful to the community. HRIA teams are able to identify actual impacts of these projects on human rights, as well as explain to corporations how their projects are successful and unsuccessful in advancing rights and improving lives. Even in cases where businesses do not actively engage in corporate philanthropy, HRIA findings can help executives understand where and how philanthropy would be most effective if they decide to initiate projects in the future.

## 2.5 Conclusion: Business, Conflict, and Human Rights

This chapter has examined the connections between business, conflict, and human rights in order to illustrate how human rights impacts differ in conflict-affected settings as opposed to more stable environments. As a result, HRIA practitioners may consider adapting their current methodologies and practices to take into account the unique challenges presented by war economics, crisis situations, and intercommunity tensions. Aspects for special consideration include: whether supply chains and user chains provide resources to armed groups; drivers of conflict and how businesses relate to these drivers; allocation of resources, including distribution of job opportunities; government human rights abuses committed on behalf of the corporation;

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<sup>159</sup> *ibid* 21

<sup>160</sup> Interview 1

<sup>161</sup> See the “From Avoiding Harm to Doing Good” chapter of this thesis.

impacts of income-generating activities; corruption; use of security forces; and discrimination. In some cases, the harm caused by business activities outweighs any potential benefits that derive from corporate presence. In these cases, businesses should carefully consider withdrawing from the project in order to avoid becoming directly or indirectly complicit in severe human rights abuses, war crimes, and violations of humanitarian law.<sup>162</sup> By conducting a systemic analysis of these issues, HRIA teams can assess whether businesses are fueling conflict -- intentionally or not -- and consequently causing negative human rights impacts.

In the same vein, businesses can also positively contribute to human rights and peacebuilding, both through their business activities and corporate philanthropy efforts. Corporations in conflict-affected societies have successfully pushed for negotiations and peace efforts, particularly through the use of coalitions and “peace marketing.” In many cases, conflict costs corporations money; therefore, it may be in their best interest to intervene. The mere presence of businesses can provide stability and employment opportunities which deter individuals (especially youths) from engaging in conflict, illegal activity, and shadow economies. Additionally, businesses provide a safe space for members of different communities to interact with one another. Through corporate philanthropy, businesses can help fund the work of NGOs and other organizations already engaged in peace and human rights efforts; alternately, corporations can establish their own projects and facilities which are designed to improve the lives of local communities. To assist with these efforts, HRIA can help businesses identify opportunities for change, needs on the ground, obstacles to assistance, key partners, baseline conditions, and local capacities. In the case of existing philanthropy projects, HRIA can examine whether corporate efforts successfully advance human rights or whether they actually lead to negative impacts or undermine peace. In doing so, HRIAs provide businesses with information they can use to make their efforts more effective.

Leverage points are crucial for both avoiding negative impacts and contributing positively to peace and human rights. Due to their tremendous influence, TNCs and other businesses can pressure top leadership, middle-range leadership, and grassroots actors. Corporations can use these leverage points not only to persuade other actors not to violate human rights, but also to engage in peace efforts and negotiations. Leverage points shift over time based

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<sup>162</sup> The concept of moral complicity is also of interest. For more information, see Hoffman and McNulty, ‘Moral Complicity’ (2009).

on stage in the project cycle, amount of investment, and area of operations. Existing HRIA methodologies already include analysis of leverage points, and rightfully so. Even so, practitioners in conflict-affected settings should pay heightened attention to leverage points, especially as they might relate to conflict transformation opportunities.

This chapter has explained the rationale for why HRIA needs to consider different aspects in conflict-affected societies as opposed to more stable environments. The next few chapters build on this argument by adding practical considerations and advice from experts. The ideas from this chapter are synthesized with lessons from all other chapters in the final section of the thesis, Human Rights Impact Assessment in Conflict-Affected Societies.

## Chapter 3: From Avoiding Harm to Doing Good

As explored in the previous chapter, businesses have the capacity to both negatively and positively impact human rights and conflict. Businesses have the core responsibility to not violate human rights or contribute to conflict. At minimum, businesses must ensure they are not causing harm, and should work extensively on mitigation strategies for negative impacts. However, many businesses are interested in not only avoiding harm, but actively contributing to good. For instance, many companies working in sensitive areas open health clinics, build schools, and establish job training programs to benefit local communities. While not mandatory, these efforts are commendable, and if done well, contribute to a general sense of goodwill towards the company. As a result, HRIA teams may find it helpful to not only assess negative impacts, but also positive ones. However, this approach has been hotly debated among HRIA practitioners, and disagreement persists. This chapter argues that in conflict-affected societies, assessing positive impacts and identifying opportunities for peacebuilding and human rights work is beneficial for businesses, human rights activists, and local communities alike.

The Danish Institute is perhaps the most notable skeptic of including positive impacts in HRIA. The Danish Institute HRIA toolkit states: “HRIA of business projects or activities should first and foremost focus on identifying and addressing adverse human rights impacts; therefore, whilst positive effects may be noted, the identification of ‘positive’ human rights impacts is not the primary objective and should not detract from identifying and addressing adverse impacts<sup>163</sup>.” The Institute goes on to give several reasons for this standpoint. Firstly, by placing negative and positive impacts next to one another, businesses may view their positive impacts as “canceling out” their negative impacts. In this way, businesses may showcase their positive outcomes in order to distract from adverse impacts in other areas<sup>164</sup>. Secondly, the Institute argues that a focus on positive impacts may give rise to a company assuming roles that should be taken on by the government. International human rights law and the UNGPs are clear that states are the primary duty-bearers of protecting and fulfilling human rights. When businesses take on projects such as building healthcare facilities and training security forces, the governments which should be responsible for these tasks have less incentive and pressure to do so. This reduces

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<sup>163</sup> Götzmann and others, DIHR (n 6) 62

<sup>164</sup> *ibid* 67

government accountability and blurs the line of responsibility clearly delineated in the UNGPs. Thirdly, ad hoc positive contributions may not relate to the rights most negatively affected by business operations.<sup>165</sup> For example, a business may tout its corporate philanthropy in education and workforce training while simultaneously not addressing its severe negative impacts on right to water.

However, not every HRIA organization shares this view. As earlier mentioned, NomoGaia assesses both positive and negative outcomes throughout the course of its HRIA process. One expert from NomoGaia explained why their methodology includes positive impacts thusly:

The UN Guiding Principles are very clear that the aim of assessing human rights impacts is to address the negatives. [...] The reason our Impact Assessment methodology looks at both the negative and positive is two-fold. First, and less important, companies have a hard time internalizing human rights. And companies generally, and the people who run companies, think they're part of something good, something positive, something contributing to global development. And it's a bitter pill to swallow to receive a report that shows you everything you're doing wrong and ignores everything that you're doing right. [...] [Secondly,] the point of including the positives is to show the difference between a wildly ineffectual CSR initiative and one that is actually contributing to good. Because when companies have done actually legitimately good things for a community, that factors into the way they are received by the community. [...] The positives are just part of the entire human rights story as understood by rights holders themselves. And they help dictate what needs to be done in terms of recommendations.<sup>166</sup>

Incorporating positive outcomes has also been championed by experts in the field of business and human rights consulting. Several interviewees commented that the companies they worked with have positively contributed to human rights on the ground, not because they were required to, but because they had a moral interest in giving back to the local community. One interviewee said that: "I definitely think if we do not understand the possible positive approach of businesses we will be losing credibility. I think we will lose the battle of human rights, so to say, if we are only focusing on negatives. We definitely need this other dimension."<sup>167</sup> These views came about as a result of decades of work with companies operating in conflict zones.

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<sup>165</sup> *ibid* 68

<sup>166</sup> Interview 1

<sup>167</sup> Interview 2

That being said, it is important to address the concerns raised by the Institute. Most importantly, HRIA teams must emphasize that positive outcomes don't cancel out negative human rights impacts. This must be clearly and repeatedly emphasized to the company not only as a matter of morality, but a matter of legal risk. No matter how many corporate philanthropy projects a company engages in, it is still liable for its violations of human rights. This is a matter of risk management, and should be communicated as such. Regarding the Institute's point about businesses taking on government responsibilities, in many cases, governments are simply unable or unwilling to fulfill their proper role, especially in situations of conflict where economic strain is high and security and stability are low. That being said, businesses can and should pressure governments to assume these responsibilities, especially once a peace agreement is settled and peace dividend funds can be used for social investment.

In many cases, it is simply not possible to avoid identifying positive impacts. Discussion of positive outcomes will naturally arise as assessment teams ask about the human rights situation surrounding the company's operations. Even the Danish Institute recognizes that HRIA teams will likely end up identifying positive impacts throughout the assessment process. The Institute recommends referring to these positive steps in the mitigation planning stage or noting them separately from negative impacts. The Institute also acknowledges that positive impacts may be included as a "secondary component" of the HRIA analysis.<sup>168</sup> Additionally, the Danish Institute already assesses corporate philanthropy and investment projects as part of the HRIA process. The toolkit explains: "One further aspect to note is that community development and strategic social investment projects are considered to be a part of company operations and as such, need to be included in the scope of HRIA. However, again the primary focus would be on whether such initiatives have any adverse impacts on human rights in the way that they are selected, designed, implemented and monitored."<sup>169</sup> Especially in the case of corporate philanthropy projects, which are designed exclusively with the aim of contributing to positive outcomes, an HRIA which does not account for positive effects appears to deliberately leave out key information on the human rights impacts of businesses.

As earlier explained, many businesses have gone beyond their core obligations in order to promote peace and contribute to human rights. Even when businesses do not engage in conflict

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<sup>168</sup> Götzmann and others, DIHR (n 6) 67

<sup>169</sup> *ibid* 68

transformation efforts of corporate philanthropy, they often consider themselves positive actors for human rights. Tripathi explains, “Most businesses view themselves as making a positive contribution to society — many perform services essential for civilian life to continue during an armed conflict.”<sup>170</sup> As a result, HRIAs which focus only on negatives may not be fully accepted by the company. Overemphasis on criticism discourages companies from engaging in positive efforts. Zandvliet illustrates this argument thusly:

Other than avoiding the risk of reputational damage or loss of staff when companies get it ‘wrong’, companies perceive there is little incentive for them to get it ‘right’. In fact, even the most progressive companies, which are ahead of their colleagues in demanding conflict transformation related conditions from government, are often criticised when their efforts are not successful. For this very reason most companies openly state they do not want to take the lead in furthering the benchmarks of good corporate behaviour. Rather, they position themselves, as a chief operating officer of a large mining company described it, “just behind the leaders and in their shadow”. Obviously, a climate of criticism makes it more difficult for companies to take risks.<sup>171</sup>

In other words, excessive focus on negative impacts can deter businesses from attempting to engage in human rights work. Recent psychological and neurobiological research supports this viewpoint. According to the research, repeated exposure to human rights violations without a focus on positive behavior normalizes abuses as standard practice. By contrast, giving examples of positive human rights behavior provides potential violators with models and examples to follow. Such positive examples capitalize on the brain’s ability to imagine and internalize possibilities for behavioral change.<sup>172</sup> However, human rights activists seeking to encourage corporations should ensure they do not engage in ego-stroking, especially when it is undeserved. Striking the right balance of encouragement and discussion of negative outcomes is critical.

HRIA is by no means the only form of impact assessment which explores positive impacts. For instance, both conflict-sensitive social impact assessment and peace and conflict impact assessment examine positive impacts alongside negative impacts. Both these forms of

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<sup>170</sup> Tripathi (n 5) 133

<sup>171</sup> Zandvliet (n 107) 374

<sup>172</sup> Laura Ligouri, ‘Brain Research Suggests Emphasizing Human Rights Abuses May Perpetuate Them’ (*OpenGlobalRights*, 18 June 2019)

<<https://www.openglobalrights.org/brain-research-suggests-emphasizing-human-rights-abuses-may-perpetuate-them/>> accessed 1 July 2019

assessment instruct organizations on how to further strengthen their projects and mitigate negative outcomes of their activity.<sup>173</sup> These efforts demonstrate that assessing positive impacts is not only possible, but desirable in many circumstances.

By incorporating positive outcomes, HRIA can become a more holistic process which gives businesses valuable insight into opportunities for change. With this information, corporations can engage with the full spectrum of human rights and conflict transformation, from avoiding harm to doing good.

### 3.1 Understanding Obligations

The extent of obligations businesses must bear in conflict-affected societies is important to understand. While businesses do have the absolute obligation not to violate human rights directly or indirectly, they are not obligated to fulfill services that should be provided by the state or to rebuild structures such as court systems and rule of law. Additionally, businesses are in no case obliged to engage in corporate philanthropy efforts. Businesses can contribute positively to the fulfillment of human rights, but their obligations are not unlimited. This must be made clear in any HRIA process, regardless of whether it takes into account positive impacts or not.

Emphasizing this point is absolutely critical for HRIA practitioners, other human rights activists, corporations, NGOs, and local communities alike. Expectations must be clearly communicated in order to avoid frustrations or disappointment when unrealistic hopes are not fulfilled.

Additionally, being clear about minimum expectations as opposed to extra efforts is essential to ensure business executives do not become overwhelmed and give up on human rights work altogether. As one interviewee stated: “I think one of the issues with the private sector is that they don't like to be pushed to be responsible for the failure of governance of a government. So if a government or the court system in a country is not functioning properly, it's not up to the private sector to come in and make it function properly.”<sup>174</sup> While human rights actors have the best intentions in trying to persuade corporations to help fill gaps, in many cases, corporations have no desire — or obligation — to do so. If human rights actors are not clear about where the

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<sup>173</sup> See chapter 4 on other impact assessments.

<sup>174</sup> Interview 3



distinction between minimum obligations and additional aid lies, they risk alienating businesses whose primary purpose is to turn a profit, not fulfill human rights obligations which should be handled by other actors. The UNGPs are clear on this, and human rights actors should continue to point to the Principles when explaining minimum duties versus additional philanthropy.

The difference can be summarized as thus: companies must ensure that, first and foremost, their business activities do not contribute to negative impacts, and secondly, that their positive efforts have meaningful impact, or at very least, do not lead to harm.

## Part 3: Where Do We Go From Here?: Adapting HRIA in Practice

The previous portion of this thesis explored the elements missing from HRIA in conflict-affected societies. Throughout the section, various questions and considerations were raised which HRIA teams can use to analyze businesses' place within the war economy and their potential for peacebuilding. While these considerations are helpful, they alone are not enough to adequately conduct HRIA in conflict-affected societies.

In addition to theoretical underpinnings, HRIA requires practical strategies for implementing ideas in reality. How can HRIA practitioners assess the considerations raised in the last chapter? How do assessors examine conflict in a meaningful and holistic way? What strategies do assessment teams need for working with conflict-affected communities in the field?

Part 2 raises questions and considerations that HRIA does not currently include, and part 3 identifies existing methods for addressing those questions.

This section features two chapters, each of which each explore how to adapt HRIA in practice. The first examines other forms of impact assessment, many of which already take into account the questions and dilemmas raised in the Business, Human Rights, and Conflict chapter. The second chapter in this section features practical advice and lessons from interviewees, many of whom have been working in conflict-affected societies for decades.

## Chapter 4: Lessons From Other Impact Assessments: Methods for Working in Conflict and Crisis Situations

Part 2 discussed several dilemmas for HRIA in conflict-affected societies, including whether it is appropriate to continue or establish business operations during armed conflict, lack of indicators and modules based around understanding conflict dynamics, and difficulties assessing corporate philanthropy efforts in humanitarian crises. With such a broad spectrum of issues and dilemmas in the field, it is impossible to create a toolkit that addresses every situation. It is therefore essential to adapt existing methodologies to the situation on the ground.

Rather than attempting to start from scratch, HRIA practitioners should examine other forms of impact assessment to see how they address conflict. Specifically, HRIA practitioners should take note of the work of professionals in environmental, social, peace and conflict, and humanitarian assessment. These practitioners have worked for decades in conflict-affected settings, fragile states, and humanitarian crises. In that time, they have learned how to adapt their assessments to local contexts and high-risk environments.<sup>175</sup> Many of these assessments already address the considerations raised in the previous section. By drawing inspiration from and building upon the work of other impact assessment professionals, HRIA practitioners can strengthen their practice and gain valuable insight into how to effectively assess conflict.

That being said, businesses working in conflict-affected societies should not abandon HRIA in favor of other forms of impact assessment which have more of a conflict lens. HRIA is still the best method for assessing human rights in conflict-affected situations, despite its limited guidance on these contexts up to this point. Despite their useful insight, other forms of impact assessment fail to take a rights-based approach which draws on internationally recognized human rights standards. This approach applies human rights norms and principles such as equality, nondiscrimination, participation, accountability, and inclusion to the assessment process and its results.<sup>176</sup> Other assessments are not designed to survey the entire spectrum of human rights impacts which projects can have on local communities. As a result, they can miss identifying key rights outcomes.

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<sup>175</sup> Though much can be said about the decades of work IA practitioners have conducted in conflict zones, a full exploration is outside of the scope of this thesis. Only a few points of particular relevance will be explored.

This chapter briefly touches on some of the main lessons that HRIA practitioners can learn from other forms of impact assessment when working in conflict-affected societies. The chapter directly answers many of the questions raised in part 2 in an effort to explain how HRIA practitioners can adapt methods from other assessments to assess important considerations in conflict-affected societies. While not all methods, research questions, and indicators apply in every instance, HRIA practitioners should consider incorporating strategies from other forms of impact assessment into their work in conflict-affected settings as they see appropriate.

#### 4.1: Questions and Indicators for Assessing the Conflict Situation

As explored in the Business, Human Rights, and Conflict chapter, while some HRIA methodologies include modules and questions around conflict, most methods do not place conflict into focus or conduct a thorough analysis of conflict dynamics. As a result, HRIA practitioners may find it useful to draw questions and indicators from other forms of IA.

Two forms of impact assessment provide especially useful insight into assessing the considerations raised throughout this thesis: PCIA and conflict-sensitive SIA.

Conflict-sensitive SIA, a specialized form of social impact assessment, considers conflict situations in depth. These SIAs identify structural and proximate causes of conflict, underlying factors, and triggers for violence.<sup>177</sup> Depending on the local context, conflict-sensitive SIA features specific questions surrounding conflict prevention and anticipation, conflict identification and management, and negotiation and conflict resolution. SIA practitioners acknowledge the potential conflicts that may arise from a particular project, and try to anticipate these conflicts before they occur. According to Prenzel and Vanclay, “SIA is capable of preventing conflict by evaluating and managing negative social impacts, thus decreasing the conflict potential of a given project.”<sup>178</sup>

By asking for perspectives from impacted individuals and examining underlying issues,

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<sup>176</sup> Nora Götzmann and others, ‘Social and Human Rights Impact Assessments: What Can They Learn from Each Other?’ (2016) 34 *Impact Assessment and Project Appraisal* 14 16

<sup>177</sup> Paula V Prenzel and Frank Vanclay, ‘How Social Impact Assessment Can Contribute to Conflict Management’ (2014) 45 *Environmental Impact Assessment Review* 30 33

SIA can help identify peaceful means for settling conflicts, negotiating agreements, or easing tensions before they occur. Additionally, like HRIA, conflict-sensitive SIA emphasizes the importance of monitoring and grievance mechanisms in order to identify sources of conflict and identify changes.<sup>179</sup>

Conflict-sensitive SIA also considers appropriate responses which could prevent escalation of conflict.<sup>180</sup> In one example, police used tear gas and anti-riot water cannons against crowds protesting a remodel of the central station in Stuttgart. This disproportionate response caused public outrage, strengthened opposition to the project, and led to a shift towards Green Party politics. Analysts pointed out that an SIA of this project could have identified potential triggers of conflict and consequences of the anti-protest strategy.<sup>181</sup> In this way, even when clients do not use SIA to prevent a conflict from occurring, they can use SIA to identify means of deescalating conflict rather than escalating it.

HRIA practitioners can also draw from PCIA, considered by some to be a specialized form of SIA. While PCIA and conflict-sensitive SIA are similar, PCIA includes a valuable set of questions that are not always examined by non-standardized SIA processes. For example, PCIA takes an in-depth look at how a conflict has impacted the local economy, food security, intergroup relations, status of women, physical and psychological health, personal security, and vulnerable populations within the immediate area of a proposed development project.<sup>182</sup>

PCIA attempts to assess potential for peace based on a number of considerations, including: institutional capacity to manage violent conflict, promote tolerance, and build peace; military and human security; political structures and processes; economic structures and processes; and social reconstruction and empowerment.<sup>183</sup> Depending on the context and circumstances, HRIA teams may find some of these questions useful to include in their assessment.

Interestingly, PCIA does not see indicators as a definite mark of success. Sometimes, a project can fail to meet certain benchmarks while still contributing to the wider peace, and vice versa. Bush illustrates on this point: “For example, an education project may fail to produce

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<sup>178</sup> *ibid* 33

<sup>179</sup> *ibid* 34

<sup>180</sup> *ibid* 31

<sup>181</sup> *ibid* 32

<sup>182</sup> Bush (n 104) 13

<sup>183</sup> *ibid* 26

students able to pass state-wide exams, but may succeed in reducing tensions between particular social groups by creating and institutionalizing a non-threatening and constructive environment that increases neutral contact and decreases misunderstanding by dispelling stereotypes and misconceptions.”<sup>184</sup> This contrasts with HRIA’s indicator-centric approach, but fits well with SIA’s broad and flexible view of assessing various project outcomes. HRIA practitioners in conflict zones may find PCIA’s differentiation between indicators and peace outcomes worth noting in some cases, especially when assessing corporate philanthropy initiatives or examining potential positive outcomes from a project.

While not necessarily conflict-focused, other forms of impact assessment may also include questions and modules relevant for conflict-affected societies. For instance, REA examines a number of questions related to conflict, including level of social solidarity between survivors and non-affected populations, as well as likelihood of future conflict over resources.<sup>185</sup>

In situations of conflict, standard human rights indicators may not be able to identify all aspects of a conflict on their own; therefore, it may be useful to supplement standard HRIA methodologies with questions from PCIA and conflict-sensitive SIA. HRIA teams should take a flexible approach to doing so, and should identify which questions and indicators are relevant or irrelevant to the context of the assessment. While many of the considerations analyzed by PCIA are outside the scope of a traditional HRIA, they may provide useful information to businesses and HRIA teams seeking to understand the conflict situation and businesses’ place within conflict dynamics.

## 4.2 Deciding Whether to Begin or Continue Business Operations in Conflict-Affected Settings

As explained in part 2, many businesses have trouble determining if they should continue operating in conflict situations. On the positive side, businesses can disincentivize workers from joining the conflict, fulfill social services not provided by the government, and create an area of stability. However, they can also fund armed groups and contribute to grievances, thereby fueling the conflict and undermining human rights. As a result, human rights activists,

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<sup>184</sup> *ibid* 7

<sup>185</sup> Charles Kelly, ‘Guidelines for Rapid Environmental Impact Assessment in Disasters’ (2018)

consultants, and academics have long argued whether businesses should operate in conflict zones at all. One interviewee summarized the dilemma as thus:

The overall general idea of whether it's still okay to be involved in such a setting would revolve around this balancing act of whether your contribution is primarily fueling an armed conflict and you cannot mitigate this contribution. Oil and gas is classically a stabilizing factor for a government. Furthermore, business operations can become an attractive target. And if that is the case, I think there would be good reasons for pulling out. On the other hand, if you are in a region where the armed conflict is not that strongly going on, and your support to the local community with regard to health and education and so on is fundamental for upholding basic services which have broken down generally, the company is contributing positively. It might have a positively stabilizing role. I think that needs to be taken into account in an overall balancing.<sup>186</sup>

In other words, businesses need to carefully evaluate their role in upholding human rights versus contributing to armed conflict.<sup>187</sup>

PCIA provides useful insight in this regard. The PCIA process features a screening phase which assesses the location, timing, political context, and other salient factors to determine how a project will influence a conflict and vice versa. In the pre-project phase, PCIA examines environmental and contextual considerations (e.g., security structures, infrastructure, political opportunity), project-specific considerations (e.g., resources, comparative advantage in the region, tolerance levels, suitable personnel), and correspondence between proposed project and the environment (e.g., level of political support, trust of authorities, support from the community, sustainability). Political and logistical factors should also be considered when deciding whether to initiate a project or not.<sup>188</sup> Assessors then review all the evidence to determine the dangers of a particular project, as well as the intended benefits.

Although answers are rarely clear-cut in conflict situations, evaluating these considerations can help businesses and HRIA teams determine whether the risks of the project are too great to proceed.

### 4.3 Incorporating Conflict Management into the Assessment Process

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<sup>186</sup> Interview 2

<sup>187</sup> For more information, see the “War Economics” section of this thesis.

<sup>188</sup> Bush (n 104) 13

HRIAs are designed to identify risks and potential conflicts which are then addressed in a mitigation and management plan. Yet this is not the only approach. SIA professionals such as Bergmüller have encouraged incorporating conflict management not only into a mitigation strategy, but also into the impact assessment itself. This strategy encourages project planners to view public resistance to a project as a constraint, just as they view geological and environmental concerns as constraints. Planners should work with SIA assessors to anticipate potential social conflicts early on in the design phase and develop alternatives accordingly, before they present problems for the project or cause tension in local communities.<sup>189</sup>

It should be noted that SIA practitioners do not necessarily view conflict as entirely negative. Since humans have a diverse array of needs and goals, conflict cannot be entirely avoided. Managed well, constructive conflict can lead to the creation of new solutions, organizational change, improved social relations, and strengthened social capital.<sup>190</sup> Conflicts become destructive when they escalate into violence; therefore, management before conflict reaches harmful levels is key. Even so, some violent conflicts are for positive causes which lead to net gain, despite violence, including rebellions to achieve democratization.<sup>191</sup>

The reminder that conflict is a natural and constructive process is especially useful. Rather than seeking to avoid conflict, HRIA practitioners should identify non-violent means of expressing community concerns, managing miscommunication, and collectively working on solutions to problems.

Some SIA teams may even participate directly in negotiation processes. When impact assessment teams are seen as impartial, the data collected during SIA can provide a common pool of information for conflicting parties. An impartial data collection process which consults all parties to the conflict can help build trust in the process. Through SIA, disadvantaged parties can obtain a greater voice, and assessors can identify whether parties are keeping their word. Impact assessors can also regularly assess agreements through an annual review process.<sup>192</sup>

While some HRIA teams would assert that participating in negotiations and other conflict management processes is outside the scope of their duties, others may find these techniques helpful for engaging with communities and gaining trust on the ground. Before doing so, HRIA

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<sup>189</sup> Ralph Bergmüller, 'Conflict Management in the Process of Impact Assessment' in (IAIA Conference, Florence, IAIA 2015)

<sup>190</sup> Prenzel and Vanclay (n 177)

<sup>191</sup> *ibid* 32



teams should carefully evaluate how their conflict management strategies may backfire and have adequate background knowledge to manage any risks that may arise. Regardless of their particular view, HRIA teams should be aware of conflict management strategies in preparation for situations where they become necessary.

#### 4.4 Rapid Assessment for Crisis Situations

HRIA is intended to be a full in-depth analysis of human rights issues laid out in a wide array of legal documents. However, a full impact assessment may not be possible or advisable in times of crisis. In these situations, it may be necessary to conduct a rapid survey of key human rights concerns in order to take quick action for prevention or mitigation.

HRIA teams may look to rapid environmental assessment (REA) as a guide for conducting emergency assessments in conflict zones. REA is a quick mechanism for assessing needs and risks in times of emergency. The stages are simple and can be worked through quickly, but provide a vast wealth of information about understandings and needs on the ground.

REA practitioners are especially apt at dealing with ambiguity and lack of information. One interviewee described how REA professionals go into the field to find the best information they can collect even in situations of uncertainty: “Within the first weeks and sometimes months of a disaster, you don't have certainty about the number of people killed or injured, the number of houses destroyed, the nature of the destruction. You can't be certain, so you just have to accept the ambiguity and begin.”<sup>193</sup> In this way, REA professionals accept that conflict and crisis lead to an absence of reliable data and consult with local communities to gather information on appropriate response strategies. Even when HRIA teams are unable to gather accurate information on the ground, a rapid evaluation in the style of REA can help establish baseline knowledge for moving forward.

The REA process — developed with support from CARE, Benfield Hazard Research Centre, USAID, and others — follows three stages: organization-level assessment, community-level assessment, and consolidation and analysis. (Previous versions of the REA also included a green procurement module, which has since been dropped, despite increased interest

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<sup>192</sup> *ibid* 34

in the issue.<sup>194</sup> HRIA practitioners may take an interest in this module when assessing supply chains.) These stages can provide useful insight to HRIA experts seeking to create a similar rapid assessment model.

The first step of REA, the organization level assessment, provides assessors with a general survey of legal requirements, policies and procedures, and context. As one REA expert explained during an interview, “the organization level assessment essentially looks at what organizations think about the situation on the ground in terms of issues that might have environmental consequences, environmental linkages, or environmental impact.”<sup>195</sup> Information sharing is especially important at this stage, especially for noting key issues and assessing existing strategies for dealing with disaster situations.

Just like HRIA, REA incorporates extensive community and stakeholder engagement in order to identify key issues and perspectives on the ground. Contrary to stereotypes, communities affected by conflict and disaster are not passive victims; they regularly take action as part of and in response to the situation affecting their lives and livelihoods. According to one interviewee, “The community level assessment essentially says, well what does the community think? And the concept is that disaster survivors will do what they think they need to do, no matter who is giving them resources to do anything else. So if you don't understand what their concerns are and what their interests are, then you might totally miss the opportunity to provide them with assistance or you might provide the wrong assistance.”<sup>196</sup> Community engagement is essential not only for evaluating what problems exist on the ground, but also proposing the most effective means for addressing those problems.

In the final stage, the REA team identifies key issues, prioritizes them, and creates strategies of action. In a conflict situation, prioritization is key; actors cannot immediately respond to every concern, and resources might be limited by the local context. REA uses a particularly notable prioritization strategy for dealing with emergency situations which HRIA practitioners may also use to allocate time and resources in times of crisis. The process draws heavily from the community level assessment, with voices in the community weighed more strongly than input from organizations. After key issues have been identified, they are then

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<sup>193</sup> Interview 3

<sup>194</sup> Interview 3

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prioritized in order of: threats to life; threats to livelihood (i.e., means of living); and threats to the environment.<sup>197</sup> Other issues are noted to be dealt with at a later time, after initial relief efforts tend to the most urgent crises on the ground.

In contexts of violence and armed conflict, human rights professionals have to make difficult decisions about which issues to focus on immediately and which issues to work on at a later date. REA's simple prioritization strategy can help HRIA teams decide where to deploy key resources and assets in difficult circumstances where a full HRIA and mitigation strategy may not be possible.

REA does not replace a full EIA; instead, it identifies immediate concerns to help communities, donors, and humanitarian actors act immediately after a crisis. REA should always be followed up by a full EIA as soon as possible.

Since war and conflict are characterized by crisis situations, a similar quick response strategy may prove helpful for HRIA teams, to be followed up by an in-depth HRIA when time and resources permit. A rapid HRIA which focuses on key issues (as raised by stakeholders) can help businesses and human rights actors respond to emergencies and address concerns in a well-informed manner. Just as REA is followed up by a full EIA, HRIA teams should then conduct a full, iterative assessment as soon as possible. The original model portion of this thesis explains more about how to adapt REA processes to suit HRIA.

## 4.5 Assessing Trade-Offs

HNA and EIA both consider the difficulty of the decision-making process in situations of humanitarian crisis. In complex situations, addressing one crisis often means diverting resources from another important issue. In some cases, fulfilling one human right means undermining another human right.

Trade-offs are especially relevant when considering environmental damage versus human rights and humanitarian action. Although a healthy environment is key to long-term fulfillment of human rights, sometimes, a certain level of environmental damage is necessary to sustain human life, especially in cases of disaster and crisis. In many cases, having environmental

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<sup>196</sup> Interview 3

<sup>197</sup> Interview 3

experts and individuals knowledgeable about the local context can help humanitarian response teams understand which resources can be used without causing irreparable harm to the local environment.

REA practitioners have extensive experience in evaluating trade-offs during times of crisis. One interviewee told a story about one such instance where humanitarian workers were debating about the merits of destroying a forest during a humanitarian crisis. A nearby camp desperately needed wood in order to boil water and prevent children from getting sick. The debate continued until one environmental expert discovered that the forest had actually been entirely destroyed by British forces during the 1950s and had regrown to what appeared to be a natural state. Using this information, the team determined that short-term destruction of the forest was necessary in order to save children's lives, and that it would likely regrow in the future.<sup>198</sup>

Just as the environmental assessment team had to trade off loss of the forest to save human lives, HRIA teams may need to make trade-offs when dealing with human rights in conflict situations. REA acknowledges this quandary. REA teams have learned how to carefully consider situations from several different angles in order to identify the least harmful route. Just as a thorough assessment allowed the REA team to evaluate that the forest would eventually grow back, an astute HRIA team can determine which human rights concerns would cause irreparable long-term damage and which concerns can gradually be ameliorated or remedied.

HRIA practitioners should carefully evaluate all aspects of trade-offs and be clear about the problems and advantages with all potential approaches. HRIA practitioners should also engage thoroughly with decision-makers to make sure they understand the potential positive and negative impacts of these choices.

#### 4.6 Assessing Philanthropy Efforts: What Does the Community Need?

As described in part 2, many companies engage in corporate philanthropy in order to help communities experiencing crisis and armed conflict. While HRIA does assess potential negative outcomes from these efforts, it does not always take positive impacts into account. The "From Avoiding Harm to Doing Good" chapter explored how HRIA teams can help businesses not only

mitigate negative outcomes, but also strengthen positive ones.

As explained in the corporate philanthropy section of this thesis, aid projects do not always help with peacebuilding efforts, despite donors' best intentions. PCIA acknowledges this dilemma and seeks to identify how projects can best support peace efforts.<sup>199</sup> HRIA teams interested in assessing corporate philanthropy projects may therefore consider adapting modules and questions from the PCIA process.

Humanitarian needs assessment (HNA) is perhaps the most useful tool in this regard. While not specifically designed for corporate philanthropy, HNA helps donor organizations to create effective plans for humanitarian aid and development projects in times of crisis. Oftentimes, corporate philanthropy projects in conflict-affected societies include some sort of humanitarian element. Even development and human rights projects relate to humanitarian considerations in these contexts. After all, there is significant overlap between short-term humanitarian needs and chronic human rights issues. Humanitarian needs can compound and become long-term grievances,<sup>200</sup> which prevent the fulfillment of human rights, which can in turn fuel conflict.<sup>201</sup> As ODI explains:

In these war-induced emergencies, humanitarian needs arising from forced displacement or the starvation of civilian populations are the consequence of deliberate strategies of war. The crises in Sudan and Somalia are as much human rights crises as humanitarian ones. The ability of agencies to understand and assess the protection environment in which needs are occurring is probably as critical as assessing those needs. There are at least three reasons for this: the critical importance of addressing protection threats as humanitarian concerns in their own right; the importance of understanding the causal link between issues like displacement and the need for relief assistance; and the need to avoid endangering either the recipient population or relief agency staff through the provision of relief.<sup>202</sup>

In accordance with this line of thinking, HRIA practitioners operating in conflict-affected societies should take care to identify both short-term humanitarian concerns and chronic human rights issues. Assessors should also identify how immediate crises can compound and become human rights violations and sources of grievance for conflict, as well as how to mitigate or

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<sup>198</sup> Interview 3

<sup>199</sup> Bush (n 104)

<sup>200</sup> Mark Bradbury and others, 'Measuring Humanitarian Needs' (Overseas Development Institute 2003) 5

<sup>201</sup> Interview 1

prevent this process.

HNA can help businesses navigate humanitarian issues and needs on the ground when planning and modifying corporate philanthropy projects. Businesses engaging in corporate philanthropy should consider how their projects contribute both in the long term and short term. ODI points out: “The persistence of the crises in Sudan and Somalia means that the challenge is not solely a short-term one of saving lives, but a long-term problem of sustaining large populations in environments where the normal parameters for development do not apply.”<sup>203</sup> In these contexts, businesses may find that in order to be effective, they must consider both immediate humanitarian needs and long-term development needs. HNA can help identify needs on the ground through both lenses, as well as opportunities for marrying these approaches.

Since corporate philanthropy projects are one key way for businesses to help promote human rights in conflict-affected societies, HRIA teams should consider keeping HNA guidelines and checklists close at hand. These guides are especially helpful for the mitigation and management planning stage of the HRIA process.

## 4.7 Sharing Assessment Findings

All interviewees emphasized the importance of sharing information with rights-holders and assessment participants. Sometimes, assessments uncover a large amount of information relevant to other actors such as humanitarian aid workers; in these cases, donors and assessment teams may consider sharing their findings, as long as it is possible to do so without jeopardizing the safety of rights-holders and assessment participants.

HNA practitioners in particular emphasize the importance of coordination and sharing findings. UNHCR recommends conducting coordinated assessments in partnership with other actors in order to develop a nuanced understanding of the situation and fully play to the advantages of each actor in the assessment process.<sup>204</sup> Findings should then be shared to provide humanitarian actors, affected communities, and key stakeholders with information they can use to better react to the humanitarian situation. In situations of crisis, coordinating assessments and

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<sup>202</sup> Bradbury and others (n 200) 6

<sup>203</sup> *ibid* 15

<sup>204</sup> Kimberly Roberson, *Needs Assessment Handbook* (UNHCR 2017) 13

sharing findings presents several advantages, including: saving time and resources, avoiding duplicating results, and providing complementary data.<sup>205</sup> However, the Assessment Capacities Project notes that there may be problems with publicly disclosing all findings due to safety and security concerns. In this case, two versions of the assessment may be produced, one for internal use and one for public distribution. In order to decide which information is too sensitive to share, HNA practitioners should consult with communities, participants, staff, partners, and coordinating bodies.<sup>206</sup>

Establishing a multi-partner coalition or partnership is one possible option for coordination and sharing. Member organizations may pool resources and information in order to produce several separate but harmonized reports which can be used for joint analysis<sup>207</sup>. Through these partnerships, businesses and HRIA practitioners can share information they find relevant while still conducting their own individual assessments focused on their own needs and operating context. These partnerships also allow corporations to receive updates from partners in rapidly evolving situations, which can then allow them to respond to changes on the ground as early as possible.

All assessments feature guidance on sharing findings. HRIA practitioners may find certain methods more helpful than others, depending on the given circumstances.

## 4.8 Monitoring and Follow-Up

HRIA toolkits already discuss the need for follow-up and monitoring human rights. This is even more important in conflict-affected societies where the situation on the ground can change rapidly.

HNA practitioners in particular acknowledge that because of the rapidly evolving nature of humanitarian crises, knowledge gathered may be quickly out of date; therefore, continual monitoring is essential.<sup>208</sup> Re-evaluation allows assessment teams to discover aspects that may not have been captured during the initial assessment.

HRIA practitioners working in conflict zones should bear this in mind when conducting

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<sup>205</sup> *ibid* 13

<sup>206</sup> ACAPS, *Humanitarian Needs Assessment: The Good Enough Guide* (Practical Action Publishing 2014) 31

<sup>207</sup> Roberson (n 204) 15

initial research, engaging with communities, and establishing ongoing monitoring mechanisms. Similarly, in conflict-affected societies, it is especially important for HRIA teams to re-evaluate their findings as the situation on the ground changes.

## 4.9 Conclusion: Lessons from Other Impact Assessments

This chapter has discussed other forms of impact assessment in order to identify best practices and methods for working in conflict-affected societies. Many of these assessment methods have existed for decades, and professionals have significant expertise on conducting assessments in situations of crisis. HRIA practitioners can thus learn significantly from analyzing existing methodologies. Although not every strategy or lesson works in every context, HRIA practitioners can integrate approaches from other fields into HRDD, depending on what the local context requires.

HRIA already encompasses a wide range of rights and indicators, so adding more considerations may seem too daunting or outside the scope of the assessment. For instance, many HRIA professionals would agree that participating directly in negotiation goes well beyond the normal or appropriate scope of HRDD. Nevertheless, indicators, questions, and methodologies from other impact assessments can reveal tensions and triggers that may not be identified by a standards-centric HRIA. Even when HRIA teams are hesitant to expand scope, it is helpful to know existing methodologies, processes, and strategies in order to avoid “reinventing the wheel” each time an HRIA must be adapted to conflict and crisis.

It can also be helpful to have individuals well-versed in other forms of impact assessment on the HRIA team. SIA professionals, especially those with experience in conflict-sensitive SIA, are a particularly strong asset. While they may not always fit on the team, environmental experts can provide critical insight, especially since many human rights issues relate closely to the environment. HRIA teams should therefore consult with environmental experts at some point during the process.

HRIA teams should also work alongside other assessment teams whenever possible. Cooperation and joint research can also help avoid duplication, streamline processes, and save resources. Additionally, by working together, different assessment teams can avoid research

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<sup>208</sup> *ibid* 31



fatigue from respondents, who may grow tired of answering similar questions from several different assessors.<sup>209</sup> Since different forms of assessment are complementary processes which support common goals, HRIA teams can benefit not only from the lessons imparted by IA professionals, but also from working directly alongside them.

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<sup>209</sup> Götzmann and others (n 176) 19

## Chapter 5: Assessment in Conflict: Practical Considerations

This section includes practical lessons and recommendations on conducting HRIA in conflict-affected societies, especially regarding fieldwork. As part of the research for this thesis, several interviews were conducted with impact assessment practitioners, corporate social responsibility experts, human rights consultants, and other professionals. In addition to technical information about how assessments function, these practitioners also provided practical information on how the assessment process actually plays out in the field. Experts provided several examples, several of which have been included here. While all of these considerations are also relevant in stable societies, their importance is even more heightened in conflict-affected settings. Therefore, businesses and HRIA teams should bring these aspects into focus and spend additional time and resources on addressing them.

### Lesson 1: Heightened Risk Management

One interviewee who works regularly with extractives companies in conflict zones emphasized that HRDD in these contexts requires, above all else, increased vigilance and risk management. Risk management techniques are necessary both for businesses operating in conflict-affected societies and the HRIA teams operating on their behalf.

From the corporate end, businesses should enhance their existing risk management strategies by incorporating human rights standards. One interviewee gave the following advice to businesses: “While in these conflict areas, be particularly clear about the risks. Take extra measures to identify the risk of direct complicity. Be very clear that you have adequate standards and clauses in the respective contracts with the government forces so that you can then say ‘this is part of our contract and I will not let you use my assets or materials for any war or conflict actions.’ Document it particularly well.”<sup>210</sup> Documenting human rights standards in contracts serves several purposes. Firstly, it clearly outlines company expectations. Secondly, it allows corporations to hold governments and business partners accountable for right violations, thereby

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<sup>210</sup> Interview 2

increasing leverage over key actors. Thirdly, it reduces the risks to company by demonstrating corporate commitment to rights standards, which can be used in court.

From the HRIA end, practitioners need to make sure they enact measures to protect themselves, their partners, assessment participants, and vulnerable community members. One HRIA expert explained what this means in practice: “First and foremost, researchers have to be so much more vigilant about the risks posed to their local contacts and partners and support and interviewees in conflict-affected and fragile states. We’ve always said that one of the fundamental tenets of human rights impact assessment is that it must not in its process violate human rights. And that is a lot harder to do in fragile contexts where tensions run high and where violence is quicker to flare up.”<sup>211</sup>

Poorly designed HRIAs can negatively affect the likelihood or iteration of conflict. When trust is low, local communities can become wary of outsiders, including businesspersons and HRIA teams.<sup>212</sup> In this way, taking time to carefully plan out the HRIA process is in and of itself a key component of risk management.

Another important aspect of risk management is careful selection of interview sites and research participants. HRIA teams must be particularly prudent about who knows about meetings so as not to inadvertently put participants at risk. Thoughtful consideration of the underlying circumstances and pretenses surrounding the interview are also important in settings characterized by conflict. In some instances, the presence of researchers can present undue risk, particularly if they are outsiders to the community or from wealthy nations. The interviewee went on to state: “In repressive states where it’s not an active conflict, but where dissent is heavily penalized, getting people to talk about you what is wrong can absolutely make them vulnerable. Which is why it is so very important that you are sensitive to who is watching you at all times and whether you are the right person to be conducting that interview, and whether the people talking to you understand the implications of the work you’re doing.”<sup>213</sup> Related to this point, it is absolutely mandatory to communicate with interviewees about the risks of their participation.

Overall, both HRIA teams and the businesses they work with must carefully think

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<sup>211</sup> Interview 1

<sup>212</sup> Interview 1

<sup>213</sup> Interview 1

through what could go wrong and then create plans for managing risks and negative outcomes.

## Lesson 2: Enhanced Focus on Communication

SIA professionals acknowledge that conflicts often arise as a result of breakdowns in communication. As one interviewee pointed out, “Communication is central, in line with systems theory which says: ‘the smallest unit of any social system is communication<sup>214</sup>.’” Ralph Bergmüller, an ESIA practitioner active in IAIA, further emphasized the importance of communication: “In the process of impact assessment and public participation, communication is a key factor determining success and failure. A central issue determining efficiency of communication is how individuals with competing interests deal with conflicts<sup>215</sup>.” Consequently, SIA pays close attention to communication, especially with regards to potential or actual conflicts.

Oftentimes, poor communication leads to misunderstandings and unrealistic expectations within the community. When these expectations are not met, the community can become resentful of the corporation in question, and the business may lose its social license to operate. Even when a business does not explicitly promise anything, communities may assume TNCs will use their profits to provide the community with benefits, services, and development projects. If this does not happen, frustrations can manifest themselves in the form of protests and conflict. Businesses must therefore clearly communicate what they can and cannot (and will and will not) do in the local community. Along the same vein, HRIA teams must clearly communicate about what the HRIA process can and cannot achieve.

## Lesson 3: Explaining Human Rights Standards in a Culturally Appropriate Way

Companies must clearly communicate their human rights standards not just externally, but also to their partners and contractors. Oftentimes, this communication takes the form of training. Regardless of whether they are internal or external, human rights communications must come in a culturally appropriate way which the audience can understand. “You develop a communication process which tries to get your message to the other side,” said one interviewee.

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<sup>214</sup> Interview 2

<sup>215</sup> Bergmüller (n 189) 2

“And if you want to reach them, then obviously you have to do it in a professional and culturally adequate way. There is no alternative to it.”<sup>216</sup>

These trainings must build on local understandings and culturally appropriate communication techniques in order to be successful. The interviewee went on to tell a story about his experience training a Pakistani security patrol about human rights. One of the security staff told the trainer, “I find this a strange topic because here in Pakistan when we hear human rights, it's all about child labor. We never thought about security issues being about human rights.” The trainer realized that trying to use the traditional legal approach to human rights training would not work in this context. Instead, the trainer sought out concepts in Pakistani culture that were similar to human rights, including the Islamic version of the golden rule, as a basis for further training and discussion.<sup>217</sup>

These principles also apply when human rights experts are trying to communicate to businesses. Businesses have their own culture and set of priorities which are very different than human rights actors. Human rights experts and HRIA teams must communicate human rights standards and obligations in a way that corporate actors can understand and internalize. One interviewee expounded on this point: “I think if you want to have good human rights impact assessments in business, it is also about intercultural communication between the business world and the human rights world. We [human rights actors] come from a certain way of dealing with these things and it needs to be communicated to a different social environment. And there needs to be much more effort made in order to get transferability and communicative connection between these different areas.”<sup>218</sup>

### Lesson 3: Careful Selection of Local Partners

Carefully selecting who assists in the impact assessment process is even more important in conflict-affected societies. In contexts where different groups are in conflict with one another, which partners assessors choose can strongly influence assessment results. One HRIA organization described how they wait to hire local partners until after they arrive in the country and survey the situation on the ground. Typically, this organization hires English-speaking

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<sup>216</sup> Interview 2

<sup>217</sup> Interview 2

<sup>218</sup> Interview 2

individuals who live one or two towns down from the assessment site. Universities can provide valuable assistance; however, the educational gap between university staff and local respondents can be a barrier. The interviewee explained: “We try not to have someone from within the community, because there's so much inherent division within any actual town, village, clan, community that you want to be outside of that a little bit. But even that has its downsides. Everybody has their friends who know friends, so you just try to be one step removed from that.”<sup>219</sup>

In practice, selecting neutral partners can be more difficult than it seems. Oftentimes, multiple layers of conflict exist, making it hard to understand the exact implications of selecting one partner over another. One interviewee stated: “You can have many sources of conflict, and many overlapping types of conflict in places. I was working on recovery after an earthquake in Papua New Guinea about a year and a half ago, and there were so many layers of conflict going on between groups, families, individuals, genders, ages, and companies. So unpacking that becomes important.”<sup>220</sup> In these contexts, HRIA teams need to be extremely careful who they decide to work with.

#### Lesson 4: Question Assumptions and Verify Findings

Questioning assumptions is a key aspect of the assessment process. Businesses, HRIA teams, and community members may have assumptions about the HRIA process itself, the causes of social and environmental damage, which human rights are most at risk, the vulnerabilities of local communities, and so on. Oftentimes, assessment teams enter a community with preformed assumptions about which issues they will encounter without actually considering community views on the ground. One interviewee stated: “I think a lot of times there's a rush to assume that there are certain issues with rights that are sort of standard. And then they get brought to the fore without doing due diligence about what might be the nuances of those issues.”<sup>221</sup> HRIA practitioners should therefore check their knowledge carefully.

These assumptions must also be questioned before aid and philanthropy are dispersed. In times of crisis, many actors are eager to help; however, the form of help they offer may not

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<sup>219</sup> Interview 1

<sup>220</sup> Interview 3

<sup>221</sup> Interview 2

always be necessary, and may even be harmful. For example, after the earthquake in Haiti, donors considered flying planes to spray the land for mosquitoes in order to prevent malaria. An assessment of actual needs on the ground quickly found that malaria was not a problem in Haiti, and so resources could be diverted elsewhere.<sup>222</sup> In another case, donors built homes for displaced families in Guatemala without consulting locals about the construction. However, local populations knew that the area where the homes had been built was a flood zone and consequently refused to move into them, knowing eventually the houses would flood.<sup>223</sup> In this way, local knowledge can either validate or conflict with organizations' assumptions.

### Conclusion: Practitioner Advice

This brief but important chapter supplements all lessons up to this point by explaining how assessments work not just in theory and in methodology, but practically on the ground. While much of this advice is also useful in stable environments, it becomes particularly important in conflict-affected societies where risks and miscommunications are heightened.

This chapter, in combination with chapter 4, has focused on the implementation and practical application of the questions raised in part 2. The following final section of the thesis synthesizes these lessons into an original model.

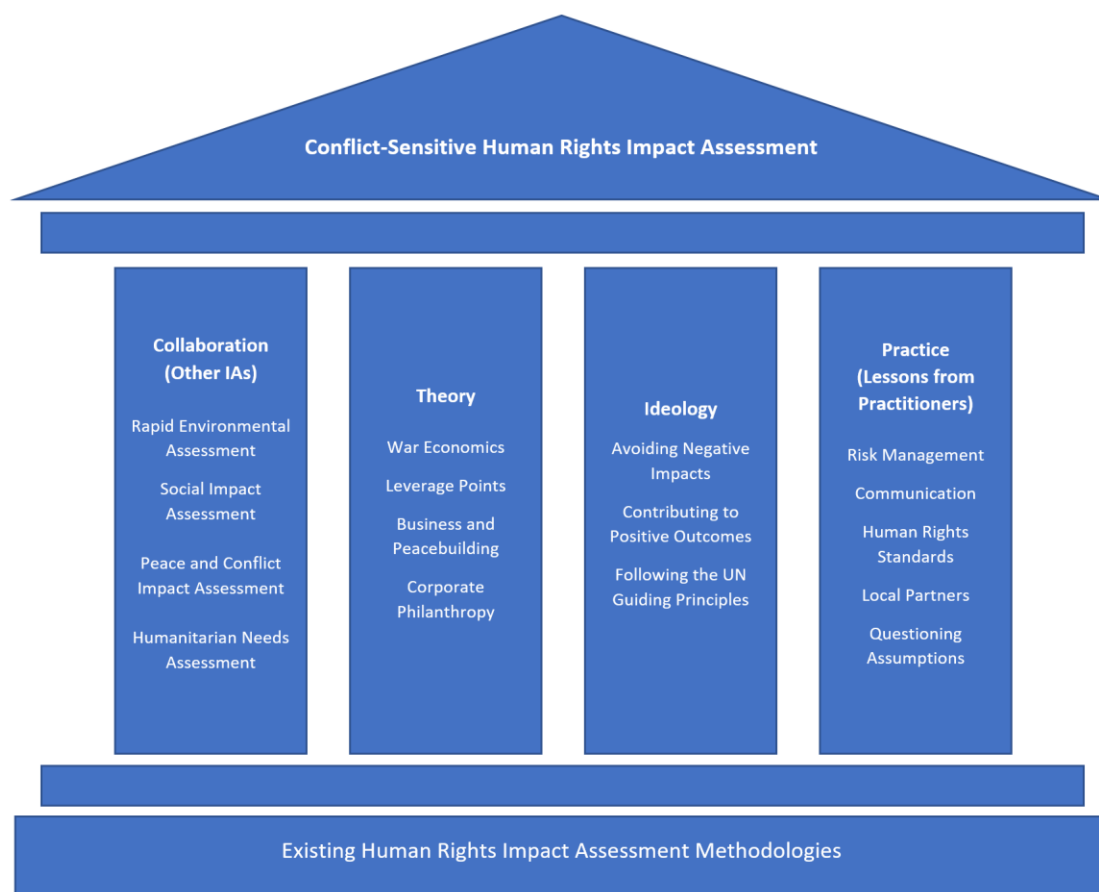
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<sup>222</sup> Interview 3

<sup>223</sup> Interview 3

# Human Rights Impact Assessment in Conflict-Affected Societies: A Proposed Model

This chapter synthesizes all lessons up to this point into a proposed model for HRIA in conflict-affected societies. As shown in the graphic below, the new model rests on four pillars: collaboration, theory, ideology, and practice. Each of these correspond with a chapter covered in the thesis. Underlying all pillars are existing HRIA methodologies.



Due to the limited scope and length of the thesis, many ideas remain to be further developed. For instance, the model proposes some areas which practitioners should explore more



in depth in conflict and crisis contexts, but does not provide a thorough list of questions or indicators.<sup>224</sup> Additionally, much remains to be written about potential areas of collaboration and coordination with other forms of impact assessment.

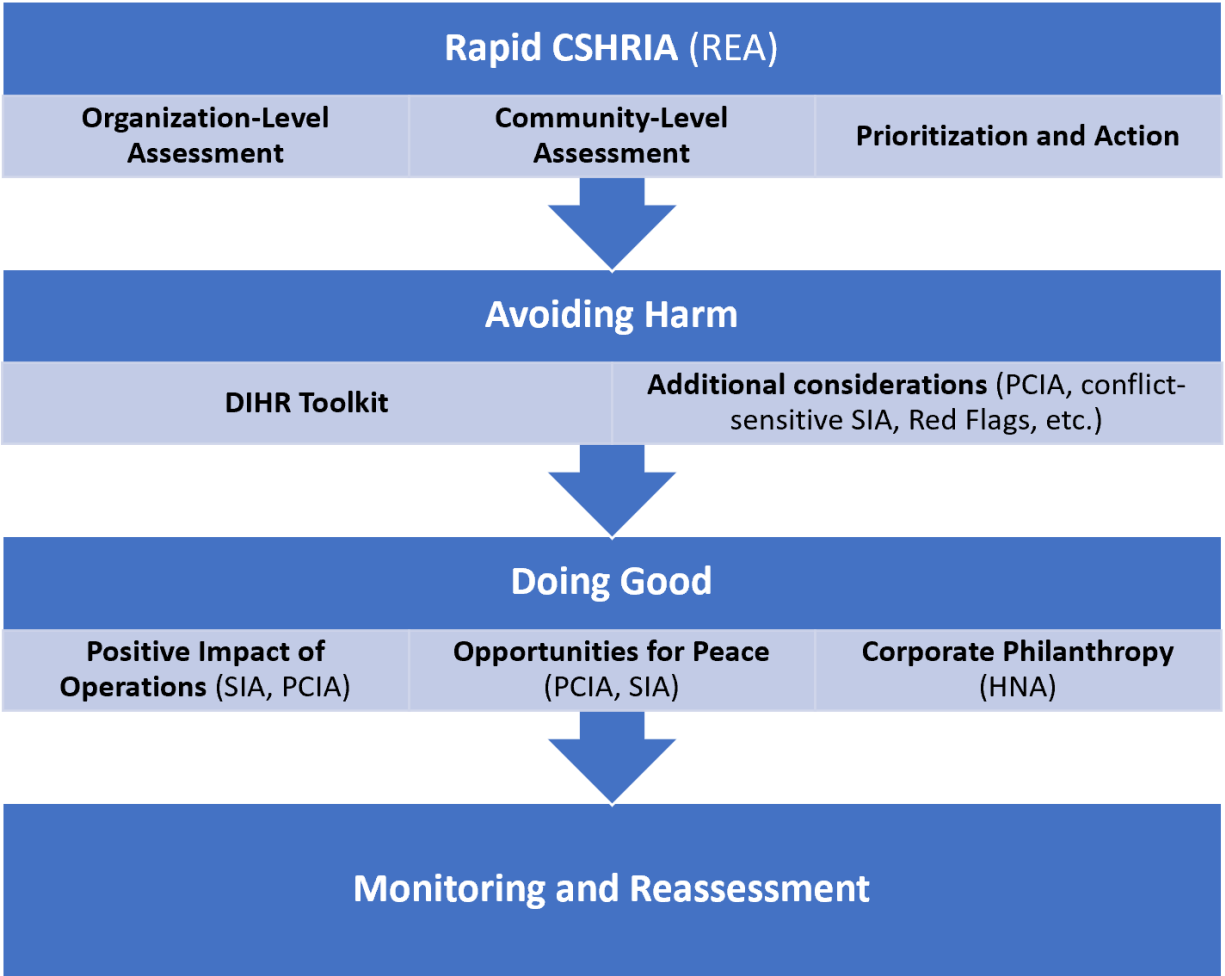
Nevertheless, the thesis proposes an original structure which can prove useful to HRIA teams working in situations of crisis and conflict. The following conflict-sensitive HRIA (CSHRIA) should be adapted to the needs of the community and businesses using the tool. Not all businesses will use every step; for instance, some businesses may focus exclusively on avoiding negative impacts in order to meet minimum standards set by the UNGPs. Others may engage in the full spectrum of peacebuilding and philanthropy efforts, and thus find all aspects of the model useful.

It is important to note that assessing negative impacts is absolutely mandatory and constitutes the minimum standard for any HRIA. The other stages are extra efforts designed to help the company understand its opportunities for change and positive impacts. While these extra stages have many benefits, including helping businesses assess how to make their social investments more effective, sustainable, and cost-efficient, they are not required by the UNGPs. Additionally, incorporating extra steps into the HRIA will require additional time, resources, and expertise, especially given the difficult circumstances in conflict-affected societies. Businesses should not expect HRIA teams to “skip” assessing negative impacts on certain human rights in order to examine potential positive outcomes.

The CSHRIA process includes two core steps: avoiding harm, which largely draws from the Danish Institute’s methodology; and doing good, which builds on original research and NomoGaia’s methods. The proposed CSHRIA includes several optional steps, including a rapid CSHRIA for quick deployment in crisis situations, an exploration of potential peace efforts, and an assessment of actual or proposed corporate philanthropy projects. The model also demonstrates where HRIA practitioners can find related methodologies and questions. For instance, HRIA teams seeking to develop a rapid CSHRIA should look to REA for guidance.

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<sup>224</sup> For information on indicators and research methods, readers may reference existing toolkits developed by International Alert, Oxfam, NomoGaia, and the Danish Institute.



1. Guiding Principles

The CSHRIA follows a number of guiding principles. Firstly, whenever possible, practitioners should draw on existing expertise of impact assessment professionals working in conflict and crisis situations. As illustrated in chapter 4, well-established methodologies already exist for assessing social dynamics in conflict-affected societies. A well-rounded CSHRIA team should include at least one member well-versed in conflict. Knowledge of mediation techniques, war economics, user chains, drivers of conflict, and research in conflict situations are especially helpful. Practitioners experienced in SIA are also strong team members due to their knowledge of social research and data collection techniques, many of which work well in conflict-affected

societies.<sup>225</sup> SIA methods are especially useful in cases where rights language is contentious, dangerous, or poorly understood. Without using explicit rights-based terminology, conflict-sensitive SIA can draw human rights data through methods such as community mapping and cooking meals with community members. These approaches can help assessors understand the rights situation without exacerbating conflict or drawing ire from the government.

Secondly, communication is absolutely critical in all forms of HRIA, including CSHRIA. Assessors should communicate in a way which is culturally sensitive and appropriate. Oftentimes, communities do not understand the concept of human rights, or rights-based language is too politically charged for the context. Literacy and access to documents may also be an issue. Care must be taken to communicate the following: what the rights of the community are; limitations on the HRIA process (i.e., what the HRIA team can and cannot do); what stakeholders and rights-holders can and cannot expect from the business; etc. Expectations and human rights policies must be clearly communicated to contractors, security forces, and other partners in a way they can understand.

Thirdly, as clearly stated in other HRIA toolkits, community engagement is the most critical part of any impact assessment.<sup>226</sup> Duty-bearers, rights-holders, and government officials must all be regularly consulted. Assessors must also report back on their findings, discuss interpretations, and solicit feedback before finalizing the report. Gender mainstreaming is critically important in this regard, since rights impacts are often experienced differently by men and women. Conflict also affects men and women differently, although the exact way it does so varies significantly between countries and cultures.

Fourthly, the assessment process should be dynamic and open to change. Conflict and crisis situations are marked by rapid, continual, and unexpected change. Impact assessment professionals must be flexible enough to work in such environments and adapt processes based on the local context.

Fifthly, leverage is critical for both mitigating negative outcomes and influencing positive changes. Businesses should seek ways to increase leverage whenever possible, including through negotiations, contractual clauses, coalitions, tripartite partnerships, and investment projects. Depending on the size and stage of the project, businesses may have leverage at the national,

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<sup>225</sup> Interview 5

<sup>226</sup> This has already been well documented in other HRIAs and so will not be gone into detail here. For more

local, and/or grassroots level. Additionally, leverage may change over time, and businesses should continually reflect on their opportunities to influence other actors.

## 2. Rapid CSHRIA

In situations of crisis, conflict, and humanitarian disaster, it is not always possible to undertake a full, thorough HRIA. As illustrated in the environmental assessment section, oftentimes the need to act quickly is greater than the need to understand every aspect of the situation at hand. In these contexts, HRIA practitioners should consider deploying a rapid CSHRIA in order to gather valuable information for businesses operating in the crisis zone.

A rapid CSHRIA should draw inspiration from REA. As earlier explained, REA's basic structure includes three phases: organization-level assessment, community-level assessment, and consolidation and analysis. The analysis phase identifies which issues to immediately address based on threats to lives, livelihoods, and the environment. Additionally, community views are heavily weighted, and assessors prioritize responding to issues the community raises rather than issues that outsiders perceive to be important. Other issues are noted and followed up on at a later date.<sup>227</sup> A rapid CSHRIA could follow this quick and flexible format. While lives and livelihoods would remain the main priority, rapid CSHRIA would also immediately consider the most severe and salient human rights issues rather than environmental issues. (However, oftentimes these issues are one and the same, since the environment and human rights are closely linked.)<sup>228</sup>

Businesses should immediately act on the issues presented in the rapid CSHRIA, first by immediately ceasing any actions that contribute to negative outcomes, and second by exerting strong pressure on other parties to stop rights violations. Some practitioners argue that in these crisis situations, businesses also have the obligation to assist in providing humanitarian aid<sup>229</sup>. While this is not required by law, there is a strong moral ground for such arguments. One interviewee expressed that: "I think in war-torn and armed conflict situations I would find it a real moral responsibility to contribute to realizing human rights if that is possible, and to contribute to humanitarian assistance to people and civilians who suffer from the war, e.g.

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information, see DIHR or Oxfam.

<sup>227</sup> Interview 3

<sup>228</sup> Interview 3

through the UN Office for the Coordination of Humanitarian Affairs. That's not part of what Ruggie has developed, but I think we should go in this direction of having some sort of responsibility."<sup>230</sup>

Furthermore, businesses should strongly consider sharing their findings with humanitarian aid organizations, local communities, and other relevant actors in order to support relief and recovery efforts. Coordinating and liaising with these actors may also be helpful during the information gathering stage.

Finally, any rapid assessment or quick action in response to crisis or disaster must be followed up by a full assessment in line with recognized HRDD standards.

### 3. CSHRIA, Part I: Avoiding Harm

A full CSHRIA can presumably draw from any existing form of HRIA. The Danish Institute's toolkit, the basis of this thesis, is particularly strong and has been thoroughly tested and reviewed by practitioners in the field. Therefore, this thesis recommends using the DIHR toolkit as a starting point, and then adapting the questions and methodologies to account for the special characteristics of conflict-affected societies.<sup>231</sup>

Preparatory work is especially important in conflict-affected societies. When businesses decide to enter or engage in a conflict zone, they collect information on the local situation in order to determine the risk of investment. HRIA teams should request this information and analyze any existing data available from the business about the actual situation on the ground, as well as the business's perspectives and assumptions. HRIA practitioners can also find data about the conflict from sources such as the International Committee of the Red Cross and International Alert.

Thorough planning is especially important in order to protect both practitioners and the communities they engage with. In some cases, it may be too dangerous for HRIA teams to enter the conflict zone. In such circumstances, HRIA teams should work with local NGOs or other well-established organizations in order to gather basic surveys and information about the human rights situation. Multiple interviewees commented on the increased capacity of NGOs to conduct

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<sup>229</sup> Interview 2

<sup>230</sup> Interview 2

<sup>231</sup> For more practical guidance and advice, see the assessment chapter of this thesis. Additional insight is available

such work and deploy questionnaires.<sup>232</sup> In circumstances where field work is difficult or impossible, HRIA teams may consider remote interviewing methods such as Skype or phone calls.<sup>233</sup>

From a practical standpoint, practitioners should consider a few key points. Most importantly, risk management must be heightened in conflict situations. Assessors should consider risk not only to the project, but also to themselves, their partners, interviewees, rights-holders, local communities, and other stakeholders. During consultations, HRIA teams must pay special attention to where they meet and who knows about these meetings.<sup>234</sup> It is also important to anonymize and secure data in order to protect participants. Further practical guidance is available in the Assessment in Conflict chapter.

As far as questions to include in a CSHRIA, assessors should carefully consider businesses' place within the war economy, with special attention to supply chains and user chains. While several possible questions and considerations were identified in the Business, Human Rights, and Conflict chapter, additional possibilities have been proposed by other organizations. The Red Flags initiative has outlined nine key activities that businesses should avoid when working in conflict-affected settings: expelling people from their communities; forcing people to work; handling questionable assets; making illicit payments; engaging abusive security forces; trading goods in violation of international sanctions; providing the means to kill; allowing use of company assets for abuses; and financing international crimes.<sup>235</sup> While most of these activities are captured in a standard HRIA, their importance increases in conflict-affected settings. Other aspects may not be captured by a standard HRIA process and must be brought into focus in a conflict-sensitive HRIA.

Additionally, professionals from the Local Capacities for Peace Project have identified four key questions for development and peace actors working in conflict:

1. What and who needs to be stopped?: Many conflicts are driven by actors who gain economically or politically from war. Unless these spoilers are addressed, peacebuilding

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from International Alert.

<sup>232</sup> Interviews 1, 3

<sup>233</sup> Interview 1

<sup>234</sup> Interview 1

<sup>235</sup> Tripathi (n 5) 139

efforts have low chance of success.

2. What and who needs to be supported?: Actors should identify and help those already working for peace on the ground. Additionally, actors should identify areas where communities do not fight and commonalities exist.
3. What are the external, as well as the internal, factors in the conflict?
4. Has the proposed activity been tried before and, if so, with what results?: Actors should be aware of which programs have already failed and why in order to avoid wasting resources.<sup>236</sup>

In this list, questions one and three relate to the “avoiding harm” phase of the CSHRIA, while question two relates to the “doing good” phase. Question four applies to both phases, as it could include both positive and negative impacts of prior efforts.

Furthermore, since conflicts are characterized by divisions in society, businesses and other actors should examine the bases and dimensions of those divisions. As Anderson explains, “Aid personnel need to understand which subgroups are in conflict and why. [...] They need to know which issues, practices, institutions or experiences divide people. Without such clarity about ‘dividers’ between conflicting subgroups, aid workers are unable to understand whether the aid they give feeds into and worsens (or helps relieve and reduce) them<sup>237</sup>.” By understanding these aspects, businesses can avoid contributing to divisive behavior that fuels conflict.

As earlier explained, sometimes business activities cause disproportionate harm to local communities in conflict-affected societies. In these cases, starting or continuing operations is not a viable option. In order to determine whether a project would cause more harm than good, practitioners can use the screening and assessment methods presented by peace and conflict impact assessment.

By the end of this stage, the HRIA team should have an understanding of: the overall rights situation; potential and actual human rights impacts which arise from the project; how business activities and presence influence conflict (including by strengthening one or more party to the conflict); drivers of conflict; dimensions of societal division; and economic aspects of the conflict.

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<sup>236</sup> Mary B Anderson, ‘Experiences with Impact Assessment: Can We Know What Good We Do?’ in Alex Austin and others (eds), *Transforming Ethnopolitical Conflict* (VS Verlag 2004) 6

#### 4. CSHRIA, Part II: Doing Good

Businesses can contribute positively to human rights and conflict in three ways: through their normal operations; through peacebuilding efforts; and through corporate philanthropy projects. While assessing these effects is optional, this thesis strongly recommends at least assessing impacts that come about due to corporate presence. Additionally, while assessing positive outcomes of corporate philanthropy projects is optional, assessing their potential negative impacts is not. The Danish Institute is clear on this front. Since community development and social investment projects are part of project operations, they must be included in the scope of HRIA.<sup>238</sup>

However, it is important to avoid “offsetting” negative impacts through positive impacts. While positive impacts can be important to note, they do not inherently “cancel out” violations of other rights. HRIA teams should therefore be careful how they present this information in order to avoid the appearance of justifying certain human rights abuses in the name of fulfilling other rights.

##### *4A: Positive Impact of Operations*

Some impact assessment methodologies, including NomoGaia’s, already take positive impacts into account. In order to avoid repeating what has already been written, only a few points will be explored here. To begin, businesses can have a stabilizing effect on local communities. By providing employment, investment, and infrastructure, businesses can reduce some of the grievances which fuel conflict. Additionally, businesses may have positive impact on the full spectrum of rights, including water, favorable work conditions, education, and nondiscrimination. Businesses also can provide a place for conflicting communities to safely meet and engage with one another.

Assessors may find NomoGaia’s guidance helpful for assessing actual and potential positives without obscuring negative outcomes. Additionally, conflict-sensitive SIA can provide insight into assessing positive impacts of businesses in conflict-affected societies.

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<sup>237</sup> *ibid* 4



#### *4B: Opportunities for Peace (Optional)*

Since conflict imposes heavy opportunity and operating costs, businesses may decide to invest time and resources into supporting peace efforts. As discussed in the Business and Peacebuilding section, several options are possible. Usually, businesses with an interest in peacebuilding focus on forming a coalition to increase their leverage. These coalitions pressure key actors into sitting for negotiations. However, other opportunities do exist for businesses to contribute to conflict transformation.

In order to assess business implications for peace, HRIA teams may adapt questions and methodologies from peace and conflict impact assessment. For example, it may be useful to examine social reconstruction processes and institutional capacities for peace in order to understand how existing efforts can be strengthened and supported.<sup>239</sup>

#### *4C: Corporate Philanthropy (Optional)*

Corporate philanthropy efforts can also have strong bearing on human rights and conflict transformation. However, poorly designed and implemented efforts may ultimately cause more harm than good. As earlier stated, it is mandatory for HRIA to assess potential and actual negative outcomes of existing philanthropy and social investment projects. However, businesses may also seek to identify positive outcomes, overall impact on human rights, and methods for improving effectiveness and efficiency.

Where corporate philanthropy projects do not already exist, businesses must carefully analyze where and how their efforts will be most effective for promoting human rights and conflict transformation. In this regard, humanitarian needs assessment can provide useful insight into the needs of local communities and individuals on the ground. It is also important to support local capacities rather than undermining them or creating dependency. Through a humanitarian needs assessment, businesses can best determine how to support local populations in times of crisis and conflict.

In some cases, short-term aid projects designed to help in times of crisis may evolve into long-term relief, recovery, and/or development initiatives. As project parameters change, the HRIA of such activities must be updated accordingly.

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<sup>238</sup> Götzmann and others, DIHR (n 6) 68

<sup>239</sup> Bush (n 104)

As earlier stated, businesses should take care not to create dependency. The assessment should therefore emphasize a long-term sustainability plan that accounts for what happens to the project once the business ceases operations. Community engagement and participatory planning is key. Save the Children Kosovo's model of transferring ownership may provide a useful approach. The organization develops project plans in conjunction with local governments and community members so that all parties have a sense of ownership over the project. Save the Children provides resources and expertise to begin the project, and then over the course of three years, gradually transfers responsibility and operations to the government and community.<sup>240</sup> While it can be argued that governments and communities will not have adequate resources to run the project in the end, businesses should reconsider starting any project that is not sustainable in the long run. Training staff to take over the project and identifying other sources of funding, including government spending, is critical in this regard. This model is critically useful for businesses who are interested in corporate philanthropy, but who do not want to create dependencies or feel totally obliged to meet all community needs indefinitely.

When assessing corporate philanthropy efforts, HRIA teams may adapt questions from REA, PCIA, and HNA. Conflict-sensitive SIA is especially useful because of its flexible approach and ability to take into account rapid societal changes which arise in cases of conflict. Needs assessments are critical for the planning stage as they allow businesses to best know how to direct their resources in order to support genuine community needs.

## 5. Monitoring and Reassessment

As outlined in the Human Rights Impact Assessment introductory chapter, HRIA is not iterative. Businesses and assessors should re-engage in assessments as developments unfold. Depending on the context, assessors may need to completely redefine scope; in other instances, periodically reviewing monitoring mechanisms may be sufficient. Input from monitoring and grievance mechanisms is especially useful for tracking any changes in the rights situation and the consequent need for reassessment.

As a result, CSHRIA results and recommendation strategies do not last forever. It may be necessary to update the CSHRIA as conflict dynamics shift, business operations change in scope or strategy, crises and disasters arise, or major events occur in the local community (e.g., mass

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<sup>240</sup> Save the Children Kosovo, presentation to EMA students, January 2019

migrations, outbreaks of violence, return of displaced populations). Businesses and assessors should engage in regular assessors to determine the exact form and scope of HRIA updates.

# Conclusion

This thesis has explored several aspects of human rights due diligence in conflict-affected societies, including: existing human rights impact assessment methods; the links between business, human rights, and conflict; arguments for including positive impacts into HRIA; how other forms of impact assessment function in conflict zones; and the experiences of practitioners who work in conflict-affected societies.

As thoroughly discussed, conflict-affected societies present a number of unique, difficult factors for businesses and HRIA teams to consider. War economies often work differently than more stable economies, and are characterized by seizure, corruption, and illicit activity. Businesses must be especially careful not to fuel conflict and thereby worsen the rights situation through their very presence in the war economy, even if they respect human rights in every other regard.

The potential model for expanding HRIA to include questions around conflict and war economics also takes into account businesses' positive role in contributing to peace, stability, and human rights, given the right circumstances. Additionally, the proposed model includes optional modules for peacebuilding and corporate philanthropy.

Most notably, the model creates space for a rapid HRIA which can be deployed in situations of crisis. Since conflict is characterized by change, often with disastrous effects, a rapid HRIA tool can be useful for informing businesses about the situation on the ground and what they can do to help local populations and avoid contributing to adverse impacts.

Throughout the conflict-sensitive HRIA process, it is critical to draw from existing impact assessment methods. HRIA practitioners should not seek to reinvent the wheel; instead, they should collaborate and draw lessons from their peers. Not every indicator, methodology, and strategy works in every context; HRIA teams should therefore be savvy about what they adopt from which source and how it relates to the context and overall goals of the impact assessment.

The importance of stakeholder engagement in these processes should not be understated. While local communities sometimes make false assumptions or have biased perceptions, they understand the situation and needs of rights-holders better than anyone else, including the

businesses engaged in those environments.

In conclusion, while existing HRIA methodologies have made significant, innovative strides towards ensuring corporate respect for human rights, models can — and should — be adapted to address the needs and circumstances of the local context. Conflict presents its own set of challenges which endanger lives and livelihoods in a multitude of ways not present in more stable environments. While much work remains to be done in adapting HRIA to conflict-affected societies, including indicator development and collaboration with other forms of impact assessment, this thesis attempts to lay the groundwork for future innovations within the field.

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