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Joint Committee on Human Rights
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Evidentiary submission by Margo Drakos, Tarek Maassarani, and Jenik Radon, Re: Human Rights Impact Assessment

Introduction

The benefits of extractive industry investment, production, and development have come at the expense of many of the host states where business is conducted. The world's most corrupt and least developed countries, such as Angola, the Democratic Republic of the Congo, Myanmar, Nigeria, Sierra Leone, and Sudan, contain some of the world's most valuable natural resources. In theory, the revenue generated from these commodities has the potential to elevate developing countries out of poverty and thus minimize the cycles of conflict and humanitarian disasters commonly found in the developing world. In reality, extractive projects frequently adversely affect the environment and disrupt the local economic and social fabric, which potentiates poverty, disease, and conflict.

This submission will describe the Human Rights Impact Assessment (HRIA), a mechanism for multi-national corporations (MNCs) to proactively mitigate or eliminate the negative human rights impacts of their operations in the developing world, while magnifying their positive impacts. Moreover, it will demonstrate that pushing for companies to conduct HRIA has the potential to yield economic rewards, hopefully changing the calculus that respecting human rights is an expensive departure from the core mission of extractive enterprises.

The authors have published, practiced, and taught on the subject, having examined United States-based businesses and case studies where egregious human rights violations occurred or were mitigated. Additionally, Tarek Maassarani is a litigator for the Wiwa v. Shell case which is going to trial in New York City May 26, 2009. This case centers on Shell Corporation's assistance and financing of Nigerian soldiers who used deadly force against the indigenous population, the Ogonis, throughout the early 1990s to repress a growing movement against the oil company. Although our work is centered on the United States legal framework, we believe our findings are applicable to the United Kingdom Government and business community.

Business and Human Rights

The world's largest MNCs operate where resources exist, regardless of a host state's infrastructure or capacity. As a result, three core challenges emerge. First, many of these valuable natural and human resources are located in developing countries where the rule of law is weak or nonexistent. Most of these states do not monitor or enforce minimum internationally recognized human rights standards. Second, MNCs are often the only significant economic opportunity for the state. The government often lacks the capacity or legitimacy to reign in the power and activities of MNCs even if they so desired. As a result, the ruling elite, often in an effort to maintain power, overlooks labor, environmental, and safety standards in order to accommodate MNCs and to maintain control of the funds generated. Finally, the lack of uniformity in defining human rights and their relevance to MNCs results in legal uncertainty and unclear regulations for private entities operating in a host state.

In spite of the challenges associated with conducting business in the developing world, there is potential for good. Capital from MNCs provides the opportunity for economic development, which can promote an open society. When MNCs operate with sound judgment, they assist in creating state guidelines that ensure transparency and the appropriation of funds. They also have the potential to raise a state's labor, health, human rights, and environmental standards. In reality, these benefits are rarely realized. Extractive industry projects in the developing world commonly cause direct or indirect environmental, health, and human rights violations; legitimize corrupt regimes; and provide little to no job opportunities for the domestic economy. These infractions are intertwined, but they can be classified into five general categories.

1. Corrupt Regimes Become Legitimized. When MNCs begin project development planning, dealing with one regime reduces the MNCs' complexities. In this instance, the ruling elite controls all aspects of the negotiated deal and services for the MNC; from transportation and security personnel to payment and revenue allocation structures, those controlling the state's power provide all services. When commercial production begins, the new source of revenue serves to legitimize, empower, and enable the existing, often autocratic or rebel, regimes. The misappropriation of economic benefits from resource revenue is rampant and devastating to the host state.[i]

2. Forced Relocation of Populations around MNC Projects. Construction of facilities and infrastructure necessarily requires resettlement of populations, often involuntarily. Displaced villagers are rarely provided with explanations and information regarding their resettlement, meaningful and adequate compensation, or basic necessities in their new home sites.[ii]

3. Abuses at the Hands of Security Guards. Without buy-in from local communities and sufficient planning for sustainable development, it becomes necessary for MNCs to employ security guards for their facilities and infrastructure. When MNCs turn to the ruling elite to secure or clear a production field or pipeline route, guards are often government or paramilitary forces. Security personnel are often antagonistic to local populations and commonly subject them to forced labor and other physical abuses. [iii]

4. Environmental Degradation Violates Health and Living Standards. Once production facilities are up and running, public health catastrophes can result from a project's toxic leaks, gas flares, and dumping of waste.[iv]

5. "Dutch Disease": The Boom Town Effect. Large-scale projects can drastically change local economies, a phenomenon commonly referred to as "Dutch Disease." The sale of extractive exports increases the value of the local currency, making other export goods uncompetitive in the international market. As a result, a country becomes solely dependent on resource extraction. As the costs of goods and services rise sharply, labor is drawn away from traditional sectors, such as education and agriculture, into temporary cash service jobs. Traditional culture and social cohesion are disrupted by these jobs and incentives for corruption are increased. Far from home, workmen often engage with flourishing drug and prostitution markets, contract HIV/AIDS, and then unknowingly spread the deadly virus in their home communities. Additionally, the precarious economic system collapses once a project matures, leaving vulnerable and dependent workers in an under-diversified economy with fewer employment opportunities than prior to the beginning of resource extraction.[v]

The Human Rights Impact Assessment Framework

The HRIA is designed to serve as a practical medium- and long-term risk management tool that incorporates the human rights rubric into a company's decision-making process. Corporate risk through the human rights lens is defined here as legal liability, potential for project interruption or abandonment, and/or negative impacts on the corporate brand. An HRIA is designed to anticipate corporate risk prior to, during, and after project implementation. An HRIA focuses on human rights impacts occurring within a corporation's sphere of influence, which may either, contribute to or detract from the fulfillment and progressive realization of internationally-recognized human rights standards.

The HRIA framework is grounded in the successes of environmental and social impact assessments that have been the cornerstone of environmental and social protection in developed countries. Both these EIAs and SIAs represent proactive, transparent, and structured approaches that avoid or mitigate significant and irreversible damage through describing preexisting conditions on the site, creating a plan for action, identifying potential impacts that may occur as a result of the action, and evaluating impacts and risk-mitigating alternatives. Impact Assessments are disclosure tools that governments and corporations recognize and accept. This submission proposes building on the SIA/EIA principles to create the HRIA, an early warning system and an essential first step in creating transparent accountability within corporations and host states. The seven crosscutting basic principles that should guide the corporate HRIA are described below.

1. Designing an HRIA Team: Work with Competent Practitioners and Credible Data. It is essential to choose the right team to work with an MNC in order to devise an effective and efficient HRIA. External auditors should exhibit familiarity with HRIAs, and maintain financial and institutional independence to avoid actual or perceived corrupt practices, the team should report directly to the MNC's board of directors. Employing and consulting with credible experts in the field of human rights, anthropology, political science, and local NGOs provides an MNC insight into the geopolitical complexities on the ground; this is essential to building a sound HRIA that is integrated into corporate decision-making and viable to the international community.

2. The Business Case: Involve All Stakeholders and Create a Sense of Ownership for All. Once the HRIA team is defined and has peripherally assessed the host state's social, political, and economic climate, the team needs to identify and meet with representatives of all groups that will be involved with or affected by the project. This should include everyone from senior staff to under-represented stakeholders such as project workers, host communities, and local NGOs. Maximum inclusion of all actors, especially any politically marginalized segments of the state's population, is particularly critical when operating in states where the rule of law and infrastructure is virtually absent. Community buy-in, joint problem-solving, cultural exchange and liability protection is essential to maximize short- and long-term project investment opportunities. In the event that misappropriations of funds or human rights violations result during project implementation, the MNCs will have established a relationship with all players and documentation of that interaction.

3. Design Methods for Defining, Measuring, and Addressing Impacts. Once all potential stakeholders are determined, impacts need to be identified, defined, and classified into categories. Similar to a practical risk management tool, this step simulates the interests and demands of all stakeholders throughout the length of a project. Each impact should then be pre-classified as a: (1) potential problem; (2) potentially mitigated problem; or (3) potentially reversible problem. The HRIA team should create a methodology to address each category. Each proposed action should be assessed while examining its impact on local dynamics. This will create long-term risk management by strengthening and legitimizing the impact assessment while simultaneously encouraging accountability. It is timely and cost efficient to discuss, define, and forecast potential complex issues surrounding the project's impact on local communities prior to production; for example, once production is under way, the daily burn rate is significantly increased compared to the pre-project planning stage. A byproduct of this step is the creation of a complex emergency response system, should problems arise during or after production. This system can be used in tandem with the local and international community experts, who would have been previously approached by the team.[vi]

4. Assess Equity of Impacts. After gathering reliable and informed data, the HRIA team should determine the positive and negative impacts from the project and any potential unbalanced distributions between communities, such as the state's current human rights situation, stability, and any historical divisions. Assessing the equity of impacts directly confronts potential complicity and liability issues; this requires MNCs to be familiar with existing labor, environment, health, and housing standards around the project as they pertain to human rights. Groups that are disenfranchised may become frustrated and aggressively retaliate, thereby threatening production, as is witnessed in Nigeria.

5. Internalize the Impact Assessment in Corporate Decision Making. The HRIA assumptions and projections should be institutionalized throughout the corporate management structure; otherwise it will be a useless exercise. Clearly delineated internal codes of conduct need to be outlined for receiving and internalizing in-formation with explicit policies for addressing discrimination, labor, security, and indigenous peoples. At this time, staff training and management protocol should be designed for overseeing contractors and local employees. If the perceived risks outlined by the HRIA suggest that the human cost from the project could be devastating, the board room is required to consider suspending the project. If the project is recommended, communication between the HRIA team and the corporate decision-makers should be clearly outlined. Once revenue is flowing into the community, bi-monthly meetings are recommended with the HRIA team and the corporate decision makers. The MNC needs to create a sense of ownership in the project that permeates through every stakeholder, including the local population and NGOs, company crane operators and engineers, the host state government, Wall Street executives, and stockowners. When team pride and integrity is nurtured at all levels of a business, optimal production and results will be realized, even when operating in complex and volatile areas.

6. Transparency: Share Findings. The first step in gaining credibility with the company's stakeholders, international initiatives, and human rights organizations is to publicly disclosing the process and results of a HRIA. The public disclosure of findings by MNCs sends the right message to the ruling elite, encourages discussion, media coverage, and transparency, and potentially decreases corporate complicity in the event of litigation or human rights atrocities. International organizations, such as branches of the UN, World Bank, IMF, and Open Society, can provide economic and development advisors to the state, offering petroleum revenue allocation structures, debt restructuring, development, and education initiatives. MNCs are presented with a unique opportunity to create internal standards early, involve the public, and set operating procedures on the international stage. The MNCs must honestly disclose the HRIA study to an appropriate extent in order to legitimize the corporation's process and decision-making as well as encourage the host state's government and local population participation.

7. Ongoing Monitoring and Evaluating: Managing Human Rights. Once a project is underway, the HRIA team should aggressively monitor all human rights impacts related to the project. Detailed monitoring and reporting should include disclosure of profits, payments dispersed to given entities, estimated production rates, fluctuations in the value of the commodity, the impact on the ground, and the status of potential impacts assessed during pre-project planning. Now is the time for the team to draw on the HRIA investment, sharing successes with crane operators, the boardroom, and the press, or working through potential complex issues surrounding complicity, inhumane practices by subcontractors, or misappropriation of funds by the government.

A Smart Investment

With a global economic recession, plummeting oil prices, and the decrease in oil production, MNC executives are under pressure to cut costs, promote efficiency, increase productivity, and maintain strong profit returns and competitiveness. It may seem contrary to the CEO mindset to dedicate energies toward promoting transparent and ethical dealings with corrupt state regimes. To be sure, MNCs cannot be solely responsible for a state's success or failure to effectively utilize resource revenue to elevate populations out of poverty. However, conducting HRIAs has the potential to yield economic returns in the medium- and long-term. This system is an ethical, promising, and cost-effective tool for MNCs to assess and control the impact of their development activity in places where host governments are unable to safeguard their citizens' rights. HRIAs are win-wins for the corporation. Although more time and money is initially required, an HRIA is a sensible insurance policy, especially considering the monetary and public costs of facing a trail in the long run. Additionally, while oil production is down, it is an optimal time to integrate the HRIA into corporate decision-making, design an independent HRIA team to work with MNCs, and engage the developing world. New processes and procedures are easier to implement when beginning new projects.

Recommendations

Drawing on United States legislation and international voluntary initiatives, the Joint Committee on Human Rights is presented with the opportunity to lead the Western world in designing an HRIA for applicable United Kingdom private- and public-sector overseas projects. The scope of this legislation may encompass extractive and/or other projects with significant human rights impacts undertaken, financed, or otherwise supported by corporations operating or registered in the United Kingdom. This legislation would include application to private lenders, the European Commission on Development, the UK Department for International Development, the British armed forces, and the Commonwealth. The UK Government may design tax incentives for MNCs that adopt and incorporate the HRIA tool into their corporate decision making. It is recommended that the U.K. Government support the creation of an independent and competent board of human rights auditors and/or an auditor certification scheme to provide corporations with reliable and timely impact assessments. To avoid allegations of impropriety, it is advisable to establish a funding or payment mechanism that ensures the financial integrity of the HRIA process.

The United Kingdom should encourage the adoption of Human Rights Impact Assessments at the supranational level and incorporate the cross-sector codes urged by the Global Compact, World Bank, International Monetary Fund, Equator Principals, and others. At the international level, the U.K. Government is encouraged to seek an agreement among states holding corporations directly liable for their HRIA obligations in the absence of domestic accountability. The international community should put significant pressure on developing world leaders to address any real or potential problems from an HRIA. This may include resolutions from the United Nations Security Council, sanctions by the U.K. and other western governments, or MNC royalty penalties outlined as a result of the HRIA.

The development of HRIA continues apace. In June 2007, the International Business Leaders Forum, the International Finance Corporation, and the Global Compact jointly produced their draft Guide to Human Rights Impact Assessment and Management to be tested by businesses and finalized by mid-2009. Independent organizations have also taken salient steps to create HRIA tools and frameworks. Canadian organization Rights and Democracy is conducting HRIA methodology trials in five countries; The Danish Institute for Human Rights and Aim for Human Rights, a Netherlands organization, have produced HRIA tools that are available online.

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[i] For example, DeBeers, the world's largest diamond producer, enabled multiple autocratic regimes to maintain power. However, the company realized that dealing exclusively with corrupt ruling elite often results in human rights atrocities and damages the company's brand—a massive anti-DeBeers publicity campaign was launched in New York City after it became apparent that the company's corporation was legitimizing violent rebels and funding multiple civil wars. "A diamond is forever," the company's popular advertising phrase turned into a marketing nightmare when grassroots organizations brought worldwide attention to "blood diamonds." The company operated mines in Botswana, Namibia, South Africa, and Tanzania, and had effectively traded guns for gems with rebel groups in conflict zones such as Angola, the DRC, and Sierra Leone. The diamond industry has a contrived value, largely through marketing campaigns, and regulates supply to match demand. DeBeers took this negative press, turned it into a positive by working with the international community, including the United States, and avoided liability for passive or active complicity in human rights violations. In 2002, following UN Security Council resolutions imposing sanctions against "blood diamonds," diamond traders, DeBeers, and major diamond trading countries created an international protocol known as the Kimberly Process, which calls for minimum standards of certification of rough diamonds from conflict regions. The countries and companies agreed to establish internal controls to eliminate the import and export of conflict diamonds from their territories. Although steps have been taken to ensure transparency and independent monitoring, many technical and operational complexities remain with significant loopholes. As will be described below, conducting an HRIA has the potential to add another level of accountability and protection for host-state citizens.

[ii] Chevron discovered vast, significant oil fields in southern Sudan in the 1980s, but was forced to withdraw from Sudan in 1984, due to the instability in the region; during this time three Chevron employees were killed by southern rebels. In 1988, Chevron resumed its activities and developed a six-year exploration and drilling program. With the Sudanese civil war intensifying between the north and south, and production facility and employee safety a significant concern, Chevron relinquished all of its Sudanese land concessions in 1991, after spending more than $1 billion. By 1992, CNPC, Britain's Greater Nile Operating Company (GNPC), and the National Company of India (ONGC) had moved into Chevron's former drilling blocks. To provide access for companies to drilling sites, the Sudanese government forcibly removed local people, their cattle, and grain from the resource-rich land. The government, using helicopter gunships to curb resident opposition, relocated large population groups to "peace camps" in western Sudan, Darfur, where they were forced to live and work for the soldiers for free. While 3 million western Sudanese citizens have been displaced and over

200,000 killed by the government-backed janjaweed, China and other consortiums continue to operate throughout the region.

[iii] In 1996, the Union Oil Company of California, UNOCAL, became the first corporation in U.S. history to face trial for com-mitting human rights abuses abroad under the Alien Tort Claims Act of 1789. During the 1980s, the oil giant and its partners had hired local military forces in Burma, now recognized as Myanmar, to secure a pipeline carrying natural gas from the Andaman Sea into Thailand. These army units forced locals to work on the pipeline, raped, robbed, and murdered civilians, and displaced entire villages. Thirteen peasants from Myanmar filed suit against UNOCAL officials in U.S. federal and California state courts, accusing the oil company of forced relocation, slave labor, rape, torture, and murder. The Supreme Court of California ruled in favor of the peasants, noting that UNOCAL "knew or should have known that the military did commit, was committing, and would continue to commit these tortuous acts." After nearly a decade of litigation, UNOCAL agreed to a confidential multi-million-dollar settlement. UNOCAL was acquired by Chevron Corporation shortly after the settlement.

[iv] The Amazon region of Ecuador has suffered grave environmental degradation due to oil extraction. In 1971, Texaco began building oil wells in areas of the Ecuadorian rain-forest, which were inhabited by indigenous communities, and continued project development through 1992. The rivers in the region are vital to the livelihoods of the native people, providing them with food, hygiene, and transportation. Texaco's contamination of the rivers brought about alarming rates of cancerous tumors, auto-immune diseases, birth defects, and spontaneous miscarriages to the indigenous populations. Dwindling fish stocks led to widespread malnutrition, poverty, and migration to the cities where employment was already lacking. In 2001, the Chevron Corporation acquired Texaco, which became a brand name under Chevron. In 2003, United States trial attorneys and thousands of Ecuadorian peasants brought a class action lawsuit against Chevron for environmental and human rights infractions while Texaco was operating in Ecuador. Charged with dumping billions of gallons of toxic oil waste into the local rivers and contaminating an area the size of Rhode Island, Chevron also faces human rights accusations including cultural genocide, and racial and ethnic discrimination. In early 2008, an Ecuadorian court-appointed independent geological engineer recommended that Chevron spend $8 to $16 billion to clean up the environmental degradation, if the company loses the case currently in New York courts. In April 2008, Chevron reportedly lobbied the U.S. government to end trade preferences with Ecuador over the lawsuit; the New York court ruled that the case should be tried in Ecuador and is currently under appeal.

[v] In the 1960s, Nigeria possessed a diversified economy; it was the largest producer and exporter of palm oil, the second largest producer of cocoa, and the leading exporter of cotton, rubber, and hides. Farmers produced 70 percent of Nigeria's exports and 95 percent of its domestic food needs. Although oil was discovered in the Niger Delta in 1956 by Royal Dutch Shell and British Petroleum, it was not until the end of the Nigerian Biafran war and the rise in oil prices in 1971 that Nigeria began to receive significant petroleum revenue. In 1983, imports financed from borrowed resources had risen dramatically to over 33 percent of gross domestic product. Today this figure is almost double from 1974 figures when imports were 17.8 percent of GDP. Nigeria's economy has become single commodity-based; in 2007 with the high price of petroleum, oil and gas was more than 95 percent of Nigeria's exports, accounted for 85 percent of government revenues, and 52 percent of GDP. Nigeria is now a food-importing economy. Due to corruption, poor governance, and microeconomic policy, the government incurred $37 billion in external debt at its peak in 2005, up from $1 billion in 1971. As the Nigerian population increased, agriculture production decreased, employment opportunities vanished, and today 54 percent of the population lives on less than one dollar a day.