

**Loan Agreements and Human Rights:
The Role of Human Rights Impact Assessments**

By Noel G Villaroman
Monash University

Paper presented during the
Regional Consultation on the Draft General Guidelines
On Foreign Debt and Human Rights

Organised by the
UN Office of the High Commissioner for Human Rights
And co-sponsored by the Government of Qatar
31 January – 1 February 2011
Doha, Qatar

Loan Agreements and Human Rights: The Role of Human Rights Impact Assessments

By Noel G Villaroman

A. Introduction

An “impact assessment” has been broadly defined as the process of identifying the consequences of a proposed activity or project. The most common and familiar type is the Environmental Impact Assessment (EIA) which has been in use for the last 40 years to study potential adverse effects to the environment of a proposed activity or project. Undoubtedly, proponents of a Human Rights Impact Assessment (HRIA) took their inspiration from the success EIAs.

A HRIA is a systematic process that aims to measure the impact of an activity or project on human rights. A HRIA is based on the normative framework of international human rights law, as laid down in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and other human rights instruments. In a HRIA, a proposed activity or project is examined for its potential consequences to certain human rights identified at the onset as the ones which are most likely to be affected because of their connection or link to the activity or project concerned. Compared with other impact assessments, a HRIA stands unique for its comprehensive treatment of human rights and a distinctly human rights-based methodology. It is unique because human rights are regarded as both the end goals and the guiding principles of an activity or project.

The unique strength of a HRIA is the fact that it is based on international standards that are legally binding either as treaty commitments or as customary international law. Its key strength is the use human rights law as the basis for impact assessment; it measures impacts in terms of obligatory standards. Being obligations of governments arising from international law, these standards can be used to prod or push governments into action. Another advantage of a HRIA is that it is a technical analysis which provides evidence-based arguments regarding why and how human rights stand to be infringed by a proposed activity or project.

Since 2000, HRIA has become a widely used tool to gauge the human rights impacts of an activity or project in a wide variety of areas. For example, HRIAs have been undertaken to measure:

1. The human rights impact of development assistance or aid programs of foreign donors on beneficiary countries;
2. The human rights impact of multinational companies upon the vulnerable sectors in the host country; and

3. The human rights impact of international trade agreements upon developing countries.

B. Why subject an international loan agreement to HRIA?

The proposal to employ HRIAs in the context of international loan agreements is a relatively new one. The Human Rights Council, in its Resolution 11/5 adopted in June 2009, has called upon debtors and creditors, particularly international financial institutions (IFIs), like the IMF and the World Bank, to consider the preparation of HRIAs with regard to development projects, Poverty Reduction Strategy Papers, and international loan agreements.

The main question is: Is there a rationale for undertaking HRIAs of loan agreements in the first place?

The undeniable fact is that the financing made available to debtor countries through international loan agreements has a direct impact, whether positive or negative, upon that country's human rights situation. There is a real possibility that borrowed funds may contribute, directly or indirectly, to human rights violations in a debtor country. This being the case, there is therefore a need, if not an urgency, to scrutinise loan agreements regarding their potential harmful effects to human rights. This is the function of a HRIA. It aims to prevent the adverse effects of loan-supported activities or projects to human rights and it enhances the effectiveness of foreign loans with respect to the improvement of the human rights situation in debtor countries.

Just to give some examples of loan-supported projects contributing to human rights violations:

- (1) Chinese loans extended to many African countries have contributed to the ability of African governments to perpetrate human rights violations. In some African countries, Chinese loans to finance infrastructure projects have caused widespread human displacement and rampant natural resource extraction which, in turn, had severe environmental, social and economic impacts.
- (2) In Cambodia, the construction of a dam which is partly financed by external loans has caused the relocation of a large number of indigenous peoples whose homes, livelihood, sacred sites, and their connection to the land have been adversely affected by the dam's construction.

The basic premise here is that lenders should not finance activities or projects that will violate, or will foreseeably violate, international human rights norms. But how do we know beforehand if there will be such violation? The obvious answer is through a HRIA. Note, however, that current lending practices do not involve the conduct of a HRIA. Neither does international or domestic law require a HRIA for

loan agreements. That is why this proposal is fully warranted: as a pre-requisite for obtaining a loan, a HRIA must be undertaken as a general rule. Doing away with HRIA should be considered as the rare exception.

When the lender is another country (bilateral creditor) or an international financial institution like the IMF or the World Bank, an impact assessment tool that employs a human rights-based approach fits perfectly for the job. This is because human rights obligations are directly “opposable,” to use the language of human rights law, vis-à-vis states both in their individual capacities and collectively as members of IFIs. In other words, we can demand that creditor states perform their human rights obligations in their individual actions and in their actions as members of IFIs. What can be invoked here is the “horizontal dimension” of the creditor states’ human rights obligations. Other scholars prefer using the term “extra-territorial” human rights obligations of states, particularly those in a position assist others states in realising human rights. They are the developed states whose extra-territorial human rights obligations include, at the minimum, the obligation not to cause human rights violations in the debtor countries.

However, one may ask: is a HRIA relevant if the lender is a private entity (e.g., a commercial bank)? Historically, human rights have been conceptualised as obligations of states towards their citizens. When the lender is a private entity, its actions may be attributed to its home state for the purpose of state responsibility. A state may be responsible for the effects of private lender conduct if the state failed to take necessary measures to prevent those adverse effects. In international law, there exists a duty among states not to cause harm or injury to another state. On the strength of this duty, states ought to regulate the conduct of private actors within its jurisdiction that threatens human rights in other countries. The duty to regulate the activities of private actors (like commercial lenders) is clearly established under international human rights law. Home states should ensure that commercial lenders comply with international human rights norms in their lending activities which have transnational consequences or effects. One such means is by requiring the completion of a HRIA before entering into a loan agreement with a debtor country.

C. What types of international loan agreements require an HRIA?

Because HRIAs are ideally comprehensive, time-consuming and potentially costly, I submit that not all international loan agreements should be subjected to it. For example, relatively small amounts of loan whose human rights impact, if any, may be too small do not necessitate an HRIA. There has to be a prior determination whether a particular loan agreement or any other way by which a government borrows funds from a lender (e.g. issuing government bonds) is suitable for a full impact assessment, and screening out those where a full HRIA is not considered a priority or necessary at all. My suggestion is to limit the conduct of HRIA to those proposed loan agreements that *prima facie* poses the most severe risks to human rights. Most obvious examples include loans to purchase military equipment or weapons; loans to build large

infrastructures like dams, power plants or airports; or loans meant to be used in the extractive sector.

D. When to conduct an HRIA?

Impact assessments can be carried out before an activity takes place (*ex ante*) or after an activity has taken place (*ex post*). The objective of an *ex ante* HRIA is to prevent human rights violations and to maximise potential positive effects. It is important to carry out *ex ante* HRIAs at the earliest possible time in order for the outcome to be incorporated into the decision-making process.

On the other hand, *ex post* HRIAs aim to measure the actual impact of activities on human rights and therefore can take place after an activity. While impact assessments should ideally be carried out *ex ante* in order to establish the feasibility of a project and avoid human rights violations from the outset, it can also be applied at particular stages of the project cycle. In the context of a loan agreement, a HRIA can also be undertaken to correspond to the staggered release of the loaned amounts, if the loan comes in different tranches.

E. How can the impact of an activity or project to human rights be adequately measured?

In previous HRIAs, the emphasis has been on quantitative indicators because of the hope that they would provide an objective assessment of the realization of human rights. The Office of the High Commissioner for Human Rights' draft Guidelines on poverty reduction strategies suggest a number of indicators with regard to the right to food; the right to health; the right to education; the right to work; and the right to adequate housing. Quantitative research is the collection of numerical data about a situation. It will include demographic data, surveys, results of questionnaires and other statistical information.

The second type of research is qualitative research. Simply put, this research provides a narrative about people's experiences. Qualitative research might include focus group discussions, interviews with key rights-holders, interviews with experts on the activity or project and on the rights issues, case studies of particular groups and individuals, and questionnaires which ask for narrative responses. All of these should involve a meaningful, rather than a perfunctory, engagement with potentially affected individuals and groups.

F. Who should conduct a HRIA in an international loan context?

To ensure the integrity and credibility of the HRIA process, I submit that it must be undertaken by an independent assessor, either by (1) a reputable HRIA

provider or (2) by the debtor country's national human rights institution, if any, provided that the latter enjoys constitutional or statutory independence from the country's political branch. If a HRIA provider is chosen, its expenses must be defrayed jointly by the creditor and the debtor country.

The situation that ought to be avoided here is allowing the debtor country to conduct on its own the HRIA. This is a recipe for a bogus HRIA because, typically, debtor countries want to quickly get hold of the money by resorting to short-cuts in the HRIA process.

A good example of a HRIA provider is the Human Rights Compliance Assessment (HRCA) launched by the Danish Institute for Human Rights, a national human rights institution. It is the most comprehensive tool available for private companies to check their human rights performance. An online database with about 350 questions (covering more than 1000 indicators) allows registered users to systematically assess the human rights impact of particular projects or overall business operations. The analysis is based on more than 80 human rights treaties and ILO conventions covering internationally recognised human rights and criteria updated on a yearly basis. After completion of the questionnaire, companies receive a report outlining key areas of compliance and non-compliance and offering suggestions for strengthening the most crucial areas. If private companies can engage the services of an independent HRIA provider, governments can do the same.

G. What HRIA for international loan agreements should contain?

1. The HRIA for a loan agreement should divulge every relevant detail concerning the loan contract, including the principal amount loaned, interest rates, maturity, penalties, as well as the positive and negative covenants. The HRIA should also fully describe the proposed activity or project which will be financed by the loan. If the loan is for a railway or an airport, for example, the HRIA should also divulge whether the creditor has reserved the right to select the contractor or contractors for the project. Full transparency must be ensured.

2. The HRIA must use an explicit human rights framework. In some cases, there are assessments where no real attempt is made to use human rights obligations as the basis for assessment at all. For example, in the HRIA done prior to the signing of the US-Thailand Free Trade Agreement (conducted, ironically, by the Thailand Human Rights Commission), there was little reference to human rights and that human rights standards did not form the basis for the assessment in any meaningful way. HRIAs must be fundamentally rooted in human rights standards if they are to be considered as genuine and credible HRIAs.

3. The HRIA should identify the legal, regulatory and administrative rules to which the contracting of the loan is subject. This should include the relevant laws of the debtor country. In many countries, the relevant laws require the approval of the legislature before the executive branch of government can enter into a loan. This ensures the loan contraction is legally authorised and helps in avoiding corruption.

4. The HRIA should describe the present human rights conditions in the area surrounding the activity or project to be financed by the loan. What is the human rights situation before the activity or project is implemented? This step entails the identification of those rights that stand to be affected by the activity or project. They are the rights closely linked to the activity or project. A fixed set of criteria, based on international human rights standards, is to be used throughout the process. The assessment should reflect the reality of a situation as represented in consistent indicators. For an HRIA to be successful, it must be based on an in-depth evaluation of the impact of the loan-supported activity or project on the human rights situation.

5. The HRIA should include a detailed and evidence-based discussion on what is likely to change as a result of the loan-supported activity or project. What sort of changes the activity or project will bring? And what is the implication for particular human rights identified? The impact assessments that have been most successful in terms of identifying severe social impacts on specific people have employed a combination of quantitative and qualitative measures including detailed case studies of affected persons.

6. Finally, the HRIA must contain a clear set of conclusions to guide the creditor and the debtor country. There are four possible conclusions that can be reached at the end of a HRIA:

(a) No negative impact on any relevant human rights is identified and the loan agreement can proceed. This is the ideal scenario;

(b) A negative impact is identified and the loan-backed activity or project needs to be calibrated; or mitigating measures should be introduced to address that negative impact;

(c) A negative impact on one or some human rights is identified, but the loan-backed activity or project does not need any changes because doing so will result in a negative impact on another set of rights. This involves a trade-off that requires judgment call as to what human rights to prioritise over others;

(d) A negative impact is identified and, because of its severity, the loan-backed activity or project needs to be discontinued as a result.

In conclusion, human rights are too important a matter to be left exposed to the potential danger posed by certain loan-supported activities or projects. To prevent such a risk, I repeat the growing call that, as a pre-requisite to entering into an international loan agreement, the contracting parties should satisfy themselves that a credible HRIA has been undertaken and that any negative impact identified has either been avoided or at least mitigated.