

Human Rights Principles – Can They be Applied to Improve the Realization of Social Human Rights?

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Preface

Is increased reference to the term “principles” in the context of human rights a positive development or a threat to the effective enjoyment of human rights? In international environmental law, environmental principles have long had a central position.¹ In international human rights law, on the other hand, there has been much less emphasis on such principles. Human rights principles have been applied so far primarily in the context of economic and social human rights,² and have been found to represent a “constitutional dynamic”.³ This article though seeks to identify the underlying idea and purpose of human rights principles and aims, particularly, to identify whether human rights principles can be a way to strengthen social human rights. Social human rights include the right to food, housing, water, and health care, as well as the protection of the family, while economic human rights include the right to property, work, favorable working conditions, and social security for those not able to work.⁴ A particular emphasis will be given to the right to food and the right to water, as these provide a most interesting context for analyzing public and corporate conduct relating to the regulation of and use of scarce resources. In addition, the article will seek to identify whether the stronger emphasis on human rights principles – evidenced across the United Nations and intergovernmental or-

¹ For a comprehensive analysis of environmental principles, see N. de Sadeleer, *Environmental Principles: From Political Slogans to Legal Rules*, 2002.

² E. Wiles, “Aspirational Principles or Enforceable Rights? The Future for Socio-Economic Rights in National Law”, *American University International Law Review* 22 (2006), 35 et seq., finding that socio-economic human rights are adequately enforceable given the existence of well-functioning institutions, improved methodologies for courts’ analysis, improved access to justice and improved legal and administrative systems of protection.

³ G. van Bueren, “Including the Excluded: The Case for an Economic, Social and Cultural Human Rights Act”, *Public Law* 2002, 456 et seq. (457). For an analysis by the present author of human rights principles as applied to health care ethics, see H.M. Haugen, “Inclusive and Relevant Language: The Use of the Terms Autonomy, Dignity and Vulnerability in Different Contexts”, *Medicine, Health Care and Philosophy* 13 (2010), 103 et seq.

⁴ A. Eide, “Economic, Social and Cultural Rights as Human Rights”, in: A. Eide/C. Krause/A. Rosas (eds), *Economic, Social and Cultural Rights: A Textbook*, 2nd edition 2001, 17-18.

ganizations – will have a positive impact on public and corporate policy. The same considerations could be applied to non-governmental organizations (NGOs),⁵ but the article will limit itself to state and corporate actors. The reason why corporate actors are relevant in this respect is because of the increased emphasis on their human rights responsibility.⁶ A central premise for the article is that the most important means for realizing human rights is the daily conduct of appropriate public policies. This conduct is based on legislation which seeks to protect the most vulnerable and gives adequate procedural guarantees.

The article will start with an overall clarification of the term “principles” as it applies in the context of international law and legal philosophy, in some national constitutions and in guidelines on corporate conduct. Second, the human rights principles will be presented, followed by a review of the most relevant categorizations made in treaties, resolutions and documents. Then, there will be an analysis of how these principles are to be applied in directing state and corporate conduct, re-

⁵ K. Fretheim, *Rights and Riches: Exploring the Moral Discourse of Norwegian Development Aid*, 2008, finds that, based on interviews with employees in three Norwegian NGOs and the Ministry of Foreign Affairs (MFA), human rights rhetoric is central in the strategy documents of these organizations, but the employees working in the field offices are unsure about how to interpret and apply human rights in their operational work. As a way to remedy this pattern – which surely does not only apply to Norway – the International Council on Human Rights Policy has launched a Forum on Human Rights Principles and NGO Accountability <www.ichrp.org/en/forum>.

⁶ See UN Global Compact Principles 1 and 2 (Businesses should support and respect the protection of internationally proclaimed human rights; and should make sure that they are not complicit in human rights abuses. Further the “Protect, Respect and Remedy” Framework, originally outlined in Doc. A/HRC/8/5 of 7 April 2008 by the Special Representative of the United Nations Secretary-General on Human Rights and Transnational Corporations and other Business Enterprises, John Ruggie, and endorsed by the Human Rights Council in Doc. A/HRC/RES/8/7 of 18 June 2008. See also the 2000 version of the OECD Guidelines for Multinational Enterprises, where Guideline II. 2 reads: “Respect the human rights of those affected by their activities consistent with the host government’s international obligations and commitments”. In accordance with the Commentary, para. 2, the Guidelines apply “particularly concerning the international operations of these enterprises”, hence having an explicit extra-territorial dimension.

spectively. As this article seeks to explore a relatively new field of research, it is hoped that it will inspire more in-depth studies.

I. The Term “Principles” in International Law and Legal Philosophy

When analyzing “principles” within the framework of international law, the standard reference is Article 38 para. 1 lit. (c) of the Statute of the ICJ. This paragraph defines “the general principles of law recognized by civilized nations” among the sources of law that the ICJ should apply in order to decide disputes submitted to it. The “general principles of law” “enable[s] rules of law to exist which can fill gaps or weaknesses in the law ...”⁷ “General principles of law” are recognized as a formal source of international law, relating to the interpretation of treaties by courts or other judicial bodies.

“Principles” can also have another function, which can be found in article 31 para. 3 lit. (c) of the Vienna Convention on the Law of Treaties. According to this, together with the context, “any relevant rules of international law applicable in the relations between the parties” have to be taken into account. The scope of this provision is still disputed.⁸ What is clear, however, is that the application of a treaty is to be governed by the rules of international law in force at the time when the treaty is applied.⁹ “Principles” can be a part of the (evolving) rules of

⁷ R. Jennings/ A. Watts, *Oppenheim’s International Law*, 1992, 9th edition, 38. See also A. Cassese, *International Criminal Law*, 2003, 28.

⁸ E.g. the WTO Appellate Body has stated that the term “the parties” must be understood as the “WTO Members”, and not only the parties to the dispute, see WTO, *European Communities – Measures Affecting the Approval and Marketing of Biotech Products*, Reports of the Panel Doc. WT/DS291/R, Doc. WT/DS292/R, Doc. WT/DS293/R of 29 September 2006, para. 7.68; this position has been criticized by B. McGrady, “Fragmentation of International Law or ‘Systemic Integration’ of Treaty Regimes: EC – Biotech Products and the Proper Interpretation of Article 31 (3) (c) of the Vienna Convention on the Law of Treaties”, *JWT* 42 (2008), 589 et seq.

⁹ Third Report on the Law of Treaties, in: *Yearbook of the ILC 1964*, Vol. II, 8 et seq. (article 56, paras 1 et seq.). The full wording of the paragraph is: “1. A treaty is to be interpreted in the light of the law in force at the time when the treaty was drawn up. 2. Subject to paragraph 1, the application of

international law. This is specified by de Sadeleer stating that, “If a rule consists in implementing a principle, the court may go back to that principle to shed new light on the merits of the case; if a rule takes the form of a derogation of a principle, the court should interpret it restrictively.”¹⁰

Robert Alexy distinguishes between rules and principles¹¹ by explaining that “[r]ules are norms that, given the satisfaction of specific conditions, definitively command, forbid, permit, or empower. Thus they can be characterized as ‘definitive commands’”, while principles “are norms commanding that something must be realized to the highest degree that is actually and legally possible.”¹² Another way of explaining the distinction is that one can specify the boundaries of rules, outside which they do not apply, while one cannot specify the boundaries of principles. In a criticism of Alexy’s principle theory, it is nevertheless acknowledged that Alexy’s theory contributes to build a more comprehensive theory of legal argumentation.¹³ The observation that principles can act as optimizing norms seems consistent with de Sadeleer, who finds that by emphasizing principles, the underlying values and the spirit of the law will be more central.¹⁴ On the other hand, he emphasizes that courts only have recourse to principles when they need to make one interpretation prevail over another, that principles are “always used in tandem with more precise rules ...”¹⁵ Hence, an increased emphasis on principles will not necessarily create legal uncertainty.

a treaty shall be governed by the rules of international law in force at the time when the treaty is applied.”

¹⁰ de Sadeleer, see note 1, 237.

¹¹ The distinction between rules and principles was originally outlined by Dworkin; R. Dworkin, *Taking Rights Seriously*, 1977; R. Dworkin, *A Matter of Principle*, 1986.

¹² R. Alexy, “Legal Reasoning and Rational Discourse”, *Ratio Juris* 5 (1992), 143 et seq. (145). He refers to the latter as “commands to optimize”. See also R. Alexy, “Constitutional Rights, Balancing, and Rationality”, *Ratio Juris* 16 (2003), 131 et seq.; R. Alexy, *A Theory of Constitutional Rights*, 2002, and R. Alexy, “On the Structure of Legal Principles”, *Ratio Juris* 13 (2000), 294 et seq.

¹³ R. Poscher, “The Principle Theory: How Many Theories and What is Their Merit?”, in: M. Klatt (ed.), *Institutionalizing Reason. Perspectives on the Legal Philosophy of Robert Alexy*, 2011.

¹⁴ de Sadeleer, see note 1, 237.

¹⁵ *Ibid.*, 274.

This article will analyze principles in a wider setting, by seeking to demonstrate that principles can also be included in the context of ensuring better compliance with treaties by public or corporate actors. The term “directing principles” has been introduced to describe the deliberations of courts,¹⁶ but it can be applied more generally, as principles can guide the legislator, frame the discretionary power of administrations and influence courts. “Directing principles” are thus applicable both in the legal and in the political sphere. Some principles are common for international human rights law as well as e.g. international environmental law.¹⁷

II. The Term “Principles” as Applied in National Constitutions

An overview of how economic, social and cultural rights are recognized in national constitutions finds that there are three main approaches.¹⁸ First, these rights are recognized as justiciable rights. Second, some rights are recognized in a separate “Bill of Rights”, while third they are recognized as “Directive Principles of State Policy”.¹⁹ South Africa, which has a comprehensive “Bill of Rights” Chapter in the Constitution, and India, which has a part in its Constitution termed “Directive Principles of State Policy” will be used as examples. These two countries show that irrespective of the manner by which the social human

¹⁶ de Sadeleer, see note 1, 250, 263-303. Moreover, S. Fukuda-Parr, “Human Rights and Human Development”, in: K. Basu/ R. Kanbur (eds), *Arguments for a Better World: Essays in Honor of Amartya Sen: Volume II: Society, Institutions, and Development*, 2009, 96, finds that human rights principles “guide designs on institutional arrangements.”

¹⁷ Ibid., 275-289, emphasizing the procedural rights to information, participation, and access to justice; see also J. Ebbesson, “The Notion of Public Participation in International Environmental Law”, *Yearbook of International Environmental Law* 8 (1997), 51 et seq.

¹⁸ M. Ssenyonjo, *Economic, Social and Cultural Rights in International Law*, 2009, 152 et seq.

¹⁹ E.g. the Indian Constitution. Although the Directive Principles are asserted to be “fundamental in the governance of the country,” they are not legally enforceable. Instead, they are guidelines for creating a social order characterized by social, economic, and political justice, liberty, equality, and fraternity as enunciated in the constitution’s preamble.

rights are included in the Constitution, these rights are nevertheless considered justiciable before the courts.

Article 27 para. 1 of the South African Constitution states that “Everyone has the right to have access to a. health care services, including reproductive health care, ... b. sufficient food and water; and c. social security ...” Moreover, in accordance with para. 2, “The State must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights”. The terms “reasonable” and “available” both give the policy a certain latitude. Moreover, articles 36 and 37 identify the limitations that can be applied generally and during states of emergencies, respectively. The social human rights are not listed among the non-derogable rights of article 37 para. 5 lit. (c). This is a different approach from that found in the ICESCR, where social human rights can be limited under certain circumstances but not derogated from. Hence, the South African Constitution, while recognizing social human rights as such and not just as “principles”, is formulated in a manner through which the scope is somewhat more narrow.

One example of a clear distinction between “rights” and “principles” is the Constitution of India. Part III deals with “Fundamental Rights”, in the realm of equality and freedom, but also includes cultural and educational rights. Part IV deals with “Directive Principles of State Policy”, which are specified in article 37 as not “enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the state to apply these principles in making laws”. They include several provisions relating to an adequate standard of living and promotion of educational and economic interests of Scheduled Castes and Scheduled Tribes. The Indian Supreme Court, however, has interpreted the right to life to encompass the right to food.²⁰ Therefore, the separation between the “rights” and the “principles” is not as strict as it might appear. Nevertheless, as the “principles” are not enforceable, but only “directive”, the term “principles” has a different connotation from the term “human rights”. Directive Principles do address standards of conduct. This use of the term “principle”, however, is not similar to the term “human rights principles” understood as specifying a minimum requirement of public conduct. To give further examples, now another realm will be reviewed, which recently has seen a flourishing of the term “principles”, namely the realm of corporate conduct.

²⁰ See note 59 below.

III. Principles Applied in Corporate Conduct Guidelines

Several examples can be given of the application of the term “principles” in the context of corporate conduct. The four examples given are not intended to represent an exhaustive list.

First, the OECD Guidelines for Multinational Enterprises which are recommendations addressed to multinational enterprises. They provide voluntary principles and standards for responsible business conduct consistent with applicable laws. They aim to ensure that the operations of these enterprises are in harmony with government policies, to strengthen the basis of mutual confidence between enterprises and the societies in which they operate, to help improve the foreign investment climate and to enhance the contribution to sustainable development made by multinational enterprises. The Guidelines are part of the OECD Declaration on International Investment and Multinational Enterprises. The other elements of it relate to national treatment, conflicting requirements on enterprises, and international investment incentives and disincentives.²¹ The Commentary on the OECD Guidelines for Multinational Enterprises states under Commentary on National Policies “2. Obeying domestic law is the first obligation of business. The Guidelines are not a substitute for nor should they be considered to override local law and regulation. They represent supplementary principles and standards of behaviour of a non-legal character ...”²²

Second, the lack of adequate legal and administrative remedies for alleged human rights-incompatible corporate conduct has been addressed by the Special Representative of the United Nations Secretary-General on Human Rights and Transnational Corporations and other Business Enterprises, in his “Respect, Protect, Access to Remedy” framework.²³ Subsequently, the Special Representative, in the context of remedies, specified that any “grievance mechanisms” must meet certain principles to be credible and effective;²⁴ legitimacy (acting sufficiently independently); accessibility (in terms of language, costs and travel distance); predictability (clear procedures, including monitoring of how decisions are implemented); equitability (parties are treated fairly); right-compatibility (decisions are in accordance with international hu-

²¹ <<http://www.oecd.org/dataoecd/56/36/1922428.pdf>>.

²² Ibid.

²³ See note 6.

²⁴ Doc. A/HRC/14/27 of 9 April 2010, para. 94; see also Doc. A/HRC/8/5, see note 6, para. 92.

man rights standards); transparency (concerning both process and outcome); and dialogue and engagement. These principles are both relevant and appropriate, but they apply to only one aspect of public policy, namely the availability of adequate remedies.

Third, the UN Special Representative has issued Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect, and Remedy” Framework (Guiding Principles).²⁵ Each of the three paragraphs introducing each element lists “Foundational Principles”. The term “must” is applied when addressing states, while the term “should” is applied when addressing corporations. When outlining the content of the corporate responsibility to respect human rights, it is specified that,

“The responsibility of business enterprises to respect human rights refers to internationally-recognized human rights – understood, at a minimum, as those expressed in the International Bill of Human Rights and the principles concerning fundamental rights set out in the International Labor Organization’s Declaration on Fundamental Principles and Rights at Work.”²⁶

This use of the term “principles” when specifying the content is somewhat surprising, as the mentioned instruments explicitly apply the term “rights” and hardly apply the term “principles”.²⁷ The Guiding Principles e.g. state that business enterprises should respect human rights, which means they should avoid infringing on the human rights of others and should address adverse human rights impacts that they may cause or contribute to. Business enterprises whose operations or operating contexts pose risks of severe human rights impacts should report formally on how they address them. In all instances, communica-

²⁵ Doc. A/HRC/17/31 of 21 March 2011, Report of the Special Representative of the United Nations Secretary-General on Human Rights and Transnational Corporations and other Business Enterprises, John Ruggie, Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework.

²⁶ *Ibid.*, principle 12.

²⁷ Arts 2 and 3 lit. (b) of the ILO Declaration apply the phrase “principles concerning fundamental rights ...”. As an example, in the ICCPR and ICESCR the term “principles” is used three times in each of them. ICCPR arts 15 para. 2 and 41 para. 1 lit. (c) refer to the “general principles of law” and “generally recognized principles of law” respectively; ICESCR article 11 para. 2 lit. (a) refers to “principles of nutrition” and article 13 para. 4 refers to the principles of article 13 para. 1, which will be elaborated in the context of the principle of empowerment below.

tions should “Provide information that is sufficient to evaluate the adequacy of an enterprise’s response to the particular human rights impact involved.”²⁸ This application of the term “principles”, through which principles are understood only as operating at a meta-level, is an understanding that could be challenged.

Fourth, the World Bank, FAO, IFAD and UNCTAD’s “Principles for Responsible Agricultural Investment that Respects Rights, Livelihoods and Resources”, adopted in 2010, make use of the term principles in the title and throughout the document, by specifying seven principles:²⁹ respecting existing rights to land; food security; transparency and accountability; consultation and participation; rule of law; social sustainability; and environmental sustainability. While several of the principles have a similar wording to the human rights principles, which will be explained in the section below, the document does not refer to human rights once. As there has been much emphasis on corporations’ human rights responsibility, this must be said to be surprising. The fundamental nature of human rights principles is that they derive from specific human rights provisions and specify the minimum conduct when seeking to implement these human rights. Principles which are seemingly similar to human rights principles, but which are a mixture of corporate principles and good governance principles might serve some functions, but will not be adequate in order to protect the rights of vulnerable communities which are faced with agricultural investment projects.³⁰

In summary, one can notice that the term “principles” is applied in corporate guidelines in a somewhat confusing manner, and cannot be considered as human rights principles. The term is applied both as an overarching one and also in the context of good governance and corporate conduct. There is now a need to have a clearer understanding of exactly what comprises human rights principles.

²⁸ See note 25, principle 21 lit. (b).

²⁹ <http://siteresources.worldbank.org/INTARD/214574-1111138388661/22453321/Principles_Extended.pdf>.

³⁰ For the most critical comments to the content of the Principles, see Food First Information and Action Network (FIAN) et al., *Why We Oppose the Principles for Responsible Agricultural Investment (RAI)*, 2010; for a (conditional) refutation of this criticism, see H.M. Haugen, “Approaches towards valuing local and indigenous peoples’ use of ‘non-timber forest products’ in the context of land acquisition”, *Law, Environment and Development Journal* 7 (2011), 17 et seq., (24, note 31).

IV. Specifying the Human Rights Principles

The identification of human rights principles will be based on standard sources of international law. Therefore, one has to start with the ordinary meaning to be given to the terms of a treaty in their context and in the light of its object and purpose according to article 31 para. 1 Vienna Convention on the Law of Treaties. Together with the context, any subsequent agreement and practice according to article 31 para. 3 lit. (a) and (b) shall be taken into account. The list that follows draws upon various other categorizations which will be reviewed in the following.

The first human rights principle, dignity, can be found in the preamble of the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR), containing a recognition that “these rights derive from the inherent dignity of the human person.”³¹ Non-discrimination is the second human rights principle,³² recognized by both the ICESCR and the ICCPR.³³ In General Comment No. 3, the Committee on Economic, Social and Cultural Rights stated that ensuring enjoyment of human rights based on non-discrimination is a state obligation of “immediate effect.”³⁴ The rule of law, including access to effective remedies, is the third human rights principle. This, for example, is enshrined in the ICESCR, in article 2 para. 1 by the wording “particularly the adop-

³¹ Preamble ICESCR and ICCPR, see also article 1 of the Universal Declaration of Human Rights.

³² While non-discrimination must be considered to constitute a rule, the other principles must be primarily understood according to Alexy as “norms commanding that something must be realized to the highest degree that is actually and legally possible” (id., “Legal Reasoning and Rational Discourse”, see note 12, 145).

³³ Article 2 para. 2 of the ICESCR reads: “The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.” Article 3 reads: “The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant.” A similar wording can be found in article 2 para. 1 and article 3 ICCPR.

³⁴ Committee on Economic, Social and Cultural Rights, *General Comment No. 3: The Nature of States Parties Obligations (art. 2 para. 1)*, Doc. E/1991/23 of 14 December 1990, para. 1.

tion of legislative measures” in the context of “appropriate means”. Lack of appropriate legislation will result in less effective human rights realization. Without there being either any possible means through which a violation of one’s human rights can be effectively sanctioned or some form of restitution, compensation or satisfaction,³⁵ the human rights guarantees are mere rhetoric.³⁶

Accountability is the fourth human rights principle, applying to duty bearers, subjecting them to scrutiny and possible sanctions if they fail to comply with objective standards. As states have consented to be bound under international law to comply with the human rights treaties once ratified, they are duty bound to fulfill their obligations. These obligations are formulated in more explicit terms in the ICCPR than in the ICESCR, as the former “undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant” and to “adopt such legislative or other measures as may be necessary to give effect to the rights recognized ...”³⁷ Under the latter the respective State Party “undertakes to take steps, individually and through international assistance and cooperation ... to the maximum of its available resources ... by all appropriate means ...”³⁸ This different wording does not imply that the human rights recognized are a less integral part of international law or that the obligations imposed are weaker. What the different wording implies is that the latter acknowledges states’ different resource bases, which is to be taken into account in determining whether or not a state has complied with its international obligations.

Transparency is the fifth human rights principle. This principle is more explicitly recognized in the most recent human rights treaties, most notably the Convention on the Rights of Persons with Disabilities

³⁵ This list is taken from the Draft Articles on State Responsibility, arts 35 through 37; as found in ILC, *Report on the Work of its Fifty-Third Session 23 April-1 June and 2 July-10 August 2001*, Doc. A/56/10 of 2001, Chapter IV. Restitution is an obligation to – if possible – “re-establish the situation”; compensation is some form of monetary compensation to be provided “insofar as the damage is not made good by restitution”; and satisfaction could be “an acknowledgement of the breach, an expression of regret, a formal apology or any other appropriate modality.”

³⁶ Note in this context that “access to remedy” is the third element in the Framework for Transnational Corporations and other Business Enterprises, see note 6.

³⁷ ICCPR arts 2 paras 1 and 2.

³⁸ ICESCR article 2 para. 1.

(CRPD). Here article 4 para. 3 might serve as an example, stating that State Parties shall “closely consult with and actively involve” persons with disabilities in the “development and implementation of legislation and policies” to implement the Convention. Moreover, article 33 regarding “National implementation and monitoring” and article 32 para. 1 lit. (a), “Ensuring that international cooperation, including international development programmes, is inclusive of and accessible to persons with disabilities.” All this is not possible without a minimum of transparency. Participation is the sixth human rights principle and is recognized in several treaty provisions, most frequently in the Convention on the Elimination of All Forms of Discrimination against Women.³⁹ Only effective participation guarantees that the realization of rights takes place through effective mobilization and involvement of all public and private institutions and all inhabitants. Empowerment being the seventh human rights principle. The core of empowerment is to strengthen peoples’ authority or power to do something. According to the Oxford Companion to Law, “Empowerment entails the process of enabling persons or groups to participate more fully as rights bearing entities within a society and state.”

These seven principles form the core of the requirements on the conduct of any policies, and can be termed “obligations of conduct”. This listing does not include the principle of proportionality,⁴⁰ and other proposed human rights principles, as will be explained below.

³⁹ CEDAW arts 7 lit. (b) (Political and Public Life); 8 (Representation); 10 lit. (g) (Education); 13 lit. (c) (Economic and Social Benefits); 14 para. 2 lit. (a) (Development Planning); and 14 para. 2 lit. (f) (Community Activities), the two latter ones applying to women in rural areas.

⁴⁰ The principle of proportionality, as defined by Alexy 2003, see note 12, 135, consists of three sub-principles: the principle of suitability, of necessity, and of proportionality in the narrow sense. The latter is specified as whether a measure “excessively burdens the individual compared with the benefits it aims to secure”; S. Tsakyrakis, “Proportionality: An Assault on Human Rights?” *Journal of Constitutional Law* 7 (2009), 474. As it primarily relates to judgments, the principle of proportionality must be understood to apply to a “narrow” sphere, and not to public conduct generally. On proportionality in the WTO, see note 61 below.

V. Reviewing the Other Categorizations

In the following, article 3 of the CRPD; the Attachment to the Report from the 2003 Second Interagency Workshop on Implementing a Human Rights-based Approach in the Context of UN Reform;⁴¹ the 2008 Report on Indicators to the Twentieth Meeting of Chairpersons of the United Nations Human Rights Treaty Bodies;⁴² and the FAO categorization first made in a 2007 “Focus On the Right to Food” publication, will be reviewed.⁴³ With the exception of the first, which specifies principles of the “present Convention”, the three others are formulated in a manner by which they must be understood as being generally applicable.

The CRPD is included as it is the first treaty that specifies international treaty human rights principles, and therefore is of interest. Two aspects of CRPD’s listing are worth mentioning. First, “equality” is mentioned twice.⁴⁴ The term “equality” must be understood to be encapsulated by the non-discrimination principle. Second, “accessibility” is listed. Whether or not accessibility should be considered a human rights principle is somewhat more complex. The Committee on Economic, Social and Cultural Rights has defined accessibility as a “core content” of the substantive human rights.⁴⁵ Hence, in order for the right to food or water to be realized, appropriate accessibility (physical and economical) is crucial. While human rights principles were defined above as “requirements on the conduct of any policies” by this definition, increased accessibility to relevant goods and resources should be the outcome of adequate human rights policies (“obligation of result”), but not mixed with the conduct of the policy *per se*.

⁴¹ United Nations Development Group (UNDG), Attachment 1: *The Human Rights Based Approach to Development Cooperation: Towards a Common Understanding among UN Agencies*, 2003, 2.

⁴² Doc. HRI/MC/2008/3 of 6 June 2008: *Report on Indicators for Promoting and Monitoring the Implementation of Human Rights; Report to the Twentieth Meeting of Chairpersons of the Human Rights Treaty Bodies*, 2008, para. 10.

⁴³ FAO, *Focus on the Right to Food: Right to Food and Indigenous Peoples*, 2007, 2.

⁴⁴ CRPD arts 3 lit. (e) (“Equality of opportunity”) and 3 lit. (g) (“Equality between men and women”).

⁴⁵ For one of many examples, see Committee on Economic, Social and Cultural Rights, *General Comment No. 12: The Right to Adequate Food (art. 11)*, Doc. E/C.12/1999/5 of 12 May 1999, para. 8.

The Second Interagency Workshop on Implementing a Human Rights-based Approach in the Context of UN Reform, held in 2003, adopted an understanding of human rights principles which has been generally approved.⁴⁶ Human rights principles are identified as: universality and inalienability; indivisibility; interdependence and inter-relatedness; equality and non-discrimination; participation and inclusion; accountability and rule of law. They are somewhat similar to the ones identified above, leaving out dignity, transparency and empowerment. This listing includes, however, equality and inclusion, but it can be argued that these two fall within the scope of the human rights principles of non-discrimination and participation.

Still the ones listed under Section IV. of this article are, however, different from those listed above. While acknowledging the importance of these, they just seem to describe the nature of human rights. The nature of human rights has been outlined in the Vienna Declaration and Programme of Action, which stated that “All human rights are universal, indivisible and interdependent and interrelated.”⁴⁷ Hence, the nature of human rights determines how these rights are to be understood. The human rights principles, on the other hand, determine the requirements of the relevant processes that must take place to ensure the best realization of human rights (“obligation of conduct”). This distinction between nature and principles cannot be applied deterministically, however.⁴⁸

⁴⁶ OECD, *DAC Action-Oriented Policy Paper on Human Rights and Development*, 2007, 13, note 2 states “UN Agencies have agreed on the following catalogue ...”; see also A. Oshaug, “Monitoring the Human Right to Adequate Food at Country Level: Challenges and Needed Actions”, in: W. Barth Eide/ U. Kracht (eds), *Food and Human Rights in Development*, Vol. II, 2007, 433, and J. Kirkemann Boesen/ H.O. Sano, “The Implications and Value Added of a Human-Rights-Based Approach”, in: B.A. Andreassen/ S.P. Marks (eds), *Development as a Human Right: Legal, Political and Economic Dimensions*, 2nd edition, 2010, 58 et seq.

⁴⁷ Doc. A/CONF.157/23 of 12 July 1993, Vienna Declaration and Programme of Action, para. 5.

⁴⁸ Fukuda-Parr, see note 16, treats the interdependence and indivisibility of human rights – implying that the realization of one human right will depend on how other human rights are being enjoyed – as human rights principles, finding that these two aspects cannot be applied in order to avoid sequence and resource prioritization. Therefore, those concepts which can also be argued to belong to the *nature* of human rights can give some guid-

In the 2008 Report on Indicators to the Twentieth Meeting of Chairpersons of the United Nations Human Rights Treaty Bodies, the human rights principles are understood to be “cross-cutting” and applying to the “process to implement and realize human rights”. As they are introduced with the term “for instance”, this clearly indicates that the human rights principles mentioned above cannot necessarily be understood to be an exhaustive list. As participation is a human rights principle, it follows logically that such participation is inclusive or inclusionary. Moreover, there is a strong relationship between participation and empowerment, but as argued above, these are adequately understood as distinct human rights principles. There are three instances where participation cannot be considered to lead to empowerment. First, if there is no substantive and actual involvement and participation takes place only through one formal consultation, with limited dialogue, resembling forms of co-optation. Second, if participation is impeded by lack of adequate translation, description and visualization, so that there are no real possibilities to understand the core of the issues at stake. Third, if there is an understanding that participation can adequately take place through certain persons said to represent others, without questioning the participating persons’ interests or degree of being affected, and the potential tensions between those present and those not present.

The fourth categorization, developed by FAO, is identical to the one elaborated in the section above, and still seems to be relatively little known.⁴⁹ Interestingly, the first time FAO presented this listing was in a publication on the right to food and indigenous peoples. There can be no doubt that the indigenous peoples’ relationship to their land implies that there must be high demands on the quality of any decision-making processes which will affect their access to their land and resources. Many indigenous peoples have not adequately been able to take part in decision-making processes, both nationally and locally, leaving them vulnerable to any outcomes of these processes. From reviewing international law, it is clear that there are few provisions which outline the

ance on the processes of human rights realization, which can be assessed by the lens of human rights *principles*.

⁴⁹ One of the few examples of applying the Food and Agriculture Organization (FAO) list is A. Eide, *The Right to Food and the Impact of Liquid Biofuels (Agrofuels)*, 2008, 28, who identifies the seven principles above, but adds another, namely “good governance”. Moreover, Ssenyonjo, see note 18, 147 lists “monitoring” as one of the principles.

content of such participation.⁵⁰ Specific policy standards applicable to indigenous peoples have been adopted by the World Bank,⁵¹ and the IFC is in the process of developing a Performance Standard 7 – Indigenous Peoples, with “special requirements” outlined in paras 14 through 20.⁵² The particular position of indigenous peoples in relation to their land and resources is emphasized in these policies and standards. These examples are illustrative of an overall tendency to provide for a more comprehensive participation by and empowerment of indigenous peoples.

This review has shown that the FAO categorization is the most comprehensive one, and should be applied to guide public conduct. While both the report from the Second Interagency Workshop, and the Report on Indicators to the Twentieth Meeting of Chairpersons of the United Nations Human Rights Treaty Bodies list “inclusion”, it is difficult to distinguish substantively between “participation” and “inclusion”.

⁵⁰ The most specific provision is ILO Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries stating in article 6 lit. (a) that consultations shall take place “through appropriate procedures, and in particular through their representative institutions ...” It is not specified what is meant by “appropriate procedures”. The Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of the Benefits Arising out of their Utilization (CBD COP 6 Decision VI/24: Access and Benefit-Sharing as Related to Genetic Resources), use the weak term “should” when prior informed consent of indigenous and local communities is addressed; see arts 26 lit. (d) and 31; see also 16 lit. (b) (ii) and 16 lit. (d) (iii). All provisions referring to indigenous peoples’ consent in the 2010 Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization, Decision X/1, Annex, restrict their influence, by stating that the provisions shall be applied “in accordance with”, “subject to” or “as required by” domestic legislation or domestic law.

⁵¹ The Operational Policy and Bank Procedure on Indigenous Peoples (OP/BP 4.10 of July 2005), specifying in paras 18, 20 that the “free, prior, and informed consultation process” should lead to “broad support” for any required relocation, and in the absence of such support, the “borrower will not carry out such relocation”. See also Operational Policy (OP/BP 4.12 of December 2001) on Involuntary Resettlement.

⁵² See also IFC’s Draft of Performance Standard 1 on Assessment and Management of Social and Environmental Risks and Impacts; Draft of Performance Standard 5 on Land Acquisition and Involuntary Resettlement; Draft of Performance Standard 6 on Biodiversity Conservation and Sustainable Natural Resource Management; and Draft of Performance Standard 8 on Cultural Heritage.

sion". "Empowerment", on the other hand, seems to be more distinctive. Empowerment is the result of many comprehensive processes, where education and transformation of power relations are crucial.

VI. State Conduct

State conduct will to a lesser or greater extent apply to almost any sphere of society. In line with the scope of this article, the examples will be on social human rights, particularly the right to food and water. As food and water are scarce resources, adequate public measures are essential to ensure adequate management, distribution and utilization of these resources. While the examples to illustrate the application of the seven human rights principles are from different sectors, they are all relevant for central areas of public conduct, seeking to show what states must consider and prioritize. The aim of this section is not to test by specific case studies whether a policy conduct that explicitly observes the human rights principles is markedly different from policies conducted irrespective of the human rights principles. Rather, this section seeks to identify relevant policy areas where the active observation and application of the human rights principles will make a difference.

Despite being the foundation for human rights, dignity does not always appear too visible in justifying certain directions of public conduct. A notable exception is the Vienna Declaration and Programme of Action, which "affirms that extreme poverty and social exclusion constitute a violation of human dignity ..."⁵³ As human dignity is inherent to all human beings simply by being human,⁵⁴ a violation of this dignity must be considered as a challenge for humanity as a whole. Facing a situation where more than one billion persons who are living under extreme poverty are facing daily violations of their dignity must be understood as requiring bold action. Cash transfer programs to assist poor families in purchasing adequate food is one way to mitigate the conditions of poverty,⁵⁵ but must be supplemented by other measures to enhance the self-sufficiency of these families.

⁵³ See note 47, para. 25. Poverty is also addressed in para. 14.

⁵⁴ J. Donnelly, *Human Dignity and Human Rights*, 2009, 10: "being human makes one worthy or deserving of respect."

⁵⁵ For a comprehensive review of cash transfer programs, see the 2009 report by the Independent Expert on the Question of Human Rights and Extreme Poverty, Doc. A/HRC/11/9 of 27 March 2009. While no resolution was

Turning to non-discrimination, this principle is absolutely central for the realization of economic and social human rights. Below, indirect discrimination will be assessed – resulting from laws, policies or practices appearing neutral, but which have a disproportionate impact on the exercise of human rights. Article 2 para. 2 of the ICESCR states that the state shall guarantee that the rights are exercised without discrimination of any kind. “Property” is listed as one of the prohibited grounds for discrimination. The General Comment which outlines the content of article 2 para. 2 states that “access to water services and protection from forced eviction, should not be made conditional on a person’s land tenure status, such as living in an informal settlement.”⁵⁶ Even if General Comments are not legally binding, the specification that states are not permitted to give less priority to water delivery in informal settlements than in established residential areas must nevertheless be noted.

Rule of law is a comprehensive human rights principle. Addressing all relevant dimensions derived from this principle is simply not possible. Still it will be briefly analyzed how courts might end up in cases where such rights have not been implemented in national law. The right to food is recognized in relatively few national legislations,⁵⁷ with few explicit prohibitions,⁵⁸ and with relatively few successful court cases,⁵⁹

adopted specifically on this report, the Human Rights Council later in 2009 mandated further work on the Draft Guiding Principles on Extreme Poverty and Human Rights, see Doc. A/HRC/RES/12/19 of 2 October 2009.

⁵⁶ Committee on Economic, Social and Cultural Rights, *General Comment No. 20: Non-Discrimination in Economic, Social and Cultural Rights* (art. 2, para. 2), Doc. E/C.12/GC/20 of 2 July 2009, para. 25, referring to *General Comment No. 15: The Right to Water* (arts 11 and 12), Doc. E/C.12/2002/11 of 20 January 2003, para. 16 lit. (c); and *General Comment No. 4: The Right to Adequate Housing* (art. 11 para. 1), Doc. E/1992/23 of 13 December 1991, para. 8 lit. (a).

⁵⁷ While there are fewer than 30 countries which have provisions in their legislation on the right to food, FAO has developed a database consisting of strategies and laws adopted in 73 countries to create an adequate environment for the realization of the right to food.

⁵⁸ But see D. Marcus, “Famine Crimes in International Law”, *AJIL* 97 (2003), 245 et seq., building broad evidence that international criminal law criminalizes government action that creates famine. While General Comment No. 12, see note 45, para. 19, identifies six distinct “violations” of the right to food, it cannot be presumed that these are generally recognized.

⁵⁹ For an exception, see Supreme Court of India, *People’s Union for Civil Liberties v. Union of India and others: Written Petition [Civil] No. 196 of 2001*, Judgment of 2 May 2003 in which the right to food was understood

even if the right to be free from hunger according to article 11 para. 2 ICESCR is termed “fundamental”. Hence, there might be instances where the rule of law implies that corporate interests are more strongly emphasized than the human rights interests of persons and communities. Rule of law is, however, not only about what the courts do, but also concerns national parliaments and governments, and the right to food could become more influential on e.g. patent legislation and enforcement, if governments consider explicitly whether the realization of the right to food is likely to be affected by the exercise of patent rights.⁶⁰ This is about ensuring proportionality⁶¹ or weighing of interests.⁶²

The accountability principle is generally applicable, but becomes even more relevant where the service delivery is partly done by commercial actors. These actors must operate within the legal framework set out. Hence, the state maintains the overall accountability for the overall level of services or goods provided, but the specific provider is not relieved from accountability. As stated in General Comment No. 15 of the Committee on Economic, Social and Cultural Rights “The human right to water entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses. An adequate amount of safe water is necessary to prevent death from dehydration, reduce the risk of water-related disease and provide for consumption, cooking, personal and domestic hygienic requirements”.⁶³ Moreover, the World Water Council states that the World Water Forum “is not a place for private firms to exploit water as a commodity but, to the contrary, to discuss and find common solutions

as an integral element of the right to life, which is protected by article 21 of the Indian Constitution.

⁶⁰ For a comprehensive analysis, see H.M. Haugen, *The Right to Food and the TRIPS Agreement – With a Particular Emphasis on Developing Countries’ Measures for Food Production and Distribution*, 2007.

⁶¹ On WTO proportionality, see P. van den Bossche, “Looking for Proportionality in WTO Law”, *Legal Issues of Economic Integration* 35 (2008), 283 et seq.; see also M. Andenæs/ S. Zleptnig, “Proportionality: WTO Law in Comparative Perspective”, *Tex. L. Rev.* 42 (2007), 371 et seq.

⁶² See note 40; see also de Sadeleer, see note 1, 289 et seq.

⁶³ General Comment No. 15, see note 56, para. 2; see also para. 44 lit. (b) *ibid.* Relevant World Water Council material includes C. Dubreuil, *The Right to Water: from Concept to Implementation*, World Water Council 2006 and *id.*, *Synthesis on the Right to Water, 4th World Water Forum, Mexico, 2006*. See also in this respect A/RES/64/292 of 28 July 2010.

...”⁶⁴ These “solutions” must observe one of the core contents of the right to water, namely (economic) accessibility.

Transparency is crucial for allowing well-informed participation. Negotiations and signing of economic agreements or agreements on the transfer of or (long-term) lease of land are in many countries taking place without adequate transparency. The increased emphasis on participatory processes and enhanced transparency will be mutually reinforcing and will lead to a more effective collection and management of public resources and therefore improved human rights realization. Finally, empowerment is the result of a comprehensive and long-term effort in many policy spheres. The improved nutrition of children might serve as an example. In line with article 11 para. 2 lit. (a) ICESCR among other measures State Parties shall disseminate “knowledge of the principles of nutrition ...” When experiencing that more children survive, families will have reduced incentives to have as many children as possible, as an extra guarantee. When the birth rate falls, there will be less pressure on the school and health system. This will benefit the overall welfare of the states.

As the above examples illustrate, by emphasizing human rights principles across the various policy areas, state conduct will improve and lead to more effective human rights protection. Further case studies could identify which changes in policy conduct could be identified as a result of a more careful observation and application of human rights principles. This will also apply to courts. Both human rights and human rights principles have to be taken into account.

VII. Corporate Conduct

This section will not elaborate in detail on the human rights responsibilities of corporate actors,⁶⁵ but rather identify what determines the re-

⁶⁴ World Water Council, 5th World Water Forum: Frequently Asked Questions, 2009, FAQ 14.

⁶⁵ The central studies on corporations and human rights are O. De Schutter (ed.), *Transnational Corporations and Human Rights*, 2006; A. Clapham, *Human Rights Obligations of Non-State Actors*, 2006, 195; A. McBeth, *International Economic Actors and Human Rights*, 2010, 71 et seq. and 243 et seq.; see also K. Weilert, “Taming the Untamable? Transnational Corporations in United Nations Law and Practice”, *Max Planck UNYB* 14 (2010), 445 et seq.

sponsibility of corporate actors, and how far this responsibility extends, since human rights principles should also be observed by corporate actors as part of their overall human rights responsibilities. The analysis will primarily focus on the duty to respect human rights, identifying also how due diligence is to be exercised when relating to sub-contractors and suppliers.

The original mandate of the Special Representative of the United Nations Secretary-General on Human Rights and Transnational Corporations and other Business Enterprises was to do research and clarify the “sphere of influence” concept.⁶⁶ At the end of his first term, the Special Representative found, however, that while this concept “remains a useful metaphor for companies to think broadly about their human rights responsibilities and opportunities beyond the workplace, it is of limited utility in clarifying the specific parameters of their responsibility to respect human rights”.⁶⁷ Rather, he found that in line with the responsibility to respect, companies must “exercise due diligence to identify, prevent and address adverse human rights impacts related to their activities”.⁶⁸ He observed that the scope of due diligence to meet the corporate responsibility to respect human rights is not a fixed sphere, nor is it based on influence. Rather, it depends on the potential and actual human rights impacts resulting from a company’s business activities and the relationships connected to those activities.⁶⁹

Emphasizing due diligence as crucial in the context of respecting human rights, actually implies a wider understanding of what respecting human rights entails, being traditionally understood as non-interference. Hence, “[t]he duty to respect as formulated ... , incorporating the obligation of due diligence, therefore in some respects resembles the duty to protect human rights.”⁷⁰ Moreover, enhanced due diligence must be exercised in states with weak government institutions. The UN Special Representative stated that the “incidence of corporate-related human rights abuse is higher in countries with weak governance

⁶⁶ Doc. E/CN.4/RES/2005/69 of 20 April 2005, para. 1 lit. (c).

⁶⁷ Doc. A/HRC/8/16 of 15 May 2008, para. 18.

⁶⁸ *Ibid.*, para. 17.

⁶⁹ *Ibid.*, para. 25.

⁷⁰ *McBeth*, see note 65, 270; *Weilert*, see note 65, 503, finding that the Special Representative insists on a comprehensive corporate responsibility to respect; see also Doc. A/HRC/11/13 of 22 April 2009, paras 59-60; Doc. A/HRC/8/5 of 7 April 2008, paras 56-64.

institutions”.⁷¹ On a more general basis, “Governments currently lack adequate policies and regulatory arrangements for fully managing the complex business and human rights agenda”.⁷²

The OECD Guidelines under Part II. General Policies state that “Enterprises should ... 2. Respect the human rights of those affected by their activities consistent with the host government’s international obligations and commitments”. This does not fully capture the situation described by the Special Representative. By emphasizing consistency with the host government’s international obligations and commitments, corporate actors are only bound in the human rights sector by the respective Conventions signed.⁷³ The Commentaries to the OECD Guidelines under Part III. also state that obeying domestic law is the first obligation of business.⁷⁴ It is obvious that there are states with weaker and inadequate laws, and enterprises tend to exploit such situations when conducting their operations. The Special Representative requires the corporate actors therefore to consider the impact of their activities and this should be done irrespective of whether the host state has consented to take upon itself more demanding human rights obligations or not, or whether it has adequate laws and institutions in place.

Probably one of the most dramatic impacts of corporate conduct is the relocation of indigenous peoples. Here the already mentioned World Bank Policy states that in the absence of broad support, the actor borrowing World Bank funds “will not carry out such relocation ...”⁷⁵ and, applying only to IFC projects, it is stated that unless based on informed participation in negotiations with a successful outcome, a project involving relocation “will not proceed ...”⁷⁶ It has to be born in mind though while the ILO has recognized the principle of free, prior

⁷¹ J.G. Ruggie, *Consultation on Operationalizing the Framework for Business and Human Rights presented by the Special Representative of the United Nations Secretary-General on Human Rights and Transnational Corporations and other Business Enterprises, 5-6 October 2009, Opening Remarks*, 3.

⁷² *Ibid.*, 2.

⁷³ The international human rights treaties signed vary from country to country quite heavily, cf. e.g. the status of Norway with that of Singapore and Malaysia, see OHCHR, Status of Ratification of Human Rights Instruments, <www.2.ohchr.org/english/bodies/treaty/docs/HRChart.xls>.

⁷⁴ OECD Guidelines, see note 6, 39 (Commentary 2).

⁷⁵ World Bank, see note 51, para. 20.

⁷⁶ IFC, see note 52, para. 17. Note that this applies to “land subject to traditional ownership under customary use”.

and informed consent, the World Bank Group has not explicitly endorsed that principle.⁷⁷ Also those activities conducted by suppliers and subcontractors of corporate actors have to be in compliance with human rights standards.⁷⁸ This due diligence responsibility must be understood to be absolute.⁷⁹

VIII. Conclusion: Are there Inherent Dangers in Focusing on Human Rights Principles?

This article has applied a broad approach to studying human rights realization, based on the understanding that most important for ensuring enjoyment of human rights is the quality of policy formulation and implementation, including the content of laws and profile of budgets. As human rights principles establish minimum standards of conduct, more careful observation and application of human rights principles can contribute to enhancing the quality of both public and corporate conduct.

Human rights principles do not stand alone, but become effective when linked to and applied together with substantive human rights, emphasizing the process for their effective realization. Hence, there is no conflict between a stronger focus on human rights principles, focusing on policy formulation and implementation, and the focus on how to enforce substantive human rights before national and international courts.

Non-discrimination is the most frequently used human rights principle in the judicial realm. If allegations of violations of substantive human rights are presented before a court, the weight of the evidence will

⁷⁷ According to J. Cariño/ M. Colchester, "From Dams to Development Justice: Progress with 'Free, Prior and Informed Consent' Since the World Commission on Dams", *Water Alternatives* 3 (2010), 425 et seq. (426); R. Goodland, "Free, Prior and Informed Consent and the World Bank Group", *Sustainable Development Law & Policy* 4 (2004), 66 et seq.

⁷⁸ Special Representative of the United Nations Secretary-General on Human Rights and Transnational Corporations and other Business Enterprises Draft Guiding Principles for the Implementation of the United Nations "Protect, Respect and Remedy" Framework of 22 November 2010, Draft Guideline 15 (c).

⁷⁹ For an analysis of most of the Special Representative's reports, concluding that his mandate "was and still is very helpful on the complex issue of TNCs and human rights", see Weilert, see note 65, 503.

be stronger if it can be documented that the conduct in question has also been discriminatory. Moreover, if it can be proven that a decision-making process has been conducted without the required participation from the affected communities, this will substantively strengthen the complainants' arguments before the court.

Any promotion of human rights principles should emphasize that these are derived from ordinary sources of law, primarily human rights treaties. The most important role of human rights principles is the emphasis on obligation of conduct, guiding legislators, administrations and courts. This article has found that there is a strong basis for applying human rights principles next to human rights, as a more careful observation and application of these principles can contribute to enhance the quality of both public and corporate conduct.