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Strengthening the human right to sanitation as an instrument for inclusive development

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Chapter 4. Human Rights Principles

4.1 INTRODUCTION

The human right to sanitation (HRS) norm, which initially evolved through a bottom-up approach, has been enriched through principles contained in various sources of human rights law. Therefore, as a precursor to analysing the HRS in further detail, this chapter addresses the secondary research question: What are the human rights principles for addressing key human development challenges; and how do the principles promote inclusive development? The scope of the chapter is limited to analysing four aspects of international human rights (HR) that are directly relevant to understanding the HRS norm, subsequently discussed in Chapter 5, namely: the sources and meaning of HR (see 4.2); an overview of the HR principles (see 4.3); and the indicators for evaluating the performance of the HR principles (see 4.4). Section 4.5 presents the inferences from the chapter. However, this chapter does not cover other wider aspects of international HR law, such as the (non-)existence of a hierarchy in international legal norms, in further detail.

4.2 SOURCES AND MEANING OF HUMAN RIGHTS

This section analyses the sources of international HR law (see 4.2.1), as a precursor to understanding the meaning of HR (see 4.2.2).

4.2.1 Sources

The Statute of the International Court of Justice of 1945, article 38(1) recognises five sources of international law, including: customs, treaties between States, judicial decisions and the writings of publicists, soft law and principles. Principles are treated under the broader category of instruments (Box 2 in Figure 2.2) in the conceptual framework for this thesis and are therefore not specifically discussed below, in order to avoid redundancy.

Customary international law

Customs predate treaties as the oldest source of international law (Alston & Goodman, 2012; Smith, 2010), and are generally established where the following elements exist: (a) concordant practise by a number of States in relation to a particular situation; (b) continuity of that practise over a considerable time period; (c) a sense of legal obligation to follow the practise, *opinio juris*; and (d) general acquiescence of the practice by other States (see *Nicaragua v. US (Merits)* (1986). It is difficult to establish whether *opinio juris* reflect *lex*

lata (the law as it is) or *lex ferenda* (the law as it ought to be), just as it is controversial whether treaties and declarations constitute State practice or *opinio juris* (Roberts, 2001). As a result, some scholars propose that customs have evolved into a less rigid source of international law, the so-called ‘modern customs’ deduced from treaties and declarations rather than State practice; this portends to be more practical and democratic law (Alston & Goodman, 2012). Nonetheless, a few contradictions do not undermine consistent State practise, provided there is sufficient similarity in the practise among States and the inconsistency is treated as a breach by States.²⁵

Customs apply *erga omnes*. However, States can opt out or alter CIL through treaties or varied State usage, though the latter is more difficult to ascertain (Smith, 2010). However, the ratification of a treaty by a majority of States does not automatically convert all the treaty provisions into CIL without proof of States practise. For instance, though the Convention on the Rights of the Child 1989 (CRC) has been ratified by all the UN member states except the US, some provisions are merely aspirational and not all States comply with all the norms, but the principle of the best interest of the child which runs through several provisions of the CRC,²⁶ is now considered as CIL (Smith, 2010).

Although economic, social, and cultural rights are not commonly listed as part of customary international law, perhaps because the principle of progressive realisation limits evidence of a consistent pattern of gross violations, the gross violation of economic, social and cultural rights like food, health, adequate standard of living and related derived rights that are fundamental to human dignity could qualify as a violation of customary international law (Smith, 2010). Hence, I explore the customary international law (CIL) status of the HRS in Chapter 5.

Treaties

The Vienna Convention on the Law of Treaties of 1969 (VCLT) covers most of the fundamental aspects of the treaty making process (cf. Brölmann, 2012) and its article 2(a) defines a treaty as “an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more

²⁵ ICJ, Fisheries case (United Kingdom v. Norway), Judgement, 18 December 1951, ICJ Reports 1951, p. 131; ICJ, Continental Shelf case (Tunisia v. Libyan Arab Jamahiriya), Judgement, 24 February 1982, ICJ Reports 1982, p. 74; Continental Shelf case, p. 33; ICJ, Case concerning Military and Paramilitary Activities in and against Nicaragua, p. 98.

²⁶ Articles 3(1), 18, and 40

related instruments and whatever its particular designation.” Compliance with most treaties is monitored by a designated treaty body mostly through regulatory instruments including a system of regular self-evaluative reports and an individual complaints procedure. States exercise their discretion on the application of treaty provisions through declarations, derogations, denunciations and reservations, where permissible (Shelton, 2014). Where a treaty conflicts with a peremptory norm of general international law or *jus cogens*, such a treaty is void *ab initio*. A peremptory norm in itself “is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character” (VCLT, article 53).

The International Bill of Rights is comprised of the Universal Declaration of Human Rights 1948 (UDHR), the International Covenant on Civil and Political Rights 1966 (ICCPR) and the International Covenant on Economic, Social and Cultural Rights 1966 (ICESCR). The rights contained in the International Bill of Rights have been expanded through subsequent international HR treaties, mainly during the 1960s and the 1980s (Ramcharan, 1991), including: the International Convention on the Elimination of all Forms of Racial Discrimination 1965 (ICERD), Convention on the Elimination of Discrimination Against Women 1979 (CEDAW), Convention Against Torture and other Cruel Inhuman or Degrading Treatment or Punishment 1984 (CAT), Convention on the Rights of the Child 1989 (CRC), International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families 1990 (ICMW)), Convention on the Rights of Persons with Disabilities 2006 (CRPD), and International Convention on the Protection of All Persons from Enforced Disappearances 2006 (CPEd) which is not yet in force. Certain rights are prioritised in some cultures and regions; these results in regional HR treaties which may either promote the cultural diversity of the region,²⁷ or proscribe cultural practices which offend international public policy.²⁸

²⁷ UN Convention on the Rights of the Child 1989, Article 20(3) recognises alternative forms of care for children including kafalah of Islamic law.

²⁸ For instance, the international community has repeatedly condemned and called for the eradication of the practise of female genital mutilation which is widely practised in some parts of Africa, the Middle East and Asia (WHO 2017). The eradication of the practise would depend on a change of cultures of the affected countries and peoples before legal measures can be successfully established for the purpose.

States exercise their discretion on the application of treaty provisions through reservations,²⁹ declarations,³⁰ derogations, and denunciations, where permissible.³¹ Treaties may subsequently be amended mostly through an optional protocol containing either additional rights and freedoms,³² or an optional enforcement mechanism which may have been initially excluded.³³ Where a treaty conflicts with a peremptory norm of general international law or *jus cogens*, such a treaty is void *ab initio* (Smith, 2010).³⁴ A peremptory norm in itself “is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character”.³⁵ The conditions for *jus cogens* are that the norm must be: (a) a norm of general international law, (b) expressly or implicitly accepted and recognised by the international community of States as a whole, (c) one from which no derogation is permitted and which can only be modified by a subsequent norm of the same character (Shelton, 2014).

Compliance with most treaties is monitored by a designated treaty body mostly through regulatory instruments including a system of regular self-evaluative reports and individual complaints procedure (see Table 4.1). The functions of the treaty bodies include: considering complaints of treaty violations by States; conducting inquiries into allegations of grave, serious, or systematic violations of HR treaty provisions,³⁶ considering State-to-State

²⁹ The Vienna Convention on the Law of Treaties 1969, Article 2(1)(d) defines reservation as: “... a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State.”

³⁰ An example is the Kingdom of Saudi Arabia that ratified the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) in 2000 but declared that “In case of a contradiction between any term of the Convention and the norms of Islamic law, the Kingdom is not under obligation to observe the contradictory terms of the Convention.” See Concluding Observations of the CEDAW Committee, February 2008, retrieved from <https://www.hrw.org/reports/2008/saudi-arabia0408/5.htm>. Although many States have objected to this declaration, similar reservations and declarations have also been lodged by other Islamic states. The result is that despite the ratification of the treaty, such States can continue to pursue and endorse practices that are prejudicial to the rights of women guaranteed in the CEDAW, within their respective territories.

³¹ The Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, article 17, for instance, does not permit reservations.

³² Examples include the Protocols to the United Nations Convention on the Rights of the Child, on the involvement of children in armed conflicts and on the sale of children, child prostitution, and child pornography.

³³ For instance, see the First Optional Protocol to the International Covenant on Civil and Political Rights which provides for a system of individual petitions.

³⁴ Vienna Convention on the Law of Treaties 1969, article 53.

³⁵ Vienna Convention on the Law of Treaties 1969, article 53.

³⁶ CAT, article 20; Optional Protocol to the CEDAW, articles 8 - 10.

complaints over treaty violations;³⁷ and convening periodic meetings of States parties to discuss matters of mutual concern for treaty implementation and monitoring (Alebeek & Nollkaemper, 2012). Some treaty bodies also organise general discussions on themes relevant to their work, the outcomes of which may inform the drafting of a new general comment on the interpretation of treaty provisions.³⁸ The concluding observations of the monitoring body on States' reports may be indicative of the scope and practical nature of the rights contained in the treaty, as well as the direction in which the rights are evolving (Smith, 2010). Other HR treaty monitoring and enforcement mechanisms exist in the form of country reports and thematic procedures, including investigations of HR situations by a special rapporteur concerning specific HR,³⁹ and world conferences on HR such as the World Conference Against Racism, Racial Discrimination, Xenophobia, and Related Intolerance (2001) and the Rio+20 United Nations Conference on Sustainable Development (2012). At the regional level, HR bodies (RHRB) are also generally established by Member States to promote and protect HR, and in the case of HR courts to resolve disputes over alleged HR violations within the respective regions.

³⁷ The CAT (article 21), ICMW (article 76), ICERD (articles 11-13), and ICCPR (articles 41-43) respectively specify the procedures for the relevant treaty body to consider complaints from one state party against another, on the grounds that the latter is not in compliance with the treaty.

³⁸ ICERD and CEDAW use the term "general recommendations".

³⁹ United Nations Charter of 1945, articles 55 and 56.

Table 4.1 Examples of international human rights treaties, treaty bodies and enforcement mechanisms

Year	Treaties	Treaty bodies	Monitoring & enforcement mechanisms
1965	International Convention on the Elimination of all Forms of Racial Discrimination (ICERD)	Committee on the Elimination of Racial Discrimination	Reports; individual complaints under article 14
1966	International Covenant on Economic, Social and Cultural Rights (ICESCR)	Committee on Economic, Social and Cultural Rights	Reports; the United Nations Economic and Social Council (ECOSOC)
1979	Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)	Committee on the Elimination of Discrimination against Women	Reports, individual complaints & inquiries
1984	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)	Committee against Torture; Subcommittee on Prevention of Torture	Visits, reports, individual complaints under article 22 & inquiries
1989	Convention on the Rights of the Child (CRC)	Committee on the Rights of the Child	Reports
1990	International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (ICMW)	Committee on the Protection of the Rights of All Migrant Workers and Members of their Families	Reports, individual complaints under article 77

In Chapter 5, I analyse the recognition of the HRS in treaties.

Judicial decisions and the writings of “the most highly qualified publicists”

There are two views in the literature on judicial decisions and the writings of the most highly qualified publicists as a source of international law. One view is that they constitute a direct source of law (Jennings, 1996; Shahabuddeen, 2011). A contrary view, which resonates with the decisions of international courts and tribunals, only regards judicial decisions and writings of the most highly qualified publicists as subsidiary sources but this is not an indication of less importance (see Prosecutor v. Zoran Kupreskic, Mirjan Kupreskic, Vlatko Kupreskic, Drago Josipovic, Dragan Papic, Vladimir Santic, Judgment, IT-95-16-T, ICTY Trial Chamber, 14 Jan. 2000, at 540 (International Criminal Tribunal for the Former Yugoslavia); Prosecutor v. Issa Hassan Sesay, Morris Kallon, Augustine Gbao, Judgment, Case No. SCSL-04-15-T, SCSL Trial Chamber, 2 Mar. 2009, at 295 (Statute of the Special Court for Sierra Leone; Wrońska 2011)). In line with this, judicial decisions and writings of the most highly qualified publicists may be regarded as subsidiary or secondary to the preceding ‘principal’ means in Article 38(1)(a)-(c) (international conventions, international customs, and the general principles of law recognized by civilized nations). Nonetheless, both

the ‘principal’ and ‘subsidiary’ means for the determination of rules of law supplement each other (Borda 2013). In line with this, I explore judicial decisions on HRS principles and instruments in Chapter 5.

Soft law

Soft law refers to regulatory measures such as the declarations and resolutions of the UN General Assembly,⁴⁰ which are normative and bear considerable influence on States’ practices without being legally binding *per se* (Kennedy, 1987; Shelton, 2003). The positivist binary distinction between law (because it is justiciable in a court or tribunal) and non-law (because it is not justiciable or legally enforceable) instruments does not recognise soft law (Weil, 1983), even though some positivists recognise that non-binding instruments could provide significant evidence of State practice or consensus on particular rules (Brownlie, 2003).

In the literature, there is a further distinction between two forms of soft law, when an instrument negotiated between parties either: (a) does not take the form of a treaty or any other form recognized as a binding legal instrument under international law (*soft instrumentum*), or (b) is in a legally binding form but does not contain any binding normative commitments e.g. because its provisions are vague (*soft negotium*) (D’Amato, 2009; d’Aspremont, 2008, 2009). The *soft instrumentum* can be further categorised into three: (a) non-obligatory agreements and declarations developed by States (for instance, non-binding political declarations and conference declarations), (b) non-binding decisions of international organisations (including guidelines and programmes), and (c) recommendations adopted by NGOs.

Nonetheless, soft law may be a more appropriate option than hard law when there is need to take urgent action in the face of scientific uncertainty, where legal pluralism prevents consensus on legally binding norms, or where there is need for participation by non-State actors who are not traditionally parties to the formulation of hard law like treaties (Shelton, 2003). Soft law measures like the Declaration on the Rights of the Child 1959, the Declaration on the Elimination of all forms of Racial Discrimination 1963, and the Declaration on the Elimination of Discrimination against women have been important precursors to treaties. In this regard, the UN General Assembly and Human Rights Council

⁴⁰ See Advisory Opinion, Legal Consequences for States for the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), ICJ, 21 June 1971, p. 50.

resolutions on the rights to water and sanitation have significantly contributed to the status of the HRS as a distinct right as discussed in Chapter 5.

4.2.2 Meaning of Human Rights

The contestations over the meaning of HR predate the codification of HR principles and standards (Sen, 2004). HR evolved through the different periods of human civilization as a concept for addressing pressing development issues through the tripartite obligations of respect, protection and fulfilment that it imposes on States as the primary duty bearers, as well as non-State actors whose operations affect the realisation of the human rights obligations (see Table 4.2). HR includes economic, social and cultural, and civil and political rights, and are universal, inalienable, interdependent, indivisible and non-discriminatory. It generally imposes three types of obligations on States as the primary duty bearers, namely: to *respect* the right by refraining from any form of interference with the right; to *protect*, by preventing interference by third parties; and to *fulfil*, by facilitating the provision of services where necessary or directly providing the resources to realise required by the right (Schenin, 2003). With such clearly defined principles (see 4.3.3), it is therefore counter-intuitive to propose that “[H]uman rights is facing a crisis of meaning and legitimacy” (Mooney, 2012, p.169). The major challenge is to formulate a definition which reflects the historical aspects of HR without compromising the dynamism of the emergent global practice of a proliferation of HR to address emerging human development challenges (Flynn, 2012; Griffin, 2008).⁴¹

⁴¹ Flynn uses the term “rights inflation” to describe the increasing number of human rights (Flynn, 2012:3).

Table 4.2 Evolution of human rights principles across civilizations⁴²

Period	Proponents & source documents	Main tenets
Antiquity	King Hammurabi's Code (1795-1750 B.C.)	Ethical standards for communal life
	Judaism, Christianity & Islamic traditions	Notions of human dignity; non-discrimination
	Pericles (490-429 B.C.)	Non-discrimination
	Sophocles (469-406 B.C.)	Right to expression & civil disobedience
	Cicero	Brotherhood of man; justice
	Marcus Aurelius	Brotherhood of man; justice; notion of duties
Middle Ages	St. Augustine (396-430)	Precursor of solidarity rights
	Thomas Aquinas (1225-1274)	Human dignity; intellectual rights
	John of Salisbury (1120-1180)	Notions of the common good
	Magna Carter (1215)	Property & family rights
Renaissance	Petrarch (1304-1374)	Education for morality
	Giovanni Pico (1463-1546)	Equality of all persons
	Desiderius Erasmus (1466-1536)	Importance of proper education & non-elitist approach to learning the scripture
	Martin Luther (1483-1546)	Freedom of conscience in the pursuit of religion
	The Vindiciae Contra Tyrannos (1579)	Justice & the rule of law
Enlightenment	John Locke (1632-1704)	Rights to life, freedom & property; poverty as a result of moral failure
	Marie Voltaire (1694-1778)	Freedom of press & religious thoughts
	Thomas Paine (1737-1809)	Poverty as a result of social disorder
	Jean Jacques Rousseau (1712-1778); Gracchus Babeuf (1760-1797)	Equitable allocation of resources
	US Declaration of Independence (1776)	Equality of all men; did not recognise women; referred to the indigenous people as "Indian savages"
	US Constitution (1789) & Bill of Rights (1791)	Freedom of thought & conscience
	French Declaration of the Rights of Man & Citizen	Civil, political & economic rights
Industrialization	Karl Marx (1818-1883); Friedrich Engels (1820-1895)	Civil & political rights as a façade of capitalism
	Malcolm X	Civil rights diminish the notion of human rights
	Papal Encyclicals	Indivisibility of human rights
	Soviet Constitution (1936)	Economic & social rights

Although the term 'human rights' was mentioned only in the UN Charter of 1945, the origins of the concept can be traced far back and has evolved with humanity's constant strive for

⁴² I compiled Table 4.2 from my literature review of scholarly literature on human rights law, published in the English Language. Nonetheless, literature available in other languages may further provide useful insight into the evolution of human rights principles.

self-actualisation over different periods of human history (see Table 4.2) (Wronka, 2008). The debate over the meaning of HR predates codification (Sen, 2004) and is traceable to a lack of a unified foundation (Mooney, 2012). This is not purely a theoretical question, but one that requires a consideration of the political processes for HR implementation as well (Flynn, 2012). On the political level, after the Cold War, the lack of consensus between the Soviet Bloc and the United States, including its allies, led to the division of indivisible, universal, interdependent, interrelated, and presumably equally important,⁴³ list of HR into civil and political, and economic, social and cultural, without any formal hierarchy, leading to scepticism over the value of HR.

In the legal literature, there is a disagreement between the natural law theory of the rights of man characterised by a strong individualistic bias and contemporary HR definitions characterised by a strong egalitarian and international orientation (see Table 4.3) (Flynn, 2012). HR are represented both as: (a) a moral theory for mutual recognition and reciprocity among States in international relations and an inherent part of constitutional democracies (Rawls, 1999), and (b) the threshold for the legitimation of State intervention in the defence of individual autonomy (Flynn, 2012). The legal literature also distinguishes between legal rights derived *de jure* from the formal rules of law that are dependent on the relationship between the individual and the state, and non-legal rights or the bare HR which are those *de facto* conditions that make human existence possible and are therefore fundamental to the individual's existence, irrespective of the relationship with the state (Mooney, 2012; Parekh, 2007; van Boven, 1982). The distinction highlights the inherent limitations of a purely legalistic (and narrow) definition of HR, and the paradox that arises where it is the vocal 'rightsholders' who are able to demand enforcement of their rights and become the main beneficiaries, rather than the marginalized 'rightsholders' who require HR protections more (Douzinas, 2000; Gearty, 2006; Mooney, 2012).

⁴³ Vienna Declaration and Programme of Action 1993, para 5. Nonetheless, the right to life is regarded as being important and necessary for the fulfilment of all other rights but its supremacy is contestable and can be legitimately denied under certain circumstances. For instance, in the execution of a court sentence following conviction for a crime. See European Convention on Human Rights 1950, Article 2; Constitution of the Federal Republic of Nigeria 1999, Section 33.

Table 4.3 Perspectives on the meaning of human rights

Meaning of Human Rights	Brief Description	Key References
Moral theory of international relations & condition for reciprocity among States	Human rights generally determine the standard of behaviour for both liberal & non-liberal States, & regulate the relations between States	Rawls, 1999
Moral threshold for the legitimization of State's extra-territorial interventions	Human rights primarily aim at protecting individual autonomy & form part of political morality	Flynn, 2012
Dependent on the relationship between the State and an individual	Human rights are determined by formal laws which are products of local culture and practice & therefore lacks a universal foundation	Mooney, 2012; Parekh, 2007; Douzinas, 2000; van Boven (1982)
Fundamental to human existence, irrespective of the relationship with the State	Human rights are necessary for human existence, universal & therefore have a defensible foundation globally	Mooney, 2012; Parekh, 2007; van Boven (1982)
Universal, unchanging and applicable to all humans	Human rights are a given and integral to human existence; perspective of natural law scholars	Rogers & Kitzinger (1986); Dembour (2006); Stenner (2010)
Outcome of negotiations between rightsholders and the State	Human rights are negotiated & agreed by stakeholders; perspective of discourse scholars	Rogers & Kitzinger (1986); Dembour (2006); Stenner (2010)
Offers protection for the vulnerable members of the society	Human rights are fought for; perspective of protest scholars	Rogers & Kitzinger (1986); Dembour (2006); Stenner (2010)
Subject for discussion or deliberation	Human rights are to be discussed; perspective of deliberative scholars	Rogers & Kitzinger (1986); Dembour (2006); Stenner (2010)

Remarkably, philosophy scholars define HR broadly as the rights to which all human beings are entitled literally because they are human, and there can be no justification for violation under any circumstances (Donnelly, 2013; Wiseberg, 1996). A mosaic of discourses support the broad definition of HR, including: grounded universals; radical activist politics; socio-political construction; rights and responsibilities; and rights and democracy (Rogers & Kitzinger, 1986; Stenner, 2010). In line with these alternative perspectives, HR may be considered to be: (a) the product of natural law and therefore universal, unchanging, and applicable to all human beings without discrimination; (b) an important instrument for protecting the vulnerable members of society; (c) a subject for deliberation between the rightsholders and the State; (d) the outcome of negotiations and agreements on rights, responsibilities, and democratic principles; and (e) a product of notions of community belonging and religious foundations (Dembour, 2006; Stenner, 2010).

Douzinas (2013, p.52) proposes that “no global ‘theory’ of rights exists or can be created. Different theoretical perspectives and disciplinary approaches are therefore necessary.” This is because HR are the result of multiple discourses, practices, institutions and campaigns (Douzinas, 2013; Mooney, 2012). The lack of consensus on meaning makes it difficult to find consistency in the implementation of HR at the level of individuals. As a result, at present, any inconsistency in the understanding of HR is mainly to be found at the social and institutional level, rather than with individuals (Stenner, 2010). This poses a challenge to the continuous relevance of HR as a legitimate approach for social regulation. Hence, while HR scholars are mainly preoccupied with codification and implementation, the meaning of HR is still in issue; HR is open to either a broad or a narrow interpretation.

Although appreciating the finite diversity of the distinct ways of understanding HR is essential to understanding the meaning and content of HR within different social and cultural settings (Stenner, 2010), it is equally important to have a common understanding of HR among stakeholders in order to strengthen the normative framework, enhance legitimacy and ensure consistency. International HR can regulate State relations and establish the standard for State intervention and extraterritorial actions to protect individual autonomy. At the national and sub-national levels, HR can: (a) counter significant power imbalances (Sinden, 2005; 2009); (b) protect the weakest and all persons who suffer various forms of inequities (de Albuquerque, 2014; London & Schneider, 2012); (c) limit State autonomy and sovereignty (Limon, 2010); (d) prioritise human protection in development policies (White, 2011); and (e) lend a sense of urgency to human development challenges such as the lack of sanitation (Qerimi, 2012). However, these outcomes are mostly achievable where HR are broadly defined to include both rights *de jure*, as contained in the formal sources of international law (see 4.2.1), and *de facto*, in recognition of emerging categories of HR like third generation solidarity rights (Alston, 2009), the fourth generation right to biotechnology (Gupta, 2014), and by extending HR to all persons without discrimination (Mooney, 2012).

4.3 HUMAN RIGHTS PRINCIPLES

General principles of law consist of “logical propositions resulting from judicial reasoning on the basis of existing pieces of international law” (Wrońska, 2011, p.38). International courts have relied on general principles of law applied in national legal systems to determine legal

concepts like the legal status of corporations.⁴⁴ The HR principles analysed below are mostly derived from treaties (see 4.2.1), and establish a minimum standard of conduct for both States and non-State actors particularly when integrated with substantive HR (Haugen, 2011). I categorise the principles that I derive from my literature review and content analysis along the three pillars of sustainable development which are reflected in my conceptual framework (see 2.4.3), namely: social, economic and environmental principles. While this approach shows that the HR principles are mostly social, I concede that in practise the impact of the principles may extend to the other pillars of sustainable development. For instance, empowerment is a social principle that may nonetheless require the equitable distribution of economic resources and thereby impact economic growth.

Accountability

Accountability is enshrined in the ICESCR, article 2(1) and ICCPR, articles 2(1) and (2). Accountability affords rightsholders with an opportunity to obtain an explanation from duty-bearers on how or why they failed to discharge their duties and a remedy or reparation for any losses they suffer as a result; it also affords the duty-bearers an opportunity to explain their actions or omissions without necessarily implying punishment for the violation of duties. Accountability can be achieved through a variety of mechanisms, including: (a) judicial (review of executive acts by the courts), (b) quasi-judicial (e.g. international HR treaty bodies, ombudsmen), (c) administrative (e.g. HR impacts assessment), and (d) political (e.g. parliamentary processes).⁴⁵

Dignity

Human dignity is a core principle of international HR law based on the premise that every human being deserves respect, which supports a broad definition of HR (see 4.3) and inspires the universal application of the International Bill of Rights.⁴⁶ The Vienna Declaration and Programme of Action equally “affirms that extreme poverty and social exclusion constitute a violation of human dignity.”⁴⁷ However, the source of human dignity and its links with HR is still contested. One view, expressed in the political science literature, is that: (a) regard for human dignity is central to non-Western cultural traditions (like the African, Chinese, Islamic and Indian), (b) HR as understood by Westerners (entitlements inherent to human beings) are

⁴⁴ See, for instance, the Barcelona Traction Co. Case (1970).

⁴⁵ Office of the United Nations High Commissioner for Human Rights, Principles and Guidelines for a Human Rights Approach to Poverty Reduction Strategies HR/PUB/06/12.

⁴⁶ Preamble ICESCR and ICCPR; UDHR, article 1.

⁴⁷ Doc. A/CONF.157/23 of 12 July 1993, Vienna Declaration and Programme of Action, para. 25.

alien to the non-Western approaches to dignity, and (c) there are other ways to protect human dignity besides HR (Donnelly, 1982; 2013). The ethical theory literature further argues for separating HR and human dignity on three grounds: (a) human dignity aggravates the justification problem for HR in secular societies; (b) HR hinged on human dignity loses universal validity, and (c) human dignity has become more controversial than HR (Schroeder 2012). Conversely, the legal literature argues that the meaning of human dignity is context specific and varies significantly both within and across jurisdictions; in the absence of a common understanding of the substantive meaning of human dignity it still plays a significant role in HR adjudication and provides “a language in which judges can appear to justify how they deal with issues such as the weight of rights, the domestication and contextualization of rights, and the generation of new or more extensive rights” (McCrudden, 2008, p.724).

Equality and non-discrimination

Equality and non-discrimination are enshrined in various treaty provisions including the International Bill of Rights, CEDAW, CRC and ICERD (see Table 4.4).⁴⁸ Equality specifically guarantees equal treatment of all persons by the law and protection against arbitrary treatment and discriminatory practices on the unlawful grounds of “race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, disability and health status, including HIV/AIDS, age, sexual orientation or other status.”⁴⁹ Inequalities and discrimination may either occur as overt “legal inequalities in status and entitlements, deeply rooted social distinctions and exclusions”, or in more covert forms.⁵⁰ Nonetheless, not every case of differential treatment amounts to a violation of the principle, except where: (a) equal cases are treated differently, (b) the difference in treatment is not reasonably justifiable or objective, or (c) if the difference in treatment is not proportional to the purpose of the action.⁵¹

Public participation

The CEDAW protects women’s right to participate in political and public life, represent their government at the international level, and participate in education, economic and social

⁴⁸ See UDHR, articles 1, 2, 4, 7; ICESCR, articles 2(2), 3; ICCPR, articles 29(1), 3, 24(1), 26; CRC, article 2; and the UN Charter, articles 1(3), 55(c), 56.

⁴⁹ Office of the United Nations High Commissioner for Human Rights, Principles and Guidelines for a Human Rights Approach to Poverty Reduction Strategies HR/PUB/06/12, p. 9.

⁵⁰ Ibid.

⁵¹ See, the Inter-American Court, *Advisory Opinion No. 4*, para. 57; *Marckx v. Belgium* (European Court); *Jacobs v Belgium* (the Human Rights Committee)

benefits accruing in their society, and for rural women to participate in development planning and community activities.⁵² The ICESCR also provides under the right to education “that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.”⁵³ The ICESCR also recognizes the right to participate in cultural life.⁵⁴ The ICCPR and the CRC also enshrine participation.⁵⁵ Public participation requires active engagement with the public through four stages: (a) preference revelation (this occurs before policy formulation and allows people to express the objectives they want to achieve through the policy); (b) policy choice (this enables people to participate effectively in the policy formulation process); (c) implementation (this is achieved through decentralization and subsidiarity); and (e) monitoring, assessment and accountability (which ensures that people affected by policies take part in the monitoring and evaluation process and can also hold the duty-bearers to account).⁵⁶

Transparency and empowerment

Transparency is explicitly recognized in the CRPD, article 4(3) which provides that State Parties shall “closely consult with and actively involve” persons with disabilities in the process of formulating and implementing the legal framework for implementing the CRPD. Such close consultation requires transparency on the part of the State (Haugen, 2011). Transparency empowers rightsholders through ensuring public access to information held by the State about public processes, decisions, and outcomes that affect their lives. It thereby supports effective participation, accountability and monitoring.

⁵² CEDAW, articles 7(b), 8, 10(g), 13(d), 14(2)(a)(f). The participation principle is also enshrined in the Rio Declaration, principles 10, 20 and 22.

⁵³ ICESCR, article 13(1)

⁵⁴ ICESCR, article 15(1)(a)

⁵⁵ ICCPR, articles 19, 21, 22(1), 25; CRC, articles 13, 15, 31.

⁵⁶ Office of the United Nations High Commissioner for Human Rights (n. 49).

Table 4.4 Overview of human rights principles and their legal status

Human Rights Principles	Examples of Source Documents	Legal Status	Key References
Dignity	1948 Universal Declaration of Human Rights 1993 Vienna Declaration and Programme of Action	Established in hard and soft law	Donnelly, 1982, 2009, 2013; McCrudden, 2008
Rule of Law	1948 Universal Declaration of Human Rights 2000 United Nations Millennium Declaration 2005 World Summit Outcome 2012 Declaration of the High-level Meeting on the Rule of Law	Established in hard and soft law	Farrall, 2009; Janse, 2013
Participation	1966 International Covenant on Civil and Political Rights 1966 International Covenant on Economic, Social and Cultural Rights 1979 Convention on the Elimination of Discrimination Against Women 1989 Convention on the Rights of the Child 1992 Rio Declaration	Established in hard and soft law	Donnelly, 2013
Equality and Non-discrimination	1965 International Convention on the Elimination of all Forms of Racial Discrimination 1966 International Covenant on Civil and Political Rights 1966 International Covenant on Economic, Social and Cultural Rights 1979 Convention on the Elimination of Discrimination Against Women	Established in hard and soft law	Donnelly, 2013
Transparency and Access to information	1992 Rio Declaration 1998 Aarhus Convention 2006 Convention on the Rights of Persons with Disabilities	Established in hard and soft law	Donnelly, 2013
Accountability	1966 International Covenant on Civil and Political Rights 1966 International Covenant on Economic, Social and Cultural Rights	Established in hard and soft law	Donnelly, 2013

4.4 INDICATORS FOR MEASURING AND EVALUATING HUMAN RIGHTS PRINCIPLES

There is a pressing need for improved methodologies for objectively measuring and evaluating HR violations, compliance and general progress, and HR indicators are among the most powerful quantitative tools available. The realisation of HR may be constrained by any of the following five factors. First, compliance largely depends on the internalization of international law norms within the domestic legal framework and inherent right of self-determination constrains enforcement through international law mechanisms (Koh, 1999). Second, States may be directly or indirectly complicit in HR violations (Collingsworth, 2002) and the local political circumstances are crucial to HR implementation (Zhou, 2012). Third, the lack of capacity and resources, especially for poor States, may hamper the provision of basic services required under the ICESCR, for instance. Fourth, HR enforcement raises the issue of the principal's moral hazard as State agencies are responsible for the protection of rightsholders, irrespective of the best interest of their principal (the State) (Miller, 2005). Non-State actors, like NGOs, also face the challenge of balancing accountability to donors with accountability to communities (Mutua, 2013). Fifth, there may be inherent power imbalances within the domestic framework which hamper voluntary compliance with HR standards and therefore require stronger regulatory mechanisms, just like commercial and property rights are usually protected by enforceable contracts. It is therefore important to support the HR framework with indicators for measuring and evaluating performance. This section therefore presents a brief overview of HR obligations and indicators, based on a literature review and content analysis.

HR indicators are the pieces of information used to measure the degree of fulfilment or compliance of a right in any given context (Green 2001). HR indicators also include information on events, as well as outcomes, objects or activities through which HR principles and instruments can be assessed and monitored.⁵⁷ There are three functions of HR indicators, namely: (a) clarity in monitoring compliance with obligations and progressive implementation, (b) an objective assessment of the impacts of human development programming based on HR standards, and (c) evidence of HR violations (de Beco 2010; Rosga and Satterthwaie 2009; Welling 2008).⁵⁸

⁵⁷ See The Use of Indicators in Realizing ESCR, Report of the High Commissioner for Human Rights UN Doc. E/2011/90 (13 May 2011); Report on Indicators for Promoting and Monitoring the Implementation of Human Rights UN Doc. HRI/MC/2008/3 (6 June 2008).

⁵⁸ Ibid.

The formulation of HR indicators involves multiple disciplines, methodologies and standardisation of processes which transcends the international HR law sphere (Rosga & Satterthwaie, 2009; Welling, 2008). Relevant considerations in the selection of HR indicators include: a) a clear link to the relevant HR normative framework; b) disaggregation to capture minorities; c) balance between context specific and universal indicators; d) practicality of use and comparison of data; e) compliance with legal, ethical and HR safeguards in the collection, processing and dissemination of data; and f) data reliability and validity.⁵⁹ Indicators may be quantitative, qualitative, structural, process related or outcome related.⁶⁰ Structural indicators capture the necessary institutional mechanisms for HR implementation; process indicators link HR policies with milestones that translate into outcome indicators reflecting the status of HR realization.⁶¹

Compliance monitoring through the use of indicators involves the selection and contextualisation of indicators, selection of benchmarks and targets as required by the specific context, reporting on the indicators, benchmarks and targets, and monitoring reported indicators to supplement recommendations made by HR mechanisms. This involves highly technical processes but at the same time, human judgement and local actors play a crucial role which ought to be reflected in the HR monitoring process for two main reasons. First, sole reliance on quantitative indicators could reduce the measurement and evaluation of HR into a technical exercise and erode human judgment and democratic accountability (Rosga & Satterthwaie, 2009). Second, there is a tension between the rationalist approach to the development of a global set of indicators and the decentralisation of the process (McGrogan, 2016). Hence, while a global set of indicators allows for monitoring HR over different timescales and across countries, it is further necessary to ensure that the local actors can contextualise the indicators to meet local circumstances and thereby enrich the practical relevance of the HR indicators locally.

4.5 INFERENCES

This chapter draws four main conclusions that lay the foundation for further analysis of the HRS institution and instruments in the remaining chapters. First, human rights have evolved over centuries and suffer from two contestations: (a) the structure of some HR systems may create a paradox where it is the vocal ‘rightsholders’ (like the population in formal

⁵⁹ The Use of Indicators in Realizing ESCR (n. 57).

⁶⁰ Report on Indicators (n. 57).

⁶¹ Ibid.

settlements) who are able to demand enforcement of their rights rather than the marginalized ‘rightsholders’ (like the population in informal settlements) for whom these rights are meant to protect; and (b) conflicts could occur between human rights held by individuals or groups at different levels of governance; for instance, at the international level there are inherent conflicts between the right to development and environmental protection heralded under the emergence of the right to promote sustainable development in the United Nations Framework Convention on Climate Change (Gupta & Arts, 2017), while at the local level, individual rights like the freedom of conscience and religion may inadvertently limit equality and universality (Bayefsky (2001) discusses universality in the UN human rights system). Considering the contestations and their effects on the human rights institution is particularly relevant for the implementation of the HRS.

Second, there are seven core human rights principles, namely: accountability, dignity, equality and non-discrimination, participation, rule of law, transparency and empowerment. These principles are mostly established in treaties, but have also evolved from national laws. The human rights principles mainly relate to the social pillar of sustainable development and focus on improving transparency and the effectiveness of participatory processes while countering power politics that lead to marginalisation or exacerbate inequalities in human development, thereby advancing social and relational inclusion. The human rights principles are much less directly linked to the ecological component of ID, although the right to a healthy environment exists with varying legal status in various human rights instruments and the right to promote sustainable development is in a legally binding Convention. Nonetheless, human rights principles such as participation play a prominent role in the development of environmental rights.

Third, the predominance of social and relational HR principles and their limited relevance to ecological inclusion further points to the need to clarify how and under what circumstances the HR normative framework can address ecological concerns, in the interest of ID, and where necessary integrate complementary environmental principles (see 5.3.2 and 7.2.3).

Fourth, HR institutions often impose mainly State-centric human rights obligations without adequately addressing the liability of non-State actors. It is therefore equally important to advance HR principles as a guiding norm for the activities of non-State actors who are increasingly involved in the delivery of services and other activities affecting the fulfilment of HR. This can be linked to the emerging discourse on the liability of non-State actors for HR violations (Obani & Gupta, 2016). While HR indicators are useful for monitoring

compliance by the duty bearers, the indicators by themselves do not guarantee the best outcomes for the most vulnerable rightsholders without opportunities for human judgement and downward accountability to the rightsholders. This underscores the need to decentralise HR formulation and empower the weakest rightsholders to demand accountability from the relevant duty bearers.