

# Human Rights Guiding Principles: A Forward-Looking Retrospective.

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## Contents

<b>Introduction</b> .....	3
<b>I. What are Human Rights Guiding Principles?</b> .....	7
1. <i>Legal weight</i> .....	7
2. <i>Closing protection gaps and other objectives</i> .....	8
3. <i>Adoption within an inter-governmental process</i> .....	9
4. <i>Adoption outside an inter-governmental process</i> .....	13
<b>II. The legitimacy of non-intergovernmental standard-setting processes</b> .....	16
1. <i>Independence and expertise of drafters/signatories</i> .....	17
2. <i>Diversity of drafters/signatories</i> .....	18
3. <i>Rigor and Persuasiveness</i> .....	19
4. <i>Practicality</i> .....	19
5. <i>Validation Processes</i> .....	20
<b>III. Critical decisions on the content of the text: striking a balance</b> .....	22
1. <i>Restatement or progressive development of the law?</i> .....	22
2. <i>Legal or non-legal language?</i> .....	24
3. <i>Detailed or broad formulations?</i> .....	25
4. <i>Targeting only States or also non-State actors?</i> .....	26
<b>IV. Critical decisions during the process – learning from experience</b> .....	26
1. <i>Consultations</i> .....	27
2. <i>Coordination with other civil society organizations and academic institutions</i> .....	29
3. <i>The adoption of subsequent documents</i> .....	30
<b>V. What lessons could be learned for the Education Principles?</b> .....	32
<b>Annex 1. Specific Recommendations</b> .....	36

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## Introduction

Recent years have witnessed the increasing involvement of private actors in education around the world. However, no clear standards exist to assess the phenomenon. Therefore, since 2015, various education stakeholders have been working to develop the Guiding Principles on States' obligations regarding private actors in education' (hereafter: Education Principles)<sup>1</sup>. The objective of these Principles is 'to clarify existing legal obligations that States have regarding the delivery of education, and in particular the role and limitations of private actors in the provision of education'<sup>2</sup>.

Initiative conveners<sup>3</sup> have emphasized that these principles would not create new standards, but rather unpack and apply the existing human rights framework, including providing guidance on how to implement them in the context of the rapid expansion of private sector involvement in education. As stressed by the conveners, the Education Principles are to reflect existing legally binding obligations and hence will apply to States irrespective of any further formal adoption.<sup>4</sup>

The human rights legal framework for education is vast, as it is contained in several binding international treaties, such as the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention on the Rights of the Child (CRC), and the UNESCO Convention against Discrimination in Education. UN treaty bodies, special procedures, and General Assembly resolutions have further developed these standards. Nonetheless, the content of these standards is sometimes abstract or not sufficiently precise when referring to the role of private actors. Therefore, as explained by the conveners of the Education Principles, there is:

'a need to clarify what exactly the existing legal human rights framework entails as it applies to the role of private actors in education [...]. In addition to filling a conceptual gap on the state of the law on the role of private actors in education provision, developing this set of Guiding Principles will provide a much-needed opportunity to conduct informed advocacy on a concrete basis. The final Guiding Principles will provide a long-term rigorous framework interpreting legally binding Conventions and Guiding Principles that States have committed to. It will be possible to use the Guiding Principles at the local, domestic, regional and

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<sup>1</sup> This is the title provided by April 2018. It might change during the final process leading to their adoption.

<sup>2</sup> [http://www.right-to-education.org/page/faqs-human-rights-guiding-principles-states-obligations-regarding-private-schools#section\\_view-default-7](http://www.right-to-education.org/page/faqs-human-rights-guiding-principles-states-obligations-regarding-private-schools#section_view-default-7). All websites were last accessed on 1 June 2018.

<sup>3</sup> The Guiding Principles process is facilitated by a Secretariat composed of 5 organizations: Amnesty International, the Equal Education Law Centre, the Global Initiative for Economic, Social and Cultural Rights, the Initiative for Economic and Social Rights, and the Right to Education Initiative. The Secretariat supports the independent Expert Group, composed of recognized experts acting in their personal capacity, who will discuss, input into, and validate successive drafts of the Guiding Principles.

The Secretariat also supports a Steering Committee, made up of individuals representing civil society organizations, which will guide and take decisions regarding the process for the development of the Guiding Principles. Information available at <http://globalinitiative-escr.org/human-rights-guiding-principles-on-states-obligations-regarding-private-schools-faqs/#7>

<sup>4</sup> [http://www.right-to-education.org/page/faqs-human-rights-guiding-principles-states-obligations-regarding-private-schools#section\\_view-default-7](http://www.right-to-education.org/page/faqs-human-rights-guiding-principles-states-obligations-regarding-private-schools#section_view-default-7)

international level to provide a basis for advocacy, policy development, and litigation'<sup>5</sup>.

The adoption of human rights guiding principles (hereafter: guiding principles or principles) to further clarify the scope and content of human rights obligations is a common practice. Since the late 1980s, the obligations imposed by the ICESCR have been further clarified through adoption of a series of principles that reflect the contribution of academics and practitioners. These include 'The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights'<sup>6</sup> (Limburg Principles) adopted in 1986, 'The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights' (Maastricht Guidelines) adopted in 1997<sup>7</sup> and the "Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights" (ETO Principles), adopted in 2011.<sup>8</sup> Principles have been also adopted at the regional level, such as the 'Quito Declaration on the Enforcement and Realization of Economic, Social, and Cultural Rights in Latin America and the Caribbean' adopted in 1998 by a number of experts and activists from Latin America.<sup>9</sup> The adoption of principles has occurred not only in regard to economic, social and cultural rights (ESCR), but also in reference to civil and political rights such as the 'Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights'<sup>10</sup> (Siracusa Principles), adopted in 1984 and the Johannesburg Principles on National Security, Freedom of Expression and Access to Information (Johannesburg Principles)<sup>11</sup>, adopted in 1995.

The topics covered by human rights principles vary widely. Those related to ESCR rights, for example, cover a wide range of issues, including the right to housing,<sup>12</sup> right

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<sup>5</sup> <http://globalinitiative-escr.org/advocacy/privatization-in-education-research-initiative/human-rights-guiding-principles-on-the-obligations-of-states-regarding-private-actors-in-education/>

<sup>6</sup> The Limburg Principles are to be found in 'The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights.' In: *HRQ*, vol. 9 No. 2, (1987), pp. 122-146.

<sup>7</sup> The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, SIM Special No. 20, The Netherlands Institute of Human rights, Utrecht 1998.

<sup>8</sup> Available at <http://www.etoconsortium.org/>

<sup>9</sup> The Quito Declaration and Programme of Action was adopted on July 24, 1998. Available at: 2 *Yale Hum. Rts. Dev. L.J.* 6 (1999). This Declaration claims to be more comprehensive than its precursors, such as the Limburg Principles and the Maastricht Guidelines because according to the text itself, its aim is both legal and political. See, the 'Preface to the Quito Declaration on the Enforcement and Realisation of Economic, Social, and Cultural Rights in Latin America and the Caribbean.' Jochnick C. and Mujica Petit J. In: 2 *Yale Hum. Rts. Dev. L.J.* 5 (1999).

<sup>10</sup> The principles were adopted in a conference held in Siracusa, Italy from April 30 to May 4, 1984 organized by the International Commission of Jurists, the International Association of Penal Law, the American Association for the International Commission of Jurists, the Urban Morgan Institute of Human Rights, and the International Institute of Higher Studies in Criminal Sciences. Available at: <https://www.icj.org/wp-content/uploads/1984/07/Siracusa-principles-ICCPR-legal-submission-1985-eng.pdf>

<sup>11</sup> These Principles were adopted on 1 October 1995 by a group of experts in international law, national security and human rights convened by Article 19, the International Centre against Censorship, in collaboration with the Centre for Applied Legal Studies of the University of the Witwatersrand, which met in South Africa.

<sup>12</sup> See e.g. 'The Basic Principles and Guidelines on Development-Based Evictions and Displacement', UN Doc. A/HRC/4/18, annex 1, of 5 February 2007.

to food,<sup>13</sup> right to education,<sup>14</sup> business,<sup>15</sup> extraterritorial obligations,<sup>16</sup> poverty,<sup>17</sup> foreign debt,<sup>18</sup> impact assessments of trade and investment agreement<sup>19</sup> equality,<sup>20</sup> and sexual orientation and gender identity<sup>21</sup>. Some guiding principles have looked beyond human rights law to clarify all international obligations related to certain group of people, including those contained in humanitarian law and refugee law. This is the case for example, of the 'Guiding Principles on Internal Displacement'<sup>22</sup> (IDP Principles), adopted in 1997, and the 'Guiding Principles on Housing and Property Restitution for Refugees and Displaced Persons' adopted in 2005<sup>23</sup>.

Each of the sets of principles adopted reflects a unique standard-setting process. Some have been adopted within an intergovernmental human rights body (e.g. Human Rights Council or the former Commission on Human Rights), others with or without a formal request by States (e.g. when they have been initiated by a decision of a UN Special procedure mandate holder). Some have been adopted under the auspices of UN agencies or have been subsequently endorsed by them (e.g. The Voluntary Guidelines on the Progressive Realization of the Right to Adequate Food in the Context of National Food Security), while others have been drafted and adopted outside any inter-governmental process by groups of experts and practitioners, often under the sponsorship of NGOs or academic institutions. This paper will focus on the latter approach.

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<sup>13</sup> See e.g. 'The Voluntary Guidelines on the Progressive Realization of the Right to Adequate Food in the Context of National Food Security' adopted on 29 October 2002.

<sup>14</sup> See e.g. 'The Minimum Standards for Education: Preparedness, Response, Recovery', adopted in 2004 and the 'Guidelines for Protecting Schools and Universities from Military Use during Armed Conflicts' adopted in 2014.

<sup>15</sup> 'The Guiding Principles on Business and Human Rights, Implementing the United Nations 'Protect, Respect and Remedy' Framework', adopted in 2011. UN Doc. A/HRC/17/31 of 21 March 2011.

<sup>16</sup> 'Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights' (ETO Principles) adopted on 28 September 2011. Available at: <http://www.etoconsortium.org>

<sup>17</sup> 'The Guiding Principles on Extreme Poverty and Human Rights' adopted in 2012. UN Doc. A/HRC/21/39 of 18 July 2012.

<sup>18</sup> 'The Guiding Principles on Foreign Debt and Human Rights' adopted in 2012. UN Doc. A/HRC/20/23 of 10 April 2012.

<sup>19</sup> 'The Guiding Principles on Human Rights Impact Assessments of Trade and Investment Agreements' adopted in 2011. UN Doc. A/HRC/19/59/Add.5 (Addendum) of 26 December 2011.

<sup>20</sup> 'The Declaration of Principles on Equality', adopted in 2008. Available at: <http://www.equalrightstrust.org/content/declaration-principles-equality>

<sup>21</sup> See 'The Yogyakarta Principles. Principles on the application of international human rights law in relation to sexual orientation and gender identity' adopted in 2006 and the 'The Additional Principles and State Obligations on the Application of International Human Rights Law in Relation to Sexual Orientation, Gender Identity, Gender Expression and Sex Characteristics to Complement the Yogyakarta Principles' (The Yogyakarta Principles Plus 10), adopted in 2017. Available at <http://yogyakartaprinciples.org>

<sup>22</sup> These principles were presented in 1998 upon the request of the former Commission on Human Rights by the Representative of the Secretary-General on internally displaced persons, Francis M. Deng. UN Doc. E/CN.4/1998/53/Add.2 of 1 February 1998.

<sup>23</sup> Submitted in June 2005 to the Commission of Human Rights by the Special Rapporteur, Paulo Sérgio Pinheiro upon request of the former Sub-Commission on the Promotion and Protection of Human Rights. UN Doc. E/CN.4/Sub.2/2005/17 of 28 June 2005.

The names used also vary: some are called ‘principles’, others ‘guidelines’ and most are called ‘guiding principles’. While some might argue that the terminology highlights differences among these texts (e.g. that ‘principles’ tend to be more general and ‘guidelines’ more specific), such differentiation is not evident in the existing documents, so this paper will use these terms interchangeably.

Regardless of the material scope and process of adoption, all human rights guiding principles may be considered ‘soft law’ instruments<sup>24</sup>. This means that, in principle, they are not legally binding because States have not formally agreed to be bound by the provisions they contain. Yet, they can carry considerable political and legal weight. They can close protection gaps, reflect key human rights concerns, and establish the foundations for further development of the law by clarifying core issues, legal concepts, and the scope of protection. When supported by public advocacy, human rights principles can promote reforms of domestic law and practices and provide objective benchmarks by which to measure the performance of State institutions. They are critical to improve accountability for human rights violations and to ensure redress for victims.

Despite little documentation about the various processes<sup>25</sup>, it is possible to conclude that the history of the adoption of guiding principles is not straightforward. A great variety of factors have influenced the processes of adoption and determined their outcome. Many of these factors are difficult to control, such as the political climate, the sensitivity of the issues at stake, the existence of comparable standards, and the presence of actors who might support or oppose the process. Even the personalities of those involved in the process sometimes have an enormous influence.<sup>26</sup> Thus, no “magic formula” ensures success in the development of guiding principles. Yet, some factors can be compared, permitting us to draw some lessons while enabling advocates and supportive Governments to respond creatively to the challenges encountered in the drafting and follow-up process. This paper reviews trends in the development and adoption of human rights guiding principles, followed by a particular focus on those principles adopted outside an inter-governmental body. The objective is to understand what most can be usefully taken forward in the development of new principles, in particular the Education Principles. The paper concludes with concrete recommendations that the actors promoting the Education Principles might consider.

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<sup>24</sup> While traditionally ‘soft law’ refers to those documents created within international organizations or at least promoted by them, increasingly the term has been also used to include those documents developed by NGOs and expert groups. See e.g. Chinkin, Christine: “Sources”. In: *International Human Rights Law*, Moeckli, Daniel et al., Oxford University Press, second edition 2014, pp. 75-95.

<sup>25</sup> The research in this paper is based on a bibliographic review, the interviews of several actors who have participated in several standard-setting processes, and the author’s own experience. In her role as the United Nations Special Rapporteur on Extreme Poverty and Human Rights (2008-2014), the author led the process for the adoption of the Poverty Guidelines. She is also one of the signatories of the ETO Principles and has been involved in other standard-setting processes in a formal and informal capacity.

<sup>26</sup> International Council on Human Rights Policy (ICHRP): *Human Rights Standards. Learning from Experience*, Geneva, 2006.

## I. What are Human Rights Guiding Principles?

Guiding principles are documents that -at the moment of their adoption- do not create legal obligations but seek to provide 'a contemporary interpretation' of legal obligations related to their topic. Thus, for the most part, the drafters of guiding principles claim that their respective principles 'clarify' the normative content of treaties and other sources of international law<sup>27</sup>, reflecting 'the present state of international law'.<sup>28</sup> The elaboration of guiding principles is a trend in human rights policy likely to continue in the coming years. At the time of writing, additional human rights guiding principles under development include the 'Guiding Principles for Human Rights Impact Assessments for Economic Reform Policies'<sup>29</sup> and the 'Guidelines on Drug Control and Human Rights'<sup>30</sup>. Despite the important standard-setting role, information about the adoption process of various guiding principles remains piecemeal. This chapter tries to fill that gap by first examining the legal weight of these documents, their objectives, and the various ways by which existing documents have been elaborated.

### 1. Legal weight

The term 'soft law' can be misleading. Though 'soft law' texts are not themselves legally binding, most human rights guiding principles draw on principles and norms contained in various sources of international law (such as international treaties and customary law). This means that even when guiding principles are not binding *per se*, they often carry an authority that does not flow from the principles themselves because they draw their provisions from international law.

Their influence is often felt in other ways. Some guiding principles have become the basis for legally binding treaties. For example, the Kampala Convention, adopted by the African Union reflects the IDP Principles<sup>31</sup>. The Limburg Principles and the Maastricht Guidelines were both highly influential in the elaboration of the Optional Protocol to the ICESCR.<sup>32</sup>

More often, guiding principles become points of reference in national legislation, national and international jurisprudence, or in other international instruments. As discussed below, several principles have filled these roles, such as the IDP Principles<sup>33</sup>,

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<sup>27</sup> The sources of international human rights law are listed in Article 38(1) Statute of the International Court of Justice: treaties, custom, general principles of law, and subsidiary means for determining the law, judicial decisions and the writings of jurists.

<sup>28</sup> See e.g., Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework; Guiding Principles on Extreme Poverty and Human Rights and Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights.

<sup>29</sup> Requested by the Human Rights Council to the Independent Expert on foreign debt and human rights. Resolution 34/3 of 16 March 2017, para. 13.

<sup>30</sup> This initiative is led by the United Nations Development Programme (UNDP) and the International Centre on Human Rights and Drug Policy. More information available at: <http://www.hr-dp.org/guidelines-on-drug-control-and-human-rights>.

<sup>31</sup> See note 22.

<sup>32</sup> Human Rights Council, resolution 8/2 of 18 June 2008. It entered into force on 5th May 2013.

<sup>33</sup> See note 22.

the Basic Principles and Guidelines on Development-Based Evictions and Displacement" (Forced Evictions Principles)<sup>34</sup>, the Guiding Principles on Business and Human Rights, Implementing the United Nations 'Protect, Respect and Remedy' Framework" (Business Principles)<sup>35</sup>, the Guiding Principles on Extreme Poverty and Human Rights (Poverty Principles)<sup>36</sup> and the 'Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights' (ETO Principles)<sup>37</sup>.

Therefore, while guiding principles do not constitute a formal source of human rights law, when they are carefully researched and drafted, they may lead to formal validation of or significantly influence State behaviour. In so doing, these documents may lay the ground for the gradual formation of customary law or treaty provisions.<sup>38</sup>

Moreover, as van Hoof notes, 'there exists a considerable "grey area" of "soft-law" between the white space of law and the blank territory of non-law'<sup>39</sup>. In this sense, some "soft law" instruments may be closer to law than others.

## 2. *Closing protection gaps and other objectives*

If guiding principles only reflect 'the present state of international law', why are they considered necessary or desirable? Human rights guiding principles are usually created to fill gaps in protection. While existing treaties may provide protection in certain respects, guiding principles may be required to frame the rights of an affected group more clearly or in human rights terms. For example, the Poverty Principles specify the States' obligations towards those living in extreme poverty; the IDP Principles seek to interpret and apply existing norms to the specific situation of those internally displaced, and the Yogyakarta Principles<sup>40</sup> help to understand the violations suffered by persons on grounds of sexual orientation and gender identity. In these cases, the principles enable advocates and members of the specific group to protect their rights more effectively. They also guide the application of human rights obligations in policy decisions affecting these groups of people (e.g. poverty reduction policies, policies to provide assistance to internally displaced people, or policies to provide protection from all forms of violence related to sexual orientation and gender identity).

Guiding principles might also be necessary to prevent and provide protection against specific practices that violates human rights that, over the years, have become more prominent or to which previously the world community was not sensitive (or insufficiently so). For example, ETO Principles were adopted to fill the protection gap created by the States' tendency to limit their human rights obligations to their own territory. The Business Principles seek to protect individuals from business-related human rights harm, which has become more severe in the context of globalization.

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<sup>34</sup> See note 12.

<sup>35</sup> See note 15.

<sup>36</sup> See note 17.

<sup>37</sup> See note 16.

<sup>38</sup> Cassese, Antonio: International Law, Oxford University Press, 2001, pp.160-161.

<sup>39</sup> Van Hoof, G.J.H.: Rethinking the Sources of International Law, Kluwer, 1983, p.188.

<sup>40</sup> See note 21.

The diagnosis of gaps is based on pragmatic analysis (facts on the ground) and international law. Yet, the claim of the existence of a protection gap is often contested. Governments tend to argue that existing standards provide protection for groups that are particularly exposed to risk, or against a particular behaviour. Conversely, members of such groups and civil society organizations often argue that the clarification of standards is needed.

Beyond clarifying legal grey areas and gaps, those seeking the establishment of new guiding principles might have several additional objectives. They might also seek to raise awareness about violations of rights; address technical issues; identify legal lacunae; inform policy development; provide guidelines for States' behaviour; or practical guidance to seek redress by those directly affected. In addition, by elaborating on the implications for States of existing standards and integrating them within a single, coherent and comprehensive document, guiding principles can be essential tools for advocacy and for enhancing accountability. It is often expected that guiding principles will also play a role in normative and jurisprudential development.

### 3. *Adoption within an inter-governmental process*

In most cases, standard-setting processes are the result of intergovernmental negotiations. Thus, human rights guiding principles are often negotiated within an intergovernmental body, mainly the Human Rights Council, but also other bodies such as the Commission on Crime Prevention and Criminal Justice (CCPCJ)<sup>41</sup> and the Committee on World Food Security.

These processes often begin with a decision of the intergovernmental body that request a subsidiary body or a special procedure (independent experts, special rapporteurs or special representatives) to develop the text in consultation with several stakeholders. For example, in 1992 the Commission on Human Rights mandated the 'Representative of the Secretary-General on Internally Displaced Persons' to develop the IDP Principles. Recently, the Human Rights Council requested to the 'Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights' (IE on Foreign Debt) to develop guiding principles for human rights impact assessments for economic reform policies.<sup>42</sup>

Some processes have been long and intricate. For example, the former Commission on Human Rights initiated the Poverty Principles in 2001 through a request to the (former) Sub-Commission on the Promotion and Protection of Human Rights (Sub-Commission).<sup>43</sup> The Sub-Commission submitted its draft to the newly established Human Rights Council in August 2006. Not persuaded by the content of the draft, the Human Rights Council opened a series of consultations from 2007 to 2009. To overcome the impasse and to move the issue forward, in October 2009, the Council

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<sup>41</sup> For example, the CCPCJ adopted in 2012 the United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems. Available at: [http://www.unodc.org/documents/justice-and-prison-reform/UN\\_principles\\_and\\_guidelines\\_on\\_access\\_to\\_legal\\_aid.pdf](http://www.unodc.org/documents/justice-and-prison-reform/UN_principles_and_guidelines_on_access_to_legal_aid.pdf)

<sup>42</sup> Resolution 34/3 of 6 April 2017.

<sup>43</sup> Resolution 2001/31, paragraph 7(a).

invited the then Independent Expert on the question of human rights and extreme poverty (later Special Rapporteur on Extreme Poverty and Human Rights) to pursue further work on the principles.<sup>44</sup> As a result, in 2012, the Special Rapporteur submitted a completely new draft<sup>45</sup> that was ‘adopted’ by consensus by the Human Rights Council.<sup>46</sup> Subsequently, the UN General Assembly ‘took note with appreciation’ of the Guiding Principles.<sup>47</sup>

The mandate of the ‘Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises’ (SRSG) was created in 2005 by the then Commission on Human Rights (now Human Rights Council) after the failure to adopt the ‘UN Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights’ (UN Norms) developed by the former Sub-Commission.<sup>48</sup> The SRSG developed first the ‘Protect, Respect and Remedy’ Framework in a series of reports, which culminated in the formulation of the ‘Guiding Principles on Business and Human Rights’ in 2011.<sup>49</sup>

Sometimes, the development of guiding principles within an inter-governmental body has been initiated without a formal request by States, including when United Nations special procedures mandate holders have developed guiding principles without any request from the Human Rights Council. For example, in 2004, the Special Rapporteur on Adequate Housing, Miloon Kothari, devoted his annual report to the issue of forced evictions<sup>50</sup>. The report recommended the Commission to authorize a process where he could lead the development of clear operational guidelines for States on forced evictions. Even without a request he undertook a series of external consultations with a variety of actors and submitted the ‘Basic Principles and Guidelines on Development-Based Evictions and Displacement’ (Forced Evictions Principles), as an annex to his report in February 2007.<sup>51</sup> Subsequently, the Human Rights Council ‘took note’ of the Principles.

Similarly, the ‘Guiding Principles on Human Rights Impact Assessments of Trade and Investment Agreements’ were submitted by the then Special Rapporteur on the on the Right to Food, Olivier De Schutter in 2011 as an addendum to his report to the Human Rights Council.<sup>52</sup> While not receiving a direct request from the Council to prepare principles on the topic, the Special Rapporteur considered the principles as contributions to the fulfilment of his overall mandate.<sup>53</sup>

When guiding principles are developed through an intergovernmental process, the initiation of the process can impact the level of States’ engagement and the resources

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<sup>44</sup> Resolutions 12/19 (2009) and 15/19 (2010).

<sup>45</sup> UN Doc. A/HRC/15/19 of 18 July 2012.

<sup>46</sup> Resolution 21/11 of 27 September 2012.

<sup>47</sup> Resolution 67/164 of 20 December 2012.

<sup>48</sup> UN Doc. E/CN.4/RES/2005/69 of 20 April 2005.

<sup>49</sup> ‘Guiding Principles on Business and Human Rights: Implementing the United Nations’ “Protect, Respect and Remedy” Framework’, UN Doc. A/HRC/17/31 of 21 March 2011.

<sup>50</sup> UN Doc. E./CN.4/2004/48 of 11 February 2004.

<sup>51</sup> UN Doc. A/HRC/4/18, of 5 February 2007, Annex 1.

<sup>52</sup> UN Doc. A/HRC/19/59/Add.5 of 19 December 2011.

<sup>53</sup> *ibid.*, para. 1.

allocated. If intergovernmental bodies (e.g. the Human Rights Council or the former Commission of Human Rights) request the elaboration of guiding principles, the resolution establishing the process determines who is entitled to participate in negotiations (e.g. UN agencies and NGOs with consultative status) and it might even set a deadline for completing the work. The processes tend to benefit from broad participation from States -whose access is unrestricted- and to receive sufficient financial support. For example, when the Human Rights Council requests the elaboration of human rights principles, the Office of the High Commissioner for Human Rights (OHCHR) is often called to undertake or to support the consultations. Therefore, OHCHR dedicates human and financial resources to the process. OHCHR may also circulate the drafts and obtain the views of States, relevant United Nations agencies, intergovernmental organizations, United Nations treaty bodies and special procedures mandate holders, national human rights institutions, non-governmental organizations, and other relevant stakeholders<sup>54</sup>. The Human Rights Council may even request OHCHR to organize seminars to discuss the draft, the cost of which are also assumed by the Office. For example, the resolution requesting the IE on Foreign Debt to develop guiding principles on economic reform policies clearly establishes that the principles should be developed:

‘in consultation with States, international financial institutions and other relevant stakeholders, and to organize expert consultations for the development of the guiding principles’ and requests OHCHR “to provide all the human and financial resources necessary for the effective fulfilment of the mandate by the Independent Expert.”<sup>55</sup>

When the process within an intergovernmental body is not initiated by a formal request (e.g. when it is initiated by a special rapporteur decision), the process is more flexible. Stakeholders’ participation is not limited to those accredited to work within the body (e.g. NGOs with consultative status). However, the participation of States and other actors in the drafting process as well as the financial resources is not guaranteed. Factors such as the perceived relevance of the topic or the level of States’ support would further determine their level of engagement. The number of consultations would be determined by the capacity of the mandate holder to mobilize funds or to work within existing resources.

Nonetheless, the fact that a process is undertaken within an intergovernmental body might make it easier to mobilize external resources. For example, for the elaboration of the Poverty Principles external, bilateral donors (e.g. DIFID) provided funds to undertake parallel consultations including with people living in poverty in 5 countries (i.e. Thailand, Peru, Senegal, Poland, and France). Similarly, the Forced Eviction Principles received the financial support of Germany and the German Institute for Human Rights to undertake consultations with a great variety of stakeholders.<sup>56</sup>

When guiding principles are elaborated within an intergovernmental body, the subsequent resolutions of that body reflect the level of support from States. Both, the

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<sup>54</sup> See, for example, Human Rights Council resolutions 2/2 of November 2006 and 7/27 of March 2008.

<sup>55</sup> Human Rights Council resolution 34/3 of 6 April 2017.

<sup>56</sup> Interview with Miloon Kothari on April 2018. On file with the author.

language used (e.g. ‘take note’ or ‘endorse’) and the method for the adoption (i.e. if they have been adopted by consensus or by vote) may indicate States’ consent to be bound. These factors can assist in determining whether these non-binding instruments have become customary international law.<sup>57</sup>

The following textbox provides examples of the various formulations used by the Human Rights Council when referring to guiding principles.

### Examples of Guiding Principles Processes

Guiding Principle	Developed by	Mandate	Location	Validation
The Basic Principles and Guidelines on Development-Based Evictions and Displacement	Special Rapporteur on adequate housing, Miloon Kothari	<b>No formal request</b> by the Human Rights Council	A/HRC/4/18, Annex 1, 5 February 2007	The Human Rights Council “ <b>took note</b> ” of them. Resolution 6/27 of 19 December 2007
The Guiding Principles on Foreign Debt and Human Rights	Independent Expert on the effects of foreign debt, Mr. Cephias Lumina	<b>Formally requested</b> The Human Rights Council requested the IE to continue the work that the former Commission on Human Rights had requested to the then IE on economic reform policies	A/HRC/20/23 of 10 April 2011	The Human Rights Council “ <b>endorsed</b> ” them. Resolution 20/10 of 18 July 2012
The Guiding Principles on Business and Human Rights, Implementing the United Nations ‘Protect, Respect and Remedy’ Framework	Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie	<b>Formally requested</b> by the Human Rights Council	A/HRC/17/31 of 21 March 2011	The Human Rights Council “ <b>endorsed</b> ” them. Resolution 17/4 of 16 June 2011  Subsequently, the Council ‘call[ed] upon all business enterprises to meet their responsibility to respect human rights

<sup>57</sup> See e.g. Chinkin, Christine: “Sources”. In: International Human Rights Law, Moeckli, Daniel et al., Oxford University Press, second edition 2014, pp. 75-95.

				in accordance with the Guiding Principles' Resolution 26/22, of 27 June 2014
The Guiding Principles on Extreme Poverty and Human Rights.	Special Rapporteur on extreme poverty and human rights, Magdalena Sepúlveda Carmona	<b>Formally requested</b> by the Human Rights Council	A/HRC/21/39	The Human Rights Council " <b>adopted</b> " them. Resolution 21/11 of 21 September 2012.  The Council also decided to "transmit the guiding principles on extreme poverty and human rights to the General Assembly for its consideration". Subsequently, the General Assembly "took note with appreciation" of the guiding principles. A/RES/67/164 para. 17

The Human Rights Council (and its predecessor, the Commission on Human Rights), is not the only intergovernmental body under which human rights guiding principles have been developed. For example, the 'Voluntary Guidelines on the Progressive Realization of the Right to Adequate Food in the Context of National Food Security' were developed by an Intergovernmental Working Group (IGWG) established as a subsidiary body of the Committee on World Food Security. Some 90-member States of FAO and several UN-agencies participated in their development. In addition, relevant international and regional institutions, as well as NGOs, civil society groups, parliamentarians, academic institutions, philanthropic foundations and the private sector were invited to participate as observers. The IGWG adopted the Voluntary Guidelines by consensus at its fourth session on 23 September 2004. They were subsequently 'endorsed' by the Committee on World Food Security and 'adopted' by the FAO Council.

#### 4. Adoption outside an inter-governmental process

Guiding principles have also been adopted outside an intergovernmental body, such as by a group of academics, practitioners and NGOs. These include some very influential instruments such as 'The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights'<sup>58</sup> (1986); 'The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights'<sup>59</sup> (1997); 'The Principles on

<sup>58</sup> The Limburg Principles were adopted in 1986 by a group of international experts convened by the International Commission of Jurists (Geneva, Switzerland), the Faculty of Law of the University of Limburg (Maastricht, the Netherlands) and the Urban Morgan Institute for Human Rights, University of Cincinnati (Ohio, United States of America).

<sup>59</sup> The Maastricht Guidelines were adopted in 1997 on the 10th anniversary of the Limburg Principles by a group of more than thirty experts who met in Maastricht at the invitation of the International Commission of Jurist (Geneva, Switzerland), the Urban Morgan Institute on Human Rights (Cincinnati, Ohio, USA) and the Centre for Human Rights of the Faculty of Law of Maastricht University (the Netherlands).

Equality'<sup>60</sup> (2008); 'The Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights'(ETO Principles)<sup>61</sup> (2011) and the 'Additional Principles and State Obligations on the Application of International Human Rights Law in Relation to Sexual Orientation, Gender Identity, Gender Expression and Sex Characteristics to Complement the Yogyakarta Principles' (The Yogyakarta Principles Plus 10) (2017).<sup>62</sup>

The main advantage of these processes is that they 'bypass' the political intricacies of an inter-governmental process. External drafting processes are more flexible and often move faster than those within inter-governmental bodies. In principle, they allow more active participation by non-state actors (e.g. is not restricted to NGOs with consultative status), a greater 'control' over the participants (e.g. avoiding those actors who would only aim to disrupt the process) and facilitate reaching consensus on a coherent text without politically compromising on critical issues. Processes led by non-governmental actors also include a greater opportunity for experts in the subject to influence the process. This contrasts with their limited influence in intergovernmental processes.

External processes for the adoption of guiding principles seem to be the best option when no legal clarity on the topic at hand exists at the beginning of the process. Hence, considerable legal research and expertise is needed to identify and clarify States' obligations (e.g. in the case of ETO and Johannesburg Principles). External processes may also be the best option when topics have little to no sufficient political support or agreement (e.g. Drug Principles). It is also critical when the topic is contested to such a degree that some States would not engage in a drafting process in good faith (e.g. Yogyakarta Principles).

The fact that some guiding principles are developed outside an intergovernmental law-making body does not mean that UN bodies cannot subsequently endorse them. For example, the Johannesburg Principles on National Security, Freedom of Expression and Access to Information (Johannesburg Principles)<sup>63</sup>, adopted in 1995 by a group of experts convened by NGOs and academics, were subsequently included as an annex in the report of the special rapporteur on the promotion and protection of the right to freedom of opinion and expression, who recommended the former Commission on Human Rights to endorse them<sup>64</sup>. In its 1996 resolution on the topic, the Commission

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<sup>60</sup> The Principles on Equality were adopted in 2008 by a group of experts at a conference organized by The Equal Rights Trust in London. Available at: <http://www.equalrightstrust.org/content/declaration-principles-equality>

<sup>61</sup> The ETO Principles were adopted in 2011 by a group of experts in international law and human rights at a gathering convened by Maastricht University and the International Commission of Jurists. Available at <http://www.etoconsortium.org/>

<sup>62</sup> These principles were adopted in 2017 to supplement the "Yogyakarta Principles" developed and adopted in 2006 by a group of human rights experts, from diverse regions and backgrounds, including judges, academics, a former UN High Commissioner for Human Rights, UN Special Procedures, members of treaty bodies, NGOs and others. See <http://yogyakartaprinciples.org>

<sup>63</sup> These Principles were adopted on 1 October 1995 by a group of experts in international law, national security and human rights convened by Article 19, the International Centre against Censorship, in collaboration with the Centre for Applied Legal Studies of the University of the Witwatersrand, which met in South Africa.

<sup>64</sup> UN Doc. E/CN.4/1996/39 of 22 March 1996. See para. 154 and Annex 1.

'took note' of the Johannesburg Principles.<sup>65</sup> Since then, the Johannesburg Principles have been cited in several annual resolutions on freedom of opinion and expression.<sup>66</sup>

States can also play an instrumental role in ensuring that guiding principles adopted outside an intergovernmental law-making body by NGOs, practitioners, and academics acquire a different legal status and are recognized by an intergovernmental process. For example, after the adoption of the Siracusa Principles, the Government of the Netherlands requested through a 'note verbal' that the UN Secretary General<sup>67</sup> circulate the principles as an official UN document. The former Commission on Human Rights complied with the request and published the principles.<sup>68</sup> Similarly, after the adoption of the Limburg Principles, the Government of the Netherlands sent another 'note verbal' requesting their publication in the form of an official UN document.<sup>69</sup> The Commission not only published the principles as an official UN document<sup>70</sup>, but it also included them in its annual resolution regarding economic, social, and cultural rights, emphasizing their importance.<sup>71</sup> The Maastricht Guidelines were also subsequently published as a UN document, through a much simpler process. The Committee on Economic Social and Cultural Rights just published them as one of its documents in its twenty-third session in the year 2000.<sup>72</sup>

Governments might also decide (or even been persuaded to) to take an active role in a standard-setting process already initiated by non-state actors. This was the case, for example, of the 'Guidelines for Protecting Schools and Universities from Military Use during Armed Conflicts' (Protecting Schools Guidelines)<sup>73</sup>. The process was initiated by a coalition of international human rights and education organizations: the Global Coalition to Protect Education from Attack (GCPEA)<sup>74</sup>. In 2012, the GCPEA initiated a consultation process with various actors including government representatives, militaries, UN agencies, and international and human rights organizations. In June 2014, when the process has already produced a widely consulted draft, Norway announced that it would lead the finalization of the process and find a way by which States could commit to implementing the Guidelines. The Guidelines were then finalized

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<sup>65</sup> Commission on Human Rights resolution 1996/53 of 19 April 1996.

<sup>66</sup> Article 19: The Johannesburg Principles on National Security, Freedom of Expression and Access to Information, London, November 1996.

<sup>67</sup> Note verbale dated 24 August 1984 from the Permanent Representative of the Netherlands to the United Nations Office at Geneva addressed to the Secretary-General.

<sup>68</sup> UN Doc. E/CN.4/1985/4 of 28 September 1984.

<sup>69</sup> Note verbale dated 5 December 1986 from the Permanent Mission of the Netherlands to the United Nations Office at Geneva addressed to the Centre for Human Rights.

<sup>70</sup> UN Doc. E/CN.4/1987/17 of 8 January 1987.

<sup>71</sup> Commission on Human Rights, Resolution 1996/11 on 'Question of the realization in all countries of the economic, social and cultural rights contained in the Universal Declaration of Human Rights and in the International Covenant on Economic, Social and Cultural Rights, and study of special problems which the developing countries face in their efforts to achieve these human rights'.

<sup>72</sup> UN Doc. E/C.12/2000/13 of 2 October 2000. The Limburg Principles were also included in this document.

<sup>73</sup> Available at [http://protectingeducation.org/sites/default/files/documents/guidelines\\_en.pdf](http://protectingeducation.org/sites/default/files/documents/guidelines_en.pdf)

<sup>74</sup> The GCPEA members include the Council for At-Risk Academics, Human Rights Watch, Save the Children, United Nations Children's Fund (UNICEF) and the United Nations Educational, Scientific and Cultural Organization (UNESCO).

through a State-led process headed by Norway and Argentina.<sup>75</sup> Moreover, in a savvy political move, these countries decided to develop a 'Safe Schools Declaration', which is an inter-governmental political document developed through State consultations. The 'Safe Schools Declaration' is the instrument by which States can endorse and commit to implement the Protecting Schools Guidelines.

To promote endorsements of the Safe Schools Declaration, the supporting governments have convened international meetings where States can formally endorse it. The Norwegian government is the depositary of endorsements. States can announce their endorsement at any time by making a public statement and/or sending a letter to the Norwegian Ministry of Foreign Affairs. Key actors, including the United Nations Secretary General, António Guterres and the UN Special Envoy for Global Education, have called on States to endorse the Safe Schools Declaration. As of April 2018, 74 countries have endorsed it.<sup>76</sup>

## II. The legitimacy of non-intergovernmental standard-setting processes

The Education Principles are being developed and will be adopted in a non-intergovernmental process. It is important to examine the factors that will determine their legitimacy. Specifically, why should States and other actors (e.g. UN treaty bodies, specialized agencies), comply with or apply the guiding principles, given that they are being developed outside an inter-governmental process? What determines whether they feel pressure to comply/apply them?

To answer these questions, I will introduce the concept of legitimacy adapted by Franck to the international system. As he defines it,

*'Legitimacy is a property of a rule or rulemaking institution which itself exerts a pull toward compliance on those addressed normatively because those addressed believed that the rule or institution has come into being and operates in accordance with generally accepted principles of right process.'*<sup>77</sup>

This notion of legitimacy suggests that two factors predispose those addressed by the rule toward voluntary obedience: one related to the process of 'rule-making' and the other to the 'rule' itself. In this analysis, the 'rule making institutions' are those directly involved in the drafting and adoption of the guiding principles (i.e. drafters and signatories/adopting individuals or institutions), the 'rules' would be the guiding principles themselves. Finally, those addressed by the rule are primarily the States, but also other actors that are expected to apply the principles in their work.

The extent to which States and other actors perceive the guiding principles to be legitimate will determine both how inclined they are to comply and the cost of non-compliance (in terms of the 'mobilization of shame'). Thus, when States do not perceive

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<sup>75</sup> Information available in the GCPEA 's website. Available at <http://protectingeducation.org/>

<sup>76</sup> Information available at the GCPEA's website: <http://protectingeducation.org/guidelines>

<sup>77</sup> Franck, T.M.: The power of legitimacy among nations. Oxford University Press, New York, Oxford, 1990, p. 24.

that the guiding principles have a high degree of legitimacy, the degree of compliance will be lower, and it will be less costly to ignore them.<sup>78</sup>

Without trying to be exhaustive, I propose the following factors as critical determinants of legitimacy for guiding principles adopted outside an intergovernmental process:

- 1) Independence and expertise of the drafters and signatories;
- 2) Diversity;
- 3) Rigor and Persuasiveness;
- 4) Practicality; and
- 5) Validation.<sup>79</sup>

It is important to note that legitimacy is a matter of degree and hence the legitimacy of guiding principles would depend on the level of fulfilment of these factors.

### *1. Independence and expertise of drafters/signatories*

The independence and expertise of those involved in the process as drafters and signatories<sup>80</sup> is without doubt one of the central factors determining the legitimacy of guiding principles. If States have little to no confidence that a body of independent experts developed the principles, they and other actors would not feel bound to comply with or apply the principles.

While the early principles tended to include mainly legal experts (i.e. academics) in drafting processes (e.g. Limburg Principles), over the years, those involved in these processes have tended to exhibit greater 'diversity of knowledge'. The Education Principles, for example, explicitly seek to involve sociologists, political economists, philosophers, and teachers.

The expertise needed is a combination of a high level of knowledge on the topic of the principles, the skills to draft this type of document, plus good political judgement to understand the context in which they will be submitted. Particularly relevant is the level of expertise of the conveners which refers to a small group of people who take responsibility for moving the process forward and undertake the core of the work (often called 'steering committee' or 'secretariat'). Their knowledge in the particular field, openness to understand and incorporate various perspectives, and capacity to identify gaps and legal analysis are essential for the success of the process. This group is often in charge of making initial proposals, synthesizing the feedback from the consultations, and taking final decisions on the text. In addition to technical and legal expertise, this group should be politically savvy. While they must have a deep understanding of why some principles are needed, they should be willing to accommodate some diplomatic and legal parameters within which drafters must work.

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<sup>78</sup> Ibid, p.49.

<sup>79</sup> The first 2 elements refer to the those drafting and adopting the guiding principles (i.e. 'the rule making institution') and the last 3 elements refers to the text of the guiding principles (i.e. 'the rule').

<sup>80</sup> While the various processes are not the same, generally, there is a small group of conveners (who undertake and lead the consultations) and another group of experts that are drafters and signatories to the principles. The latter might also have some influence in the drafting process.

Often the development of guiding principles is supported by additional research commissioned to experts who are requested to draft specific ‘background’ documents in their field of expertise. The additional research may seek to clarify contested or complex topics, identify existing obligations, provide a comparative analysis, and identify good practices or existing case law. Taken as a whole, the core group, the conveners, supporting experts, and drafters/signatories should have considerable expertise in the diverse areas covered by the principles.

## 2. *Diversity of drafters/signatories*

Another important indicator of legitimacy is the diversity of those involved in the process. This refers, for example to diversity in term of gender, geographical representation (people from different countries/continents), the representation of different forms of social and legal systems, and different areas of expertise. This is also a matter of degree. For example, a process developed or lead only by white academics from the North would certainly lack legitimacy. The legitimacy of the process would increase in line with the diversity of those involved in the process.

While in early processes the level of diversity was low,<sup>81</sup> nowadays it seems unacceptable to have a process without gender and geographical balance. Those involved in the development of guiding principles seem to attach a high degree of importance to this factor, as it is often emphasized that those involved in their respective processes are a diverse group of experts.<sup>82</sup> Yet, in several cases, while those involved might be from different nationalities, they are often based in institutions from Western Europe and the United States.<sup>83</sup>

In some cases, the legitimacy of the process can be undermined if beneficiaries, victims, and those who are directly affected by the principles are not represented. It can be particularly damaging for the legitimacy of a process and resulting instrument if the experience of those most affected by violations of the standards at stake were not adequately consulted or represented in the process. In the case of the Poverty Guidelines, for example, efforts were taken to ensure the direct participation of people living in poverty.<sup>84</sup>

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<sup>81</sup> For example, from the 34 participants in the conference that adopted the Maastricht Guidelines, 30 were from Europe and North American and only 9 were women. The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, SIM Special No. 20, The Netherlands Institute of Human Rights, Utrecht, 1998. Annex 2 ‘List of Participants’.

<sup>82</sup> See, for example, the ‘Introduction’ to The Yogyakarta Principles and the ETO Principles.

<sup>83</sup> Still, there is much room for improvement. For example, from the 40 signatories to the ETO Principles, 15 were women and as evident from their positions, the great majority of the experts were based in Europe and North America (their nationalities were not registered in the document). Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights. Annex.

<sup>84</sup> The participation of people living in poverty was mediated by ATD Forth World, an organization with vast experience working and developing consultations with them. Thus, the methodology used was specifically adapted to ensure the effective and meaningful participation.

### 3. *Rigor and Persuasiveness*

The persuasiveness of guiding principles heavily depends on the quality of the research and analysis underpinning their development. Guiding principles should convince readers that they are elucidating existing obligations and that they are based on formal sources of international law.

Thus, their formulation should rely on quality and thoroughness research, solid legal analysis, careful preparations of the process, and broad consultations. The more progressive the text is or the more it asked in term of obligations for States and other actors, the more justification is expected, and higher levels of persuasiveness is required. Hence, more rigorous research is needed when the text expands the human rights protection included in hard law instruments.

To strengthen their persuasiveness after the adoption of some principles, those involved in previous processes have published legal annotations or commentaries expanding on the legal basis of each adopted principle. Such documents seek to provide detailed legal analysis, directly citing specific provisions of bidding treaties and domestic and international case law and referencing reports of UN special rapporteurs or treaty bodies and as well as academic publications.<sup>85</sup>

Rigorous research requires at the very minimum institutional commitments, time, and resources. For example, the 'Global Principles on National Security and the Right to Information' (2013) were drafted by 22 organizations and academic centres in consultation with more than 500 experts from more than 70 countries at 14 meetings held around the world and in consultation with relevant international and regional human rights special rapporteurs.<sup>86</sup> The process was facilitated and funded by the Open Society Justice Initiative. Without its support and commitment, the process and resultant principles would have been very difficult to achieve.

### 4. *Practicality*

The legitimacy of the guiding principles also relies on their practicality. The implementation of the required measures should be feasible. They should not impose undue burdens on those tasked with implementing them.

Thus, guiding principles should be clearly written, with precision and reflecting a good understanding of the particularities of various States. In this regard, it is crucial for the drafters to be able to differentiate the 'unwillingness' from the 'inability' of States to comply with the obligations identified in the process.<sup>87</sup> To be able to respond effectively to the realities of different countries, the principles must be based on solid country or regional case studies and identification of best practices. To this end, some processes

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<sup>85</sup> See, for example, De Schutter, Olivier; Eide, Asbjørn; Khalfan, Ashfaq; Orellana, Marcos; Salomon, Margot and Seiderman, Ian: Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights, *Human Rights Quarterly* 34 (2012) 1084–1169.

<sup>86</sup> <https://www.opensocietyfoundations.org/sites/default/files/global-principles-national-security-10232013.pdf>

<sup>87</sup> As noted in the Maastricht Guidelines No. 13: '[i]n determining which actions or omissions amount to a violation of an economic, social or cultural right, it is important to distinguish the inability from the unwillingness of a State to comply with its treaty obligations.'

have not only invited experts to undertake research, but also to complete detailed questionnaires on the law and practice of their countries concerning key issues.<sup>88</sup>

## 5. Validation Processes

The legitimacy of guiding principles is enhanced when other experts (beyond the drafters) as well as national and international bodies expressly recognize them. The more human rights principles are referred to by other bodies, the higher their legitimacy.

Undoubtedly, the endorsement of the UN political organs, such as the Human Rights Council and the General Assembly are important. When these bodies adopt resolutions reaffirming human rights principles adopted outside an intergovernmental body, such resolutions undoubtedly increase the legitimacy of the principles.

The legitimacy of guiding principles is also bolstered when different expert bodies (e.g. UN treaty bodies, special procedures mandate holders, regional human rights bodies or national human rights institutions) refer to them. The ETO Principles have been referred to by UN treaty bodies, Special Procedures, and in recommendations adopted by the Universal Periodic Review process.<sup>89</sup> A recent example is the General Comment No. 24 adopted by the UN Committee on Economic, Social and Cultural Rights (CESCR) in August 2017, which, in line with the ETO Principles, defines States' extraterritorial obligations to respect, protect, and fulfil the Covenant rights, the types of remedies, and measures of implementation.<sup>90</sup> This General Comment has not only enhanced the significance of the ETO Principles but has also contributed to a better understanding of States' extraterritorial obligations in specific situations. Regional human rights bodies have also relied on human rights principles for their decisions. For example, the Poverty Guidelines have been mentioned in the case law of the European Committee of Social Rights.<sup>91</sup>

Validation also occurs when guidelines are referenced in resource materials and textbooks books related to human rights that are used across the world or by a variety of stakeholders in particular those who are addressed by them. For example, not only have civil society and workers' organizations and national human rights institutions endorsed the Business Principles, but also Governments, business enterprises,

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<sup>88</sup> This has been the case for example, of the process for drafting 'Global Principles on National Security and the Right to Information'. See Coliver, Sandra: 'National Security and the Right to Information', presentation delivered in Paris 11th December 2012. Available at: <https://www.opensocietyfoundations.org/sites/default/files/coliver-nsp-pace-20121220.pdf>

<sup>89</sup> Global Initiative for Economic Social and Cultural Rights: Working Paper Human Rights Law Sources: UN Pronouncements on Extra-Territorial Obligations, November 2015.

<sup>90</sup> Committee on Economic, Social and Cultural Rights, General Comment No. 24 on State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities, UN Doc. E/C.12/GC/24 of 23 June 2017. For a compilation of additional pronouncements on ETOs by UN human rights bodies, see: Global Initiative for Economic, Social and Cultural Rights (2015). Human Rights Law Sources: UN Pronouncements on Extra-Territorial Obligations. Available at <http://globalinitiative-escr.org>

<sup>91</sup> For example, decision on the merits concerning the complaint No. 69/2011 – Defence for Children International (DCI) v. Belgium, of 23 October 2012, para 81. Available at: [https://www.coe.int/en/web/turin-european-social-charter/processed-complaints/-/asset\\_publisher/5GEFkJmH2bYG/content/no-69-2011-defence-for-children-international-dci-v-belgium?inheritRedirect=false](https://www.coe.int/en/web/turin-european-social-charter/processed-complaints/-/asset_publisher/5GEFkJmH2bYG/content/no-69-2011-defence-for-children-international-dci-v-belgium?inheritRedirect=false)

business associations, and investors.<sup>92</sup> The Forced Evictions Principles have been included in a 'judicial implementation protocol'<sup>93</sup> issued by the Mexican Supreme Court in 2014 intended to serve as a reference for judges as they adjudicate cases where large infrastructure, mining, and development projects can cause human rights violations. If this protocol is implemented in practice, it has the potential to integrating these principles in the Mexican jurisprudence.

Considering that the final objective is the implementation of human rights principles, their use in court proceedings (e.g. in affidavits or amicus curiae) and their recognition by judicial bodies is a major validation factor of principles. Despite their formal non-binding nature, is not uncommon to find that human rights principles have influenced court judgements. For example, reportedly, the Forced Evictions Principles have led to either a halt to the planned evictions or ensured a resettlement program is consistent with international human rights law.<sup>94</sup> The High Court of India, have used the Forced Evictions Principles to uphold the rights of slum dwellers and evictions victims<sup>95</sup>. Similarly, the High Court of Kenya have used the Forced Eviction Principles to guide the determination of the resettlement rights of slum residents<sup>96</sup> and it has called for a national law on evictions to be modelled on them<sup>97</sup>.

In some exceptional circumstances high level national courts have expressly consider human rights principles biding at the domestic level. This was the case, for example, of the Colombian Constitutional Court regarding the IDP Principles.<sup>98</sup>

A strategy commonly used to achieve faster validation of principles developed outside an intergovernmental process is to engage with various human rights expert bodies and judicial authorities very early in the process, as well as invite some of them in their personal capacities to be 'signatories' of the principles (i.e. those who publicly appear adopting the principles).<sup>99</sup> However, with the exception of the Yogyakarta Principles Plus 10 where several national judges were signatories, most initiatives have focused mainly on UN experts. New initiatives could put more emphasis on engaging with representatives of regional expert bodies (e.g. members of the Inter-American and

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<sup>92</sup> UN Doc. A/HRC/17/31 of 21 March 2011 para. 7.

<sup>93</sup> 'Protocolo de Actuación para Quienes Imparten Justicia en Casos Relacionados con Proyectos de Desarrollo y Infraestructura', Suprema Corte de Justicia de la Nación, Mexico, 2014.

<sup>94</sup> Housing and Land Rights Network (2013), *Reaffirming Justiciability: Judgements on the Human Right to Adequate Housing from the Delhi High Court*, India, New Delhi, March 2013.

<sup>95</sup> See, for example, the case *Sudama Singh and Others vs. Government of Delhi and Anr* (W.P. (C) Nos. 8904/2009, 7735/2007, 7317/2009 and 9246/2009, judgement of 13 February 2010) and the case of P.K. Koul vs. Estate Officer and Anr. and Ors (W. P. (C) No. 15239/2004 and CM No. 11011/2004, judgement of 30 November 2010.

<sup>96</sup> Case of Kepha Omondi Onjuro & others v Attorney General & 5 others, High Court of Kenya, Petition No. 239 of 2014. Available at <http://kenyalaw.org/caselaw/cases/view/105457/>

<sup>97</sup> Case of Satrose Ayuma & 11 others v Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme & 3 others, High Court of Kenya, Petition No. 65 of 2010. Available at <http://kenyalaw.org/caselaw/cases/view/90359/>

<sup>98</sup> See e.g. Colombian Constitutional Court, Judgment T-O25 (2004).

<sup>99</sup> For example, the Limburg Principles were agreed by 29 experts, the Maastricht Principles were adopted by 34 experts, the ETO Principles were adopted by 40 experts and the Declaration of Principles of Equality by 128 'original signatories'. Moreover, in the latter case, the Principles are still open for new endorsements through the Secretariat. See <http://www.equalrightstrust.org/content/declaration-principles-equality>.

African Commission) as well as from national human rights institutions (e.g. Chairperson of the Global Alliance of National Human Rights Institutions).

It is also common that those proposing the adoption of guiding principles carefully use the events related to the initiative to achieve greater dissemination and support. For example, the Yogyakarta Principles (2006) were launched on 26 March 2007, at a public event timed to coincide with the main session of the UN Human Rights Council in Geneva. Attended by Ambassadors, other State delegates, a former UN High Commissioner for Human Rights, UN Special Procedures mandate holders, members of treaty bodies, participating experts, and NGO representatives, the launch has been considered critical 'to move the Yogyakarta Principles onto the international agenda'. Reportedly, within days of the Geneva launch, more than 30 States made positive interventions on sexual orientation and gender identity issues, with seven States specifically referring to the Yogyakarta Principles.<sup>100</sup>

### III. Critical decisions on the content of the text: striking a balance

Those leading a process of elaborating guiding principles are often confronted with critical decisions that determine the nature of the document. While these decisions are presented here as dichotomies, the challenge is to strike a balance between the options available. This section analyses how some existing guiding principles have responded to these challenges, and the pros and cons of the various approaches.

#### 1. *Restatement or progressive development of the law?*

The texts as well as the drafters of guiding principles often affirm that their respective principles do not create new legal obligations, but merely reflect or make explicit the existing state of international law (see e.g. the IDP Principles<sup>101</sup>, the Yogyakarta Principles<sup>102</sup>, the Business Principles<sup>103</sup>, the Poverty Principles<sup>104</sup> and the ETO Principles<sup>105</sup>). By claiming that the adopted principles only reflect or clarify existing norms, drafters and signatories are stating that the principles articulate or clarify existing binding international legal standards with which States must comply even in the absence of the principles.

Such statements reflect difficult dilemmas that drafters must address when elaborating the text. Considering that the whole objective of the process is to clarify emerging international legal obligations, drafters may want to develop a progressive set of standards (i.e. expanding human rights protection especially for the most vulnerable). However, if they go too far, their document might be dismissed by States or by key

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<sup>100</sup> See O'Flaherty, Michael and Fisher, John: Sexual Orientation, Gender Identity and International Human Rights Law: Contextualising the Yogyakarta Principles, *Human Rights Law Review* (2008), pp.31-32.

<sup>101</sup> See Foreword to the Guiding Principles by Under Secretary General for Humanitarian Affairs, Mr. Sergio Vieira de Mello and Principle 3.

<sup>102</sup> See 'Introduction to the Yogyakarta Principles' and 'Preamble'.

<sup>103</sup> See 'General Principles'.

<sup>104</sup> See 'Objectives'.

<sup>105</sup> See 'Introduction' and 'Preamble'.

stakeholders as not being sufficiently grounded in international law. On the contrary, if they fall too short, they risk diluting existing obligations and thus undermining human rights protection.

The quest to be consistent with existing law can result in the deliberate omission of elements from the final text that had been considered during the drafting phase, but which the drafters concluded were not yet binding under international law. For example, the Yogyakarta Principles (2006) did not include the right to marry by same sex couples, despite the fact that its inclusion was repeatedly raised during the process.<sup>106</sup> Yet, the principles expressly noted that regular revisions to international human rights law were necessary ‘to take account of developments in that law and its application to the particular lives and experiences of persons of diverse sexual orientations and gender identities over time and in diverse regions and countries’.<sup>107</sup> Thus, ten years after the adoption of the principles, the ‘Yogyakarta Principles Plus 10’ were adopted to ‘supplement’ the original 29 Yogyakarta Principles. The ‘Yogyakarta Principles Plus 10’ add additional principles and States obligations, ‘which have arisen over the past decade’<sup>108</sup>. However, the adoption of subsequent principles is very exceptional.

Considering the risks and costs of developing guiding principles, it might be preferable for conveners and drafters to aim for a text that is as progressive as possible while remaining in line with current international law and standards.

The difficulty of calibrating the text in order to ensure that it is progressive but at the same time receives the support of States and other relevant actors was evident in relation to the ‘Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights’ (UN Draft Norms) developed by the former UN Sub-Commission on the Promotion and Protection of Human Rights in 2003.<sup>109</sup> While the Draft Norms were presented as a restatement of the human rights obligations imposed on companies under international law, they were criticized for the ambiguity of their legal foundations and by imposing obligations on business actors that went beyond the existing legal framework.<sup>110</sup> Many governments and the business community also vehemently opposed to them considering they went too far.<sup>111</sup> The former Commission on Human Rights also rejected the UN Draft Norms.

To overcome the impasse, in 2005 the Commission on Human Rights requested the Secretary-General to appoint a Special Representative on the issue of human rights and transnational corporations and other business enterprises (SRSG), John Ruggie<sup>112</sup>. Turning his back to the UN Draft Norms, the SRSG radically changed the approach

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<sup>106</sup> Principle 24 on the right to found a family, only speaks of a right to non-discriminatory treatment of same-sex marriage in those States which already recognize it. See O’Flaherty et al., *op cit.*, note 101

<sup>107</sup> See “preamble” of the Yogyakarta Principles.

<sup>108</sup> Press Release: ‘Experts Release Much Anticipated Expansion of the Yogyakarta Principles’, November 27, 2017. Available at: <http://yogyakartaprinciples.org/principles-en/press-release/>.

<sup>109</sup> Resolution 2003/16, UN Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003).

<sup>110</sup> See Office of the High Commissioner for Human Rights (2005), Report of the United Nations High Commissioner on Human Rights on the responsibilities of transnational corporations and related business enterprises with regard to human rights (UN Doc. E/CN.4/2005/91).

<sup>111</sup> Remarks by the Special Representative of the Secretary General, John Ruggie on 28 January 2014. Available at: <https://sites.hks.harvard.edu/m-rcbg/CSRI/UNBusinessandHumanRightsTreaty.pdf>

<sup>112</sup> UN Doc. E/CN.4/RES/2005/69 of 20 April 2005.

taken by the Sub-Commission: he undertook an inclusive consultation process seeking to build consensus among the various stakeholders<sup>113</sup>. As a result, in 2011 he submitted a completely new set of principles to the Human Rights Council: 'The Guiding Principles on Business and Human Rights, Implementing the United Nations 'Protect, Respect and Remedy' Framework'<sup>114</sup> which were strongly supported and endorsed by the Human Rights Council.<sup>115</sup>

However, the Business Principles have not been exempted from criticism. For some States (particularly from the Global South), academics, and NGOs, they contain watered-down obligations that are cast only in terms of a *responsibility* (rather than an obligation) to respect human rights<sup>116</sup> and did not include the extraterritorial dimension of the duty to protect human rights in relation to business entities<sup>117</sup>. Some authors have argued that the attempt to take into account and reconcile the views of all parties concerned led to a lack of coherent conceptual foundation.<sup>118</sup>

Thus, drafters should strive to identify the most protective interpretations of international human rights law as well as best practices. They should ensure that the text of the principles is based on existing international law but at the same time provide wider protection against abuses by applying the general standards to a specific context.

The drafters should be particularly careful in ensuring that the principles do not take a regressive approach towards the human rights obligations of States and the responsibilities of non-state actors than authoritative interpretations of international human rights law and current practices.

## 2. *Legal or non-legal language?*

The language, format, and length of these documents vary enormously. Some documents are written in a non-legal language (e.g. Forced Eviction Principles) some in a more normative language (e.g. the Limburg Principles, the Johannesburg Principles and the ETO Principles) and yet others in a mix of both normative and non-legal language (e.g. Poverty Principles).

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<sup>113</sup> Buhmann, Karim: Navigating from a "train wreck" to being "welcomed": negotiation strategies and argumentative patterns in the development of the UN framework. In Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect? Deva, Surya and Bilchitz, David (eds.), Cambridge University Press, 2013.

<sup>114</sup> UN Doc. A/HRC/17/31 of 21 March 2011.

<sup>115</sup> Human Rights Council Resolution 17/4 of 16 June 2011.

<sup>116</sup> See, e.g., Lopez, Carlos: The "Ruggie Process": from legal obligations to corporate social responsibility? and Deva, Surya: Treating human rights lightly: a critique of the consensus rhetoric and the language employed by the Guiding Principles. In Deva, Surya and Bilchitz, David (eds.), Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?, Cambridge University Press, 2013.

<sup>117</sup> Augenstein, Daniel and Kinley, David: When Human Rights 'Responsibilities' become 'Duties': The Extra-Territorial Obligations of States that Bind Corporations, Sydney Law School, Legal Studies Research Paper No. 12/71, September 2012.

<sup>118</sup> See, e.g., Lopez *op. cit.*, note 118, and Melish, Tara: Putting "Human Rights" Back into the UN Guiding Principles on Business and Human Rights: Shifting Frames and Embedding Participation Rights. In C. Rodriguez-Garavito (Ed.), Business and Human Rights: Beyond the End of the Beginning (Globalization and Human Rights, pp. 62-75), Cambridge University Press, 2017. See also 'Joint Civil Society Statement on the draft Guiding Principles on Business and Human Rights' of January 2011. Available at: [https://www.fidh.org/IMG/pdf/Joint\\_CSJ\\_Statement\\_on\\_GPs.pdf](https://www.fidh.org/IMG/pdf/Joint_CSJ_Statement_on_GPs.pdf)

The language used seems to be largely determined by the process undertaken, the topic under discussion, and the aim of the document. When the process is mainly led by legal experts, the guiding principles generally use legal terminology that reflects formulations found in the international human rights treaties. This is the case, for example, of the ETO Principles adopted by 40 international law experts. The more a process draws on the advice of non-legal practitioners and experts, the less legal the language used. Moreover, when the guidelines are designed to be operationalized, in other words, to be a tool for policy-makers and practitioners (e.g. the Forced Eviction Principles and the Poverty Principles), less legal and more technical language is used.

While drafters should avoid legally dry documents and should make guiding principles more accessible to non-legal experts, sometimes relying on well-established legal language has advantages. Using legal terms may assist in restating the authority and status of the principles. Moreover, it could help avoiding definitions or clarifications. For example, various guiding principles related to economic, social and cultural rights use the well-established tripartite typology of respect, protect, and fulfil (e.g. Forced Eviction Principles and ETO Principles). The widely accepted typology reflects, in a concise manner, the various levels of obligations absent which lengthy explanations would be required.<sup>119</sup>

### 3. *Detailed or broad formulations?*

Vagueness can lead States and other actors to dismiss a set of principles. However, broad formulations are sometimes needed to avoid the risk that the principles quickly become outdated. Drafters therefore must strike a balance between specific normative guidance and leave room for normative improvement or further development of additional standards and norms. They need to identify issues that are likely to evolve in the future and draft the relating principles with this in mind. This does not mean that all the principles should be broad and non-prescriptive but, rather, that broad language should be considered where substantive legal uncertainties remain after the background research and consultations have been done.

While the principles need to be mandatory to guide States' behaviours, ignoring the diversity among States or interfering with the legitimate discretion of States to determine the policy measures best suited to their needs could undermine their support and compliance. Sometimes it might be appropriate to draft a principle in a manner that allows States to make choices on implementation within carefully defined limits. The challenge here is to identify the situations in which States should enjoy such discretion. Drafters might question, for example, if specific approaches are appropriate in most, but not all, States due to their specific contexts. Is there any cultural limitation for the implementation of some principles in some countries/regions? These questions should be carefully addressed by the drafters and subject to the widest consultation possible.

To strike a balance, human rights guidelines should be drafted with a clear sense of the controversies and difficulties surrounding the topic. When possible to infer clear

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<sup>119</sup> For further information about this typology, see Sepúlveda Magdalena: *The Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights*, Intersentia, Antwerpen, 2003.

obligations without stretching too much beyond the current stage of international law, the text should attempt to provide detailed guidance in a mandatory manner (e.g. 'States must'). When international law and standards are emerging, not clear, or even contradictory, the drafters should use less mandatory language (e.g. 'States should') or formulations which interpretation can evolve over the years providing a broader protection to the individuals. Decisions about how generally or specifically to articulate a controverted principle should be subject to broad consultation and when necessary be subject to additional research.

#### 4. Targeting only States or also non-State actors?

Considering that the States are the primary duty bearers in international law, human rights principles are mainly addressed to them. Nonetheless, under international law, States have a duty to protect against non-state abuses; therefore, even when focusing on States, third parties, including corporations, are indirectly liable for infringements.

Due to the relevance of other actors in the promotion and protection of human rights, some principles have included 'recommendations' directly addressed to non-state actors. This is the case, for example, in the Poverty Principles and the Yogyakarta Principles. While the ETO Principles target States, some may also be applicable to international organizations.<sup>120</sup> Often, when guiding principles make recommendations to non-state actors, the language changes from 'shall' or 'must' (which refers to States' obligations") to a simple 'should'.

Even when it is decided to focus only on State actors, it might be advisable to include some recommendations directed at other actors and framed to ensure the dissemination and endorsement of the principles. For example, the Yogyakarta Principles recommend that the UN High Commissioner for Human Rights endorse them, 'promote their implementation worldwide' and integrate them into the work of OHCHR, 'including at the field level'.<sup>121</sup> They also recommend that Special Procedures and UN treaty monitoring bodies "integrate the Principles into the implementation of their respective mandates".

#### IV. Critical decisions during the process – learning from experience

As noted, each process for developing and adopting guiding principles has been unique. Yet, drawing recommendations from the past experiences of standard-setting processes can improve future endeavours.

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<sup>120</sup> For example, while the ETO principles deal with the obligations of States, some principles may however also be applicable to International Organizations. See Commentary to Principle 16. See De Schutter, O. et al., *op. cit.*, note 86.

<sup>121</sup> Yogyakarta Principles, Additional Recommendation A.

## 1. Consultations

The various processes for the adoption of guiding principles have implemented different levels of consultation. They often include international NGOs (e.g. Amnesty International, Human Rights Watch and Save the Children); national human rights organizations working in the areas addressed by the guidelines (directly or through coalitions); inter-governmental organizations with relevant mandates (e.g. UNICEF and UNHCR); international law and policy experts, academics, and practitioners.

Often, consultations also include affected constituencies. For example, in the development of the Poverty Principles, emphasis was given to the direct participation of people living in poverty.<sup>122</sup> In the Business Principles, consultations were held with business enterprises as well as individuals and communities directly affected by the activities of enterprises.<sup>123</sup> Extensive, inclusive consultations are not only important to refine the content of the document. They also contribute to the positive reception of the document and build a degree of consensus around it.

The conveners of guiding principles are the gate-keepers of the process. Nonetheless, further acceptance of human rights principles depends heavily on adoption through an inclusive and consultative process. Open consultations might also be an important tactical decision. When the consultation process has involved a wide range of actors from different regions (e.g. international lawyers, expert bodies, regional organizations, UN bodies, and NGOs), they consequently feel ownership of the process and may be critical allies in the dissemination and implementation of the principles.

Broad and inclusive consultations are important to refine the content of the documents. Inclusive consultations enable the drafters to gain a better understanding of different view-points, legal and ethical issues, States' constraints, and of the experience of those who are directly affected. They also contribute to the positive reception of the document among various stakeholders, to build a degree of consensus around it, and to gather political momentum. However, consultations should be planned carefully. When different stakeholders have strongly-held divergent views, it might be necessary to keep consultations open only to like-minded individuals and organizations. For example, it is unlikely that the Yogyakarta Principles would have been adopted if the socially conservative forces that deny the rights of women and LGBTI people had been invited to actively participate in the process.

Moreover, a consultation process could be weakened if there is a great asymmetry of power among participants. In such cases, the drafters of guiding principles should explicitly recognize such asymmetries and take active measures to equalize the power of various participants. Stakeholders with less power, resources, and capacities should be actively encouraged to participate in the consultations. To this end, conveners should take a variety of measures, from providing translations into local languages to funding the participation of competent and well-informed national and local NGOs from different regions.

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<sup>122</sup> The participation of people living in poverty was mediated by ATD Forth World, an organization with vast experience working and developing consultations with them. Thus, the methodology used was specifically adapted to ensure the effective and meaningful participation.

<sup>123</sup> UN Doc. A/HRC/17/31 of 21 March 2011, para. 10.

Inclusive consultations are particularly important when the principles seek to regulate actors who are not directly represented in the drafting process. They should have the opportunity to contribute with their expertise, challenge assumptions, and make proposals.

Thus, promoters of guiding principles should take all necessary measures to ensure an inclusive consultation process while appropriately weighting the views of actors with different powers and interests and preventing the disruption of the process. In any case, an inclusive consultation process does not mean trying to achieve political consensus in each aspect of the process. Experience shows that the desire to achieve political consensus tends to undermine the quality and legal weight of a text.<sup>124</sup>

Particular concerns arise when a consultation process is open to corporations that could be negatively affected by the process. These corporations might not be willing to participate in good faith in the process. While conveners might be tempted not to invite them to participate, their engagement could be necessary for ensuring legitimacy and to secure their 'buy-in'. Thus, it might be better to keep consultations open while adopting measures to minimize or prevent these actors from disrupting or capturing the process. As noted,

'business claims of cost, burden and impossibility must be taken with a pinch of salt: we generally expect very persuasive justifications for interferences with rights, and a similar approach should guide the GDPs when faced with intransigence from private educational providers'.<sup>125</sup>

Due to cost, undertaking consultations depends primarily on the capacity to attract funds or to efficiently use existing ones. Some guiding principles have been based on a considerable number of consultations. For example, for the development of the Business Principles there were at least 47 multi-stakeholder consultations and the SSRG and his team visited business operations and their local stakeholders in more than 20 countries.<sup>126</sup> The level of resources needed to undertake this level of consultations would be hard to match in the current financial context.

Moreover, inclusive consultations also require translations of key documents. Considering that English tends to dominate communications among people from diverse languages, the lack of translations into local languages is a major barrier for the participation of non-English speakers.

To ensure the impact of a consultation, different stakeholders should be addressed in their own 'language'. For example, the success of the Business Principles among corporations has been attributed to the fact that the SRSG employed economic

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<sup>124</sup> ICHRP, *op. cit.*, note 26.

<sup>125</sup> Lowenthal, Tom: Drafting guiding principles on state obligations concerning private schools: Lessons and strategic considerations from a rights perspective, Posted on 22 January 2018. Available at <https://gemreportunesco.wordpress.com/2018/01/22/drafting-guiding-principles-on-state-obligations-concerning-private-schools-lessons-and-strategic-considerations-from-a-rights-perspective/>

<sup>126</sup> UN Doc. A/HRC/17/31 of 21 March 2011 para. 8.

arguments (e.g. stressing the ‘competitive advantages’ to companies of respecting human rights).<sup>127</sup>

As resources are always limited and consultations are never enough, it is essential to set priorities and carefully select those invited to participate. A rule of thumb is to invite the most representative organizations or coalitions. In the latter case, the organizers may let the coalition members to organize themselves to bring their collective views and to disseminate the results.

When several consultations take place, an additional challenge is ensuring the continuity of the process. Consultation should be considered building blocks and, thus, as the process evolves, previous agreements cannot be reopened for discussion. At each level of the process, the conveners need to decide what agreements/proposals are fundamental – both for the value of the guiding principles and the coherence of human rights in general – and not open for substantive discussion. This requires a complex political judgement. On the one hand, the conveners may have a deep understanding of why a principle is needed and be unwilling to open it for negotiation. On the other hand, they need to ensure that different views are taken into account and that participants leave the consultation with a sense of achievement. In any case, participants of the consultation process should be fully, transparently and promptly informed about the parameters of the consultation in which they engaged.

## *2. Coordination with other civil society organizations and academic institutions*

When a group of academics or NGOs lead a process for the adoption of human rights guiding principles, it is critical that they work and coordinate with others. Even when it might be important for them to keep high-level visibility and leadership of the process (not least to justify their work with donors), the dissemination and impact of the process will depend on broader alliances. Successful experiences have shown great levels of collaboration among those involved. For example, a consortium of academic institutions, non-governmental organizations, and human rights experts led the ETO principles. In 2007, 30 members set up the ‘ETO-Consortium’<sup>128</sup> and by 2018, the consortium has become a global network of over 140 civil society organizations and academics that now seeks to create awareness on and advance the implementation of the ETO principles.<sup>129</sup>

As more organizations and academic institutions are involved in the drafting of principles, more actors will be committed to work on their dissemination and implementation. In this regard, it is particularly relevant to engage with organizations at working at the domestic level in the Global South.

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<sup>127</sup> Buhmann, Karim: Navigating from a “train wreck” to being “welcomed”: negotiation strategies and argumentative patterns in the development of the UN framework. In *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?*, Deva, Surya and Bilchitz, David (eds.), Cambridge University Press, 2013.

<sup>128</sup> Künnemann, Rolf; Rocha, Mariana and Suárez Franco, Ana Maria: Report of the 3<sup>rd</sup> Conference of the ETO -Consortium, Lancaster, 9-11 September 2009, FIAN International, December 2009.

<sup>129</sup> <http://www.etoconsortium.org/en/main-navigation/about-us/eto-consortium/>

Directly engaging with organizations from the South requires additional efforts. While technology has greatly facilitated their involvement, they often do not have high-quality access to it. Language is also a barrier. Overcoming barriers for engaging with civil society in the South is not only critical for ensuring the principles appropriately incorporate national perspectives, but that these partners are well prepared and positioned for dissemination and implementation in the South. For example, the role that national NGOs play in influencing the positions and behaviour of their government is irreplaceable. Moreover, national NGOs are in the best position to reference principles in parallel reports to human rights monitoring bodies.

In the elaboration of principles, partnerships between NGOs and academic institutions have also proven quite effective. Academics frequently have played a critical role validating principles through references in their academic writings.

### 3. *The adoption of subsequent documents*

Guiding principles are often relatively brief documents. For this reason, after the adoption of such principles, those involved in the drafting have often engaged in the preparation of non-technical handbooks<sup>130</sup>, toolkits<sup>131</sup>, legal articles<sup>132</sup> or annotations<sup>133</sup>. These documents might serve to various purposes: they further develop the content of the principles, emphasise and explain their legal foundations, or make the principles more accessible to some constituencies.

For example, after the adoption of the Poverty Principles, a coalition of NGOs elaborated a broadly consulted and field tested handbook in order 'to translate the legal language of the Guiding Principles into concrete suggestions to help those working at the local level to better understand the implications of human rights for people living in poverty'.<sup>134</sup> Similarly, following the adoption of the Yogyakarta Principles, an international Youth Coalition prepared a 'youth friendly' version of the Principles.<sup>135</sup> When the principles are written in a predominantly legal language, this type of initiative seems critical to decode their arid legal language.

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<sup>130</sup> See e.g. Amnesty International, Housing and Land Rights Network and Youth for Unity and Voluntary Action: A Handbook on UN Basic Principles and Guidelines on Developed-based Evictions and Displacement, New Delhi, November 2008; FAO: Handbook on Housing and Property Restitution for Refugees and Displaced Persons. Implementing the Pinheiro Principles, Rome 2007; ATD Fourth World and Franciscans International: Making Human Rights Work for People Living in Extreme Poverty. A Handbook for Implementing the UN Guiding Principles on Extreme Poverty and Human Rights, Geneva, 2015 and ETO Consortium: For human rights beyond borders: How to hold States accountable for extraterritorial violations. Handbook, Heidelberg, Germany, September 2017.

<sup>131</sup> See e.g. ETO toolkit. Available at: [http://www.etoconsortium.org/nc/en/main-navigation/library/documents/detail/?tx\\_drblob\\_pi1%5BdownloadUid%5D=205](http://www.etoconsortium.org/nc/en/main-navigation/library/documents/detail/?tx_drblob_pi1%5BdownloadUid%5D=205)

<sup>132</sup> See e.g. De Schutter, O. et al., *op. cit.*, note 86.

<sup>133</sup> See e.g. Kälin, Walter: Guiding Principles on Internal Displacement. Annotations, Studies in Transnational Legal Policy, No. 38 The American Society of International Law Washington, DC, 2008.

<sup>134</sup> Graham, Alison; Restifo, Francesca and Nelson, Janet: "Making Human Rights Work for People Living in Extreme Poverty: A handbook for implementing the UN guiding Principles on Extreme Poverty and Human Rights". Franciscans International and ATD Fourth World, Geneva 2015.

<sup>135</sup> See O'Flaherty et al., *op. cit.*, note 101, p. 32.

It is also common that, once adopted, guiding principles are widely translated. For example, the IDP Principles have been translated into at least 49 languages<sup>136</sup>; the Forced Evictions Principles into 25 languages;<sup>137</sup> and the Poverty Principles into at least 9 languages<sup>138</sup>. Translations are essential for a wide dissemination of the document as well as to ensure their implementation at the national level. Translations in local languages are critical to assist grassroots groups and affected communities to use and advocate for the principles.

Nonetheless, translations come with their own challenges. While translations into the six official languages of the United Nations (i.e. English, French, Spanish, Russian, Chinese and Arabic) are often the 'official' translations of the document, the success of an initiative might be measured in the number of 'unofficial' translations that activists and NGOs prepare following the adoption of principles. Yet, those who have led the adoption of the text might need to assume they will have no control or responsibility over the translation as they will be unable to check their quality. Without a revision (or edition) and a proofreading, the translated text might in some parts contain no resemblance to the original text.

Experience shows that even when non-intergovernmental processes adopt principles, it is possible to get them published (and translated) as a UN document as in the case of the Maastricht Guidelines and the Limburg Principles.<sup>139</sup> Moreover, in some cases, OHCHR has published some guidelines as 'official publications' in a reader friendly format. Such publications have greatly contributed to the dissemination of the principles within the Office and elsewhere.<sup>140</sup>

A good practice followed by several NGOs is to identify and keep track of subsequent development, such as pronouncements by expert bodies (e.g. UN human rights bodies and regional human rights courts), further translations, or subsequent signatories of the principles. Some of these initiatives have been included in specific websites or in publications.<sup>141</sup>

Ideally, these efforts should be envisaged from the beginning of the process, nonetheless, many unexpected opportunities might arise once the principles have been

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<sup>136</sup> <http://www.ohchr.org/EN/Issues/IDPersons/Pages/Standards.aspx#languages>

<sup>137</sup> Handbook on the United Nations Basic Principles and Guidelines on Development-based Evictions and Displacement (Fourth Edition), Housing and Land Rights Network, New Delhi, 2018.

<sup>138</sup> <http://www.ohchr.org/EN/Issues/Poverty/Pages/DGPIIntroduction.aspx>

<sup>139</sup> See section II.5.

<sup>140</sup> See e.g. Basic Principles and Guidelines on Development-Based Evictions and Displacement Available at: [http://www.ohchr.org/Documents/Issues/Housing/Guidelines\\_en.pdf](http://www.ohchr.org/Documents/Issues/Housing/Guidelines_en.pdf) and Extreme Poverty Guidelines, available at [http://www.ohchr.org/Documents/Publications/OHCHR\\_ExtremePovertyandHumanRights\\_EN.pdf](http://www.ohchr.org/Documents/Publications/OHCHR_ExtremePovertyandHumanRights_EN.pdf). At least in the case of the Poverty Guidelines, the resources for the publication were not provided by OHCHR; rather they were provided by an external donor through the Special Rapporteur on Extreme Poverty and Human Rights.

<sup>141</sup> See e.g. [www.etoconsortium.org](http://www.etoconsortium.org) and <http://yogyakartaprinciples.org>. See also Global Initiative for Economic Social and Cultural Rights: Working Paper Human Rights Law Sources: UN Pronouncements on Extra-Territorial Obligations, November 2015. Available at <http://globalinitiative-escr.org/wp-content/uploads/2015/11/151027-Human-Rights-Law-Sources-ETOs.pdf>

adopted and activists see their potential. Conveners of the Education Principles should be prepared to encourage and support such initiatives, including by providing funds.

## V. What lessons could be learned for the Education Principles?

While the elaboration and adoption of guiding principles is not a predictable set of activities, as examined in this paper, some common challenges can be identified and addressed. Based on the analysis of various initiatives that have sought the adoption of human rights guiding principles, this paper has aimed to assist those advocates working on the adoption of the Education Principles to draw conclusions and assess their own work.

Human rights guiding principles are usually created to fill gaps in protection. In this sense, the Education Principles seem necessary to prevent and provide protection in the face of an increased involvement of private actors in education. They aim to ‘clarify the normative framework with which to assess privatization in education from a social justice perspective’.

This paper has elaborated on a series of factors that determine the legitimacy of human rights guiding principles in the eyes of States and other actors: (a) independence and expertise of the drafters and signatories; (b) drafter and signatory diversity; (c) rigor and persuasiveness; (d) practicality; and (e) validation processes. The more serious the efforts of those leading the development of the Education Principles to address each of these factors, the more likely they will be broadly applied.

At the time of writing, the process seems to be going in the right direction. Extensive research has already been undertaken to clarify the existing legal obligations regarding the role of private actors in education. The research has covered theoretical and canvassed empirical data from specific countries<sup>142</sup>. Several consultations with a variety of stakeholders have informed the current draft of the Principles. Engagements with UN treaty bodies between 2014 and 2017 has additionally resulted in more than 20 UN Concluding Observations on the role of private schools and the right to education that add to the previous ones.<sup>143</sup>

The conveners of the Educational Principles have envisaged an inclusive process for their elaboration that ‘aims to include inputs from all interested stakeholders, and to involve people from various backgrounds - human rights lawyers, education specialists and practitioners and affected communities - and geographic regions’.<sup>144</sup> Yet, additional efforts should be made to ensure further participation of key constituencies such as representatives of ministries of education, teachers, parents, and students associations.

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<sup>142</sup> [http://www.right-to-education.org/page/faqs-human-rights-guiding-principles-states-obligations-regarding-private-schools#section\\_view-default-13](http://www.right-to-education.org/page/faqs-human-rights-guiding-principles-states-obligations-regarding-private-schools#section_view-default-13)

<sup>143</sup> <http://globalinitiative-esr.org/human-rights-guiding-principles-on-states-obligations-regarding-private-schools-faqs/#9>

<sup>144</sup> [http://www.right-to-education.org/page/faqs-human-rights-guiding-principles-states-obligations-regarding-private-schools#section\\_view-default-13](http://www.right-to-education.org/page/faqs-human-rights-guiding-principles-states-obligations-regarding-private-schools#section_view-default-13)

The conveners have also planned for the development of a variety of additional tools to complement the Education Principles once adopted.<sup>145</sup> The question remains of whether they can achieve the proposed level of inclusion and keep the momentum and resources for the steps planned after adoption.

Considering that the process is in its final stage, it is critical for the conveners to ensure continuity across consultations and ensure each successive consultation builds on those that preceded it. This requires careful planning of the agenda and materials for each meeting. In this regard, it might be convenient that the Secretariat, in consultation with the Steering Committee, identify from the latest draft those principles fundamental for the process, for consistency with existing human rights standards, and which are unlikely to be subject to substantive changes in subsequent consultations. They should clearly distinguish between those provisions that must be formulated without ambiguity from the outset and those that may be allowed to evolve during subsequent consultations. Finally, they should also clearly identify those principles for which the legal bases are not yet clearly established in international law and take a decision about whether to include them or not. If so, they need to decide how to incorporate them without undermining the overall text. Participants in the remaining part of the consultation process should be explicitly informed about these issues and should have a clear understanding of the parameters of their expected contribution in each case.

Thus far, it seems that limited engagement of for-profit education providers has occurred. As the process is close to an end, might it be the right time for the conveners of the initiative to strategically think about how they can constructively further engage with these actors? What arguments would convince them to engage in good faith in the process? What form of engagement would allow their views to be taken into account without disrupting the process? To what extent might the outcome be impacted if these companies have not been part of the process? What arguments resonating with their interests could cause them to accept the guidance provided by the Education Principles? What risks might companies encounter if they disregard human rights and the Education Principles?

Despite the considerable work that the Initiative conveners have undertaken to develop a network of partners and allies to support the Education Principles, room for improvement remains. The more allies and political support that the process garners now, the more likely the process will succeed in the future. The Secretariat should continue to inform different actors about the process and invest in wider advocacy campaign. They should continue to work with some friendly Governments and national actors and enlist them to support the Principles from the day of their adoption.

All future events related to the process, from additional consultations to the launch, should be planned strategically to move the Education Principles onto the international agenda, as well as to ensuring their widest dissemination in various regions. Conveners of the Education Principles should consider undertaking any additional consultations in those regions less represented in the process so far (e.g. Arab region) and to plan numerous launch-related events. They should aim at disseminating the

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<sup>145</sup> 'Human Rights Guiding Principles on the Role of States and Non-State Actors in the Provision of Education. Concept and Planning Note', dated 2 June 2016. On file with the author.

Education Principles in a variety of venues such as the Human Rights Council, regional human rights bodies, and UNESCO Headquarters. Any such events should be co-hosted by Governments in conjunction with other key stakeholders, including national and international NGOs.

Once adopted, conveners and allies should know *how* they can frame the Education Principles in a manner which maximises support. They should develop a range of arguments in favour of the Education Principles - legal, financial, ethical, and popular - and be ready to use them when necessary. They should also foresee how the Education Principles would impact the work of those who will have to implement them. They should consider the difficulties that countries at different levels of development will encounter when they implement the Principles. They should have a clear understanding of the implications that the Education Principles will have for private education providers and be prepared to submit facts and counter arguments when needed. To this end, appropriate mechanisms to share information efficiently and to respond quickly and in a coordinated manner to challenges and obstacles ahead should be clearly established.

Whatever option they decide to follow, it would be critical to determine *when* it would be appropriate to take each step. To this end, the conveners need to map the opportunities ahead (e.g. within intergovernmental processes or funders), as well as foresee possible difficulties (e.g. changes in the composition of UN expert bodies, or governments that may oppose the Principles).

While conveners of the Education Principles should be prepared to accommodate changes in circumstances and adapt to opportunities that may arise during the final stages of the process, they need to be driven by a coherent vision and long-term strategy. The consolidation of the strategy should include concrete plans for the implementation of the Principles after their adoption.

As to the validation of the Education Principles once adopted, the history of other processes shows that there are several options. Following the example of the Siracusa Principles, conveners may seek to find a like-minded State willing to send a note verbal to the UN Secretary General to circulate the principles as an official UN document. Or as done with the Maastricht Guidelines, they might lobby a State to request the Committee on Economic Social and Cultural Rights to publish them in its annual report. While these are relatively simple options (provided that a like-minded and influential government is willing to champion the principles), the current political context seems not to be open to these direct options, making other options potentially more politically feasible. Following the precedent of the Johannesburg Principles, conveners may decide to lobby the UN Special Rapporteur on the Right to Education to include the Education Principles as an annex to one of her reports to the Human Rights Council and to recommend its endorsement.

Conveners might also decide to lobby the members of the Committee on Economic, Social and Cultural Rights or the Committee on the Rights of the Child to adopt a general comment on the topic, an approach with several advantages. First, a general comment would help to clarify the corresponding treaty provisions relating to the involvement of private actors. If a general comment refers to the Education Principles, their legal weight would increase. General comments are often considered as deriving

their authority from the binding nature of the treaty with the implied consent of States. Second, general comments may become the basis of States practice, which in turn may lead to crystallization of the norm as customary international law. To achieve this impact, is essential to ensure that the content of a general comment on the topic is not considered by the States as outside the competence of the treaty body that issues it.

The paper has shown that in light of existing precedents, a variety of options can ensure the validation of the Education Principles. More importantly, the history of guiding principles shows us that with the right support and a legitimate text, it is possible to find opportunities for their endorsement even in restrictive political contexts. In this regard, the path followed by the Safe School Guidelines seems feasible in today's uncertain times. It would require persuading one or two governments to take an active role in the process of finalizing the text and promoting a State-led declaration or any other innovative way by which States can formally commit to implement the Education Principles. Considering the relevance of the topic for UNESCO, yet another option would be to lobby Member States of UNESCO and its Executive Board to propose a resolution endorsing the Principles.

Inevitably, some circumstances outside of the control of the conveners of the Education Principles will influence the progress of the process and its outcome.<sup>146</sup> The progress to date indicates that the conveners can manage the negative impact of such developments, as well as any upside. The approaches outlined in this paper should also prove instructive.

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<sup>146</sup> ICHRP, *op. cit.*, note 26, pp. 64-66.

## Annex 1. Specific Recommendations

Based on the lessons learned from past experiences, this section provides some concrete recommendations to those involved in the development of the Education Principles. These recommendations focus on what can be done at the current stage in the process of developing the Education Principles.

### Human Rights Council

- Include in the text of the Principles a recommendation to the Human Rights Council to 'endorse' them and give substantive consideration to human rights violations based on the privatization of education with a view to promoting States' compliance.
- Lobby a State to request that the Human Rights Council through a "note verbal" publish the Principles as a UN document.

### Special procedures and treaty bodies experts

The long-term objective is to ensure that UN monitoring bodies integrate the Education Principles into the work of their respective mandates. This may include taking them into account when reviewing individual cases, when reviewing State reports, and when drafting General Comments/Recommendations (i.e. treaty bodies) as well when drafting thematic and country reports (i.e. Special Procedures).

- Include in the text of the Education Principles recommendations to UN human rights bodies to pay due attention to human rights violations based on the privatization of education and to integrate the Principles into the work of their respective mandates.
- Present the principles to the Special Procedures and treaty bodies at their respective annual meetings. Lobby treaty bodies, in particular the Committee on Economic, Social and Cultural Rights and the Committee on the Rights of the Child, for the adoption of general comments on the topic.
- Lobby the Committee on Economic, Social and Cultural Rights to publish the text of the Principles as an official UN document by including them into one of its annual sessions documents.
- Lobby relevant Special procedure mandate holders, in particular the Special rapporteur on the right to education, to include the Principles in one of her reports to the Human Rights Council.

### Universal Periodic Review

- Coordinate and support NGOs working on education or broader ESCR issues to make submissions on the topic when the Principles are relevant in the countries under review. Such submissions could explicitly reference the Education Principles, both to articulate the nature and scope of State obligations, and to identify detailed recommendations for measures that States can take to fulfil these obligations at the national level.
- Organize informal briefings, make materials available, and encourage States in the UPR Working Group to raise concerns and make recommendations on the impact of privatization on education.
- Lobby Governments to accept key recommendations regarding the right to education prior to adoption of the final UPR report. Subsequently, promote action on the recommendations and follow-up their implementation at the domestic level.

### Office of the High Commissioner for Human Rights (OHCHR)

- Take concrete measures (from training activities to bilateral meetings) to ensure that the staff of OHCHR is aware of the Principles, in particular the staff supporting treaty bodies, special procedures, and more broadly dealing with ESCR issues. The aim would be to ensure that the Principles are included in Concluding Observations and Special procedures' reports but also incorporated in compilations of relevant materials prepared by the Office. These efforts should not be limited to headquarters level as sometimes field offices may have more flexibility in integrating the Principles into their work. The annual meetings between the heads of the OHCHR field offices and Geneva-based NGOs, might also provide a good opportunity for introducing the Principles.
- Request (and possibly even fund), the publication of the Education principles as an "official OHCHR publication" in a reader friendly format.

### **Other UN Agencies**

- Present the Principles to the relevant staff of other UN Agencies, in particular UNICEF and UNESCO.
- Lobby Member States of UNESCO and its Executive Board to propose a resolution endorsing the Principles.

### **International Financial Institutions**

- Present the Principles and lobby for their application within their work (e.g. limiting or stopping the funding of private education).

### **National Courts and Regional Human Rights Courts**

- Submit amicus curiae in cases where the Principles might be relevant.
- Lobby the Secretariat of regional human rights courts when appropriate to use the principles to interpret provisions relating to the right to education (e.g. Arts. 13 and 16 Protocol of San Salvador, Art. 2 First protocol to the ECHR). Judicial decisions can carry persuasive weight across countries.
- At the Inter American System, consider lobbying a State member to request an advisory opinion on the topic.

### **National Human Rights Institutions**

- Disseminate and promote the Principles among NHRIs through the Global Alliance of National Human Rights Institutions (GANHRI) to ensure they integrate the Principles into the work of their respective mandates (e.g. their monitoring work, handling of cases, and review of legislation for compliance with international law).

### **General public and those affected by the privatization of education**

The limited participatory approach inherent in an expert-led process of drafting the Principles raises a risk that the process or text might be rejected as elitist by the very communities whose situation it was intended to address and the support of whom is of crucial significance.

- Actively promote the Principles among teachers and students (e.g. Unions) from affected countries

### **Media**

- Identify and collaborate with key journalists to inform them about the principles

Draft - do not cite or circulate

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