

Human Rights Impact Assessment in the Context of Biofuels: Addressing the Human Right to Food and the Human Right to Water

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Abstract :

The original mandate of the UN Special Representative on Business and Human Rights said that he should 'develop materials and methodologies for undertaking human rights impact assessments.' Since then, tools for human rights impact assessment (HRIA) have developed by different actors. This article reviews two such tools, both of which are up for revision in 2010. One is by the International Finance Corporation, International Business Leaders Forum and Global Compact, the other by the Roundtable on Sustainable Biofuels. The article finds that substantive human rights and human rights principles are well understood by the former, while the latter seems to have an inadequate understanding of crucial human rights principles, such as non-discrimination, but the latter has some procedural strengths as compared to the former.

Keywords :

Human Rights Impact Assessment, right to food, right to water, biofuels, International Covenant on Economic, Social and Cultural Rights

I. Introduction

Human rights impact assessment (HRIA) is a relatively new field of research and

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practice.¹ This article analyses the extent to which an HRIA is appropriate in order to distinguish between acceptable and non-acceptable biofuel projects. It will primarily analyse two tools already published in draft version, but which are both to be revised based on input from stakeholders. First, the 'Global principles and criteria for sustainable biofuels production'(the Principles).² These were first published in 2008 and serve as a broader framework, but contain explicit and implicit references to human rights and apply particularly to biofuel projects. Second, the Guide to Human Rights Impact Assessment (the Guide)³ gives practical assistance to any investors in the planning of new investments, and is said to be 'very suitable for large-scale projects or large

companies.⁴

The focus of this article will be on the emerging biofuels industry, and it seeks to identify to what extent the Principles and the Guide address human rights adequately, in particular: the right to food and the right to water.

After an introduction explaining the substantive challenges of biofuel projects, there will be a brief presentation of the current status and application of HRIAs. The substantive content and process of HRIAs will then be elaborated, focusing on HRIAs developed by and for corporate actors. An analysis of the right to food and the right to water follows, before applying this understanding on the scope of the two human rights to the specific HRIAs, in order to assess the appropriateness of these HRIAs. This paper concludes by assessing the general applicability of HRIAs.

1 Todd Landman, *Studying Human Rights* (Routledge, London 2006) 126; see also Gauthier de Beco, 'Human Rights Impact Assessment' (2009) 27 *Netherlands Human Rights Quarterly* 139; Bård Anders Andreassen and Hans-Otto Sano, 'What's the Goal? What's the Purpose? Observations on Human Rights Impact Assessments' (2007) 11 *Journal of Human Rights* 275; and Paul Hunt and Gillian MacNaughton, *Impact Assessments, Poverty and Human Rights: A Case Study Using The Right to the Highest Attainable Standard of Health* (UNESCO, Paris 2006). As early as 1979 however, a Report from the UN Secretary-General to the General Assembly (1979) E/CN.4/1334 [314] (E/CN.4/1334) recommended 'requiring a "human rights impact statement", which might be similar in concept to an environmental impact statement, to be undertaken prior to the commencement of specific development projects or in connection with the preparation of an overall development plan or programme'.

2 Roundtable on Sustainable Biofuels (RSB), 'Version Zero of the RSB Principles and Criteria' (2008) <<http://cgse.epfl.ch/page79931.html>> accessed 5 March 2010. For the revised documents, see n 17.

3 International Finance Corporation, International Business Leaders Forum and Global Compact, 'Guide to Human Rights Impact Assessment: Road-Testing Draft' (2007) <http://www.unglobalcompact.org/docs/news_events/8.1/HRIA_final.pdf> accessed 5 March 2010 ('Road-Testing Draft').

4 Olga Lenzen and Marina d'Engelbronner, *Guide to Corporate Human Rights Impact Assessment Tools* (Human Rights in Business, Aim for Human Rights, Utrecht 2009) 35.

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The controversies regarding the first generation of biofuels,⁵ also termed 'agrofuels' are considerable. Four main concerns were raised by the former Special Rapporteur on the right to food: increased food prices; increased competition over land and forests, and increased evictions; employment and conditions of work; increased prices and scarcity of water.⁶ These concerns are also addressed in an FAO Report.⁷ To this list can be added the harmful effects of biofuel plantations on peoples' rights over their natural wealth and resources and the enjoyment of their cultural rights.

Even more concerns are raised in a report issued by UN-Energy, an inter-agency mechanism to ensure UN coherence in the field of energy.⁸ When addressing 'key sustainability issues' relating to bioenergy, nine issues are considered: (i) energy services for the poor; (ii) job creation; (iii) health and gender; (iv) structure of agriculture; (v) food security; (vi) government budgeting; (vii) trade, foreign exchange and national energy security; (viii) biodiversity and natural resource management; and (ix) climate change.

We see that human rights are not explicitly referred to by UN-Energy when indicating the sustainability issues. However, several of the concerns that are raised under the different issues are directly human rights-related. Concentration of ownership that could force the 'poorest farmers off their land' is acknowledged.⁹ This will have a direct effect on the realisation of the right to water and food.

When addressing food security, the core dimensions of availability and accessibility are recognised, together with stability (the price effect in the global energy market) and utilisation (nutritious intake of food and water).¹⁰ Finally, with regard to the overall impact on the most vulnerable and on climate change, the UN-Energy report notes: 'Unless new policies are enacted to protect threatened land, secure socially acceptable land use, and steer bioenergy development in a sustainable direction overall, the environmental and social damage could in some cases outweigh the benefits.'¹¹

5 Biofuel is a generic concept covering currently five different forms of fuel: bioethanol, biodiesel, biogas, biomethanol, biohydrogen, with the two former being liquid biofuels and of particular interest in this study.

6 UNCHR, 'Report of the Special Rapporteur on the Right to Food' (2007) A/62/289 [35-42] (A/62/289).

7 Asbjørn Eide, 'The Right to Food and the Impact of Liquid Biofuels (Agrofuels)' (FAO Right to Food Studies) (2009) Rome.

8 UN-Energy, *Sustainable Bioenergy: A Framework for Decision-Makers*(UN Energy, New York 2007).

9 Ibid 24.

10 Ibid 31.

11 Ibid 5.

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The ambition should be to adopt international guidelines on the production of biofuels. This is proposed by the present UN Special Rapporteur on the right to adequate food, himself expressing concern over biofuels.¹² These guidelines should build on human rights treaties, emphasising the right to adequate food and housing, decent conditions of work, and the rights of indigenous peoples and of women.¹³ The emphasis in this article will primarily be on food and water concerns of local communities, not of each employee.

II. Relevant Adopted and Proposed HRIAs

Illustratively, it is the UN Special Representative on Business and Human Rights, Professor John Ruggie ('Special Representative'), who was the first of the UN human rights experts to address HRIA, insofar as his mandate, given in 2005, included: 'To develop materials and methodologies for undertaking human rights impact assessments of the activities of transnational corporations and other business enterprises.'¹⁴ Even if his new mandate does not include the same formulation,¹⁵ the reports by the Special Representative will be included in the analysis.

While sustainability impact assessments (SIAs) or Environmental and Social Impact Assessments (ESIAs) have been used in different sectors for more than a decade, HRIAs are of a more recent date and less used.¹⁶ In the context of

12 UNCHR, 'Report of the Special Rapporteur on the Right to Food' (2009) A/HRC/12/31 [23] (A/HRC/12/31); also see UNCHR, 'Report of the Special Rapporteur on the Right to Food' (2008) A/HRC/9/23 [31] (A/HRC/9/23) which states that '...any new large-scale investment ... should be authorized ... only when its detailed and multi-stakeholder assessment is positive in terms of its implications...'.
13 Ibid; see also A/HRC/9/23 [32]. Concerns over biofuels in the context of secure tenure over land are also

expressed in UNCHR, 'Report of the Special Rapporteur on the Right to Food' (2008) A/63/278 [35] (A/63/278).

14 UN Commission on Human Rights, 'Human Rights and Transnational Corporations and Other Business Enterprises (2005) E/CN.4/RES/2005/69 [1(b)].

15 UN HRC, 'Mandate of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises' (2008) A/HRC/ RES/8/7 [4].

16 For a brief explanation on the difference between social and environment impact assessments (SEIA) on the one hand, and human rights impact assessments (HRIA) on the other, see UN, 'Human Rights Impact Assessment: Discussion Paper' (2006) (prepared for the UN Special Representative to the Secretary-General) <<http://www.reports-and-materials.org/Discussion-paper-human-rights-impact-assessments-Jul-2006.pdf>> accessed 5 March 2010; see also Lenzen and d'Engelbronner(n 4).

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biofuels, there are different guidelines and standards, in addition to the Principles developed by the Roundtable on Sustainable Biofuels (RSB).¹⁷ The RSB Principles contain a total of 12 principles, five of which are considered relevant in the context of this article. As this article will focus on the communities, not the employees, principle 4 will not be included, as it focuses only on the latter. The principles found to be most relevant are principles 5 ('development of local, rural and indigenous peoples'), 6 ('food security') and 9 ('water, including formal and customary water rights') and 12 ('land rights'). Moreover, principle 1 states that biofuels production shall comply with international treaties to which the host country is bound. The Principles – as emerging in new and revised versions – is likely to be a reference document for the biofuel industry.

From among the several general tools for human rights impact assessment,¹⁸ this article will focus on the Guide to HRIAs, which is scheduled to be adopted in a final version in 2010. The Guide identifies eight different steps of a business project plan, specifying how human rights are to be included in the strategic decision-making at all these stages. Hence, the responsibility for ensuring respect for human rights is with the companies. While this emphasis on the responsibility of corporations is welcomed, it is acknowledged by the UN Special Representative of the Secretary-General on Business and Human Rights that the 'incidence of corporate-related human rights abuse is higher in countries with weak governance institutions.'¹⁹ Moreover, on a more general basis, he states that the 'Governments

17 RSB (n 2). The Principles are subject to a dynamic process, as evidenced in RSB, 'Current Version of the Principles and Criteria' <<http://cgse.epfl.ch/page79935.html>> accessed 5 March 2010. There are three 'plant-specific' forums: (1) the Round Table on Sustainable Palmoil adopted in 2006 a RSPO Principles and Criteria for Sustainable Palm Oil Production, with Annex 1, which lists several ILO conventions and the ICESCR as 'protections', not as 'human rights'; (2) the Better Sugarcane Initiative (BSI) has a 'BSI Standard Version 1', where principle 2 ('human rights') is very focused on the employees, while principle 1 ('obey the law') focuses on indigenous peoples and principle 5 ('continuous improvement') focuses on land and water quality <http://www.betersugarcane.org/bsi_standard.html#standard> accessed 5 March 2010; (3) the Jatropha Sustainable Biofuels Alliance was set up in September 2008, and has no guidelines yet.

18 Lenzen and d'Engelbronner(n 4) identify five different tools: (1) Canadian Rights & Democracy, Human Rights Impact Assessments for Foreign Investment Projects(2007); (2) International Alert, Conflict-Sensitive Business Practice: Guidance for Extractive Industries(2005); (3) Road-Testing Draft(n 3); Danish Institute for Human Rights, The Human Rights Compliance Assessment(2009); and (5) Maplecroft, Human Rights Risk Tools(2009). The two latter are constantly revised.

19 John G Ruggie, 'Consultation on Operationalizing the Framework for Business and Human Rights' (Presented by the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, 5-6 October 2009) Palais de Nations, Geneva, 3.

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currently lack adequate policies and regulatory arrangements for fully managing the complex business and human rights agenda.²⁰ Hence, corporate-specific human rights codes of conduct are most effective when the regulatory framework of States is strong and predictable.

In the Guide, substantive human rights are listed in Appendix 4.²¹ A comprehensive list of rights is provided under the section 'rights of communities'. First, the so-called 'key rights' relate to property, housing, health, education, food, water, religion, association, assembly and expression, as well as minority rights. Second, the specific rights of indigenous peoples are identified as consultation and participation, land and natural resources, relocation, and cultural rights. Third, the so-called 'key emerging issues' include free and prior informed consent, and traditional knowledge. In addition to the core human rights conventions, the ILO Convention 169 concerning Indigenous and Tribal Peoples in Independent Countries and the Convention on Biological Diversity are finally listed as 'key international standards'.

III. What is Added by an HRIA as Compared to Other Impact Assessments?

While other impact assessments encompass at least the environmental and social dimensions (and sometimes also the economic), an HRIA is based on international law standards, and may therefore be more robust on the normative side than other impact assessments, even if corporate actors do not have similar obligations to States. The two first principles of the UN Global Compact reads: 'Businesses should support and respect the protection of internationally proclaimed human

20 Ibid 2.

21 Road-Testing Draft(n 3) 73-79.

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rights',²² and 'Businesses should make sure that they are not complicit in human rights abuses.'²³

A document from the UN Special Representative on Business and Human Rights identifies the requirements of an HRIA (extracts):²⁴

1. catalogue the human rights standards, including indigenous customary law;
2. describe human rights conditions in the area before activity begins, and identify the relevant baseline indicators;²⁵
3. present the likely changes as a result of the business activity, and community perceptions of what is likely to change;
4. make practical recommendations to address those risks that are identified;
5. adopt a management plan that includes provisions for monitoring the baseline indicators.²⁶

The Special Representative states: 'The process of carrying out an HRIA can be as

22 For an elaboration on the scope of respect see the two reports by the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises, 'Protect, Respect and Remedy: a Framework for Business and Human Rights' (2008) A/HRC/8/5

[51-81] (A/HRC/8/5) and 'Business and Human Rights: Towards Operationalizing the "Protect, Respect and Remedy" Framework' (2009) A/HRC/11/13 [45-85] (A/HRC/11/13). The International Chamber of Commerce (ICC), 'ICC Welcomes UN Human Rights Report' (Press Release) (10 June 2008) states that the Special Representative's 2008 report 'offers a well-designed framework of principles for business responsibility on human rights'. On the general reception of the work of the UN Special Representative, see Giovanni Mantilla, 'Emerging International Human Rights Norms for Transnational Corporations' (2009) 15 *Global Governance* 279, 293.

23 On complicity, see A/HRC/8/5, n 22, above [73-81] and A/HRC/8/16, Clarifying the Concepts of 'Sphere of influence' and 'Complicity' (2008) [26-72].

24 A/HRC/7/74, Human rights impact assessments – resolving key methodological questions (2007) [12-16] and [23].

25 O Lenzen and M d'Engelbronner (n 4) 8, where it is stated that human rights indicators, based on and linked to human rights standards, 'play a central role within the HRIA process'. The indicators can be divided into three categories: policy (status of norms), process (effect of procedures), and performance (potential for correction).

26 Road-Testing Draft (n 3) elaborates each of these processes, in chapters 3 to 7, with chapter 8 entitled 'Monitor, evaluate and report on the management process' guiding the subsequent process. See also the Human Rights Impact Resource Centre's 'Eight Step Approach to Human Rights Impact Assessment' <<http://www.humanrightsimpact.org/hria-guide/overview/phases/>> accessed 5 March 2010, where monitoring and evaluation are the last two. Ruggie (n 19) lists ten steps which are for CSOs or NGOs to undertake, not steps taken by the corporate actors themselves.

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or even more important than a final report.²⁷ This is a correct observation, in the view of the present author. Moreover, while the Special Representative says that the HRIAs should describe human rights conditions (also termed 'baseline assessment'), he does not set out any limitation regarding which human rights that should be included in an HRIA.²⁸

Another quality of an HRIA is the emphasis on the human rights principles,²⁹ in this context understood as how the investors conduct the investment process. Most of these human rights principles are listed in Appendix 4 of the 'Guide to Human Rights Impact Assessment'.³⁰ These principles will apply differently to corporate actors and States.

Taking 'rule of law' as one example, States are to adopt legislation and establish institutions in order to enhance rule of law within their jurisdiction. Corporate actors, on the other hand, are to make sure that they do not exploit the weaknesses of the legislation and institutions of the States in which they operate, hence applying double standards and acting contrary to the company's general codes of conduct.

Such codes of conduct in the realm of human rights are being adopted by more and more companies,³¹ but there is no requirement to have such Codes in place in order to participate in the UN Global Compact, and the Global Compact secretariat is not involved in any systematic monitoring of the 4,000 corporations which have committed themselves to complying with the Global Compact's 10 principles.³²

Hence, it seems reasonable to state that even if the positions of companies

27 A/HRC/7/74(n 24) [20]; in A/HRC/8/5(n 22) [59] and [61] Ruggie also states that an HRIA must be one of four elements in a corporate 'human rights due diligence process'.

28 See also Ruggie(n 19) 2, which argues against a delimited list of business-specific rights.

29 The relevance of human rights principles is emphasised in UN, 'Report on Indicators for Monitoring Compliance with International Human Rights Instruments' HRI/MC/2008/3 [10] (HRI/MC/2008/3). FAO (Food and Agricultural Organization) identifies seven human rights principles: participation, accountability, non-discrimination, transparency, human dignity, empowerment and the rule of law in 'Right to food and indigenous peoples' (2007) 2 <http://www.fao.org/righttofood/wfd/pdf2007/focus_indigenous_eng.pdf> accessed 5 March 2010.

30 Road-Testing Draft(n 3).

31 According to the Business and Human Rights Resource Center, established to support the efforts of the Special Representative, there are 242 company policy statements on human rights <<http://www.business-humanrights.org/Documents/Policies>> accessed 5 March 2010. It is reported that the majority of large companies now have codes of conduct, on which they provide training. The most 'significant ethical issues' are, however, not human rights, but environment, safety and security matters, see Simon Webley and Nicole Dando, *Use of Codes of Ethics in Business: 2007 Survey & Analysis of Trends*(Lutz Press, 2008).

32 Scott Jerbi, 'Business and Human Rights at the UN: What Might Happen Next?' (2009) 31 *Human Rights Quarterly* 299, 304.

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differ, there is a general support of human rights, as seen by the support of the Global Compact and the 'respect, protect, remedy' framework of the Special Rapporteur. If this support is to bear fruit in the actual conduct of the companies, the companies need appropriate tools and enhanced understanding of the content of the relevant human rights.

Before identifying the extent to which the two documents introduced in Section B above are appropriate tools for highlighting and clarifying both human rights principles and substantive human rights in an adequate manner, we need a more precise understanding of the actual content of relevant human rights, particularly the right to food and the right to water.

IV. The Human Right to Food

Based on the assumption that an HRIA is appropriate for corporate actors, even if they do not have the same specific obligations under human rights treaties as do States, there will now be an analysis of which community impacts should be included in an HRIA. The human rights to food and water are presumed to encompass the most relevant impacts on communities by the projects by corporate actors, in the context of this article particularly applying to biofuel projects.

Regarding food, this paper will primarily analyse the International Covenant on Economic Social and Cultural Rights (ICESCR), article 11.2(a). This is a provision which is not frequently quoted, and was hardly addressed in General Comment No 12 on the right to adequate food.³³ This paragraph is important, however, as it identifies substantive measures which the States shall take to 'improve methods of production, conservation and distribution of food', 'by developing or reforming agrarian systems in such a way as to achieve the most efficient

33 ECOSOC 'General Comment 12' in 'Substantive Issues Arising in the Implementation of the International Covenant of Economic, Social and Cultural Rights' (2000) UN Doc E/2000/22 [102-110]. Paras 25 and 26 address access to resources in the context of production and distribution of food.

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development and utilization of natural resources'.³⁴ Three relevant aspects of this provision will now be clarified, applied to the context of biofuels.

With regard to the first, namely to 'improve methods of production', there is a general understanding that a massive introduction of the most modern methods of production will simply not be appropriate in many local contexts. There is also an acknowledgement of the need to recognise and integrate the existing knowledge, including traditional knowledge, of farming communities, and build upon these when modern technologies are introduced.³⁵ Hence, a problem is that the attention devoted to facilitating agrofuels drive the attention away from the enhanced production of staple food, and that land set aside for food production is rather used for agrofuel production.³⁶ If land originally set aside for food production and leased to an investor for this purpose, is subsequently only used for producing non-edible plants for fuels, it could aggravate national food insecurity.³⁷ The success of the Brazilian bioethanol industry is explained by the fact that sugarcane can be used both as sugar and as a raw material for fuel for national consumption or export, and is easy to shift between the various forms of processing. The income from producing sugarcane can be used for buying food.

Second, with regard to the reform of agricultural systems, there are concerns regarding distribution of land, and in this regard Brazil is not a model.³⁸ Moreover, on the issue of uncertain or lacking legal entitlements to land:

34 The full text of article 11.2(a) reads: 'The States Parties to the present Covenant, recognizing the fundamental right of everyone to be free from hunger, shall take, individually and through international co-operation, the measures, including specific programmes, which are needed: (a) To improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources.'

35 See the 2008 reports from the International Assessment of Agricultural Knowledge, Science and Technology for Development (IAASTD) <<http://www.agassessment.org>> accessed 5 March 2010.

36 According to Tanzanian Deputy Minister in the PM's Office, 'investors had been acquiring arable land meant for food crop production and turning them into farms for growing biofuel crops such as jatropha, a move that could fuel a food crisis in the country' as cited in 'Govt identifies factors fuelling land conflicts' Guardian (TZ) (29 May 2009).

37 Interview with Peter Sumbi, Director of WWF Tanzania (27 March 2009) where he stated that improved food security is the most important issue for Tanzania.

38 The Catholic Church's Pontifical Council for Justice and Peace, 'Toward a Better Distribution of Land: The Challenge of Agrarian Reform' (1997) <www.natcath.com/NCR_Online/archives/040398/040398a.htm> accessed 5 March 2010, which condemned the unjust distribution of land as a 'scandal'.

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Many indigenous lands have been and still are declared public or unoccupied because they are held collectively according to conceptions of ownership and access that do not fit well with imported property systems. This lack of status has consequences for indigenous asset holders and society at large and is a critical issue.³⁹

Several states lack formal recognition of collective ownership, and this will be a problem when faced with an expanding biofuels industry.

Third, with regard to 'efficient development and utilization of natural resources', this relates to the principle of sustainability. When the ICESCR was drafted, environmental sustainability did not exist as a concept, and environmental concerns were primarily related to pollution. Therefore, a proper understanding of the phrase 'efficient development and utilization of natural resources' must take into account the current understanding of the balance between science, technology and environment, and not the understanding prevailing in the 1960s. In general, if forests are converted to biofuels production, there will always be a negative environmental effect, both locally and globally. If, on the other hand, trees are planted for biofuel production on dry land, it would be positive, even if the commercial potential of such production is limited.⁴⁰ It must be presumed, however, that the latter part of article 11.2(a) is not sufficiently specific to serve as a basis for specific environmental considerations.

V. The Human Right to Water

Access to water is recognised as a human right by the Convention on the Rights of the Child (CRC), article 24.2(c) in order to 'combat disease and malnutrition'; in the Convention on the Elimination of all Forms of Discrimination of Women (CEDAW), article 14.2(h) in the context of 'adequate living conditions';

39 United Nation's High Level Commission on the Legal Empowerment of the Poor, Making the Law Work for Everyone Volume I(2008) 79.

40 Bryant Chen et al, 'Jatropha curcas L: Biodiesel Solution or All Hype? A Scientific, Economic and Political Analysis of the Future Energy Crop' (2008) 12 <<http://humanities.uchicago.edu/orgs/institute/bigproblems/bp-energy.html>> accessed 5 March 2010: 'The dry seed yield of Jatropha planted on normal land after 6 years is estimated to be on average 3.45 tonnes per hectare. On marginal land, this value drops to 1.8 tonnes per hectare.' See also Khoti C. Kamanga, 'The Agrofuel Industry in Tanzania: A Critical Enquiry into Challenges and Opportunities' (Report) (May 28, 2008).

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and in the Convention on the Rights of Persons with Disabilities (CRDP), article 28.2(a), relating to 'social protection'. We therefore see that there are three distinct approaches towards the recognition of the human right to water within these three conventions. Children, rural women, and disabled must be considered to be vulnerable persons.

Water is not explicitly recognised in the ICESCR, but can be understood as falling within ICESCR articles 12.2(b) and (c), emphasising 'improvement of environmental hygiene' and 'prevention of diseases'.

Neither is the right to water recognised explicitly in article 11. Article 11.1 contains the term 'including' between the recognition of the human right to an 'adequate standard of living' and the specific rights to 'food, clothing and housing'. The term 'including' has been interpreted by the Committee to imply that the subsequent catalogue of rights, namely food, clothing and housing 'was not intended to be exhaustive'.⁴¹

General Comment No. 15 on the right to water is based on the premise that the right to water is implicitly recognised in article 11.1 and article 12.2 of the ICESCR. It will now be questioned whether this interpretation of these two provisions of the ICESCR is appropriate, or if such interpretation can be said to be too expansive.

First, regarding article 11.1, General Comment No. 15 identifies one criterion for determining what is actually essential to secure an adequate standard of living, by confirming that the right to water 'is one of the most fundamental conditions for survival'.⁴² Hence, the term 'including' of article 11.1 of the ICESCR must be understood as saying that access to those goods which are fundamental to human survival can be said to constitute human rights in accordance with article 11.1. This criterion must be considered to be relatively strict, not allowing any resource or good to be implicitly recognised within article 11.1, but only goods which are fundamental conditions of human survival independent of the natural circumstances under which human beings are

living. However, the human rights

41 ECOSOC 'General Comment 15' in 'Substantive Issues Arising in the Implementation of the International Covenant of Economic, Social and Cultural Rights' (2002) UN Doc E/C.12/2002/11 [3].

42 Ibid; for legal literature stating that the right to water is a human right, see Wouter Vandenhole and Tamara Wielders, 'Water as a Human Right – Water as an Essential Service: Does it Matter' (2008) 26 *Netherlands Quarterly of Human Rights* 391; see also the articles and books referred to in fn 1 of that article; see also Salman, M.A. Salman and Siobhán McInerney-Lankford, *The Human Right to Water: Legal and Policy Dimensions* (World Bank, Washington DC 2004) and Knut Bourquain, *Freshwater Access from a Human Rights Perspective: A Challenge to International Water and Human Rights Law* (Martinus Nijhoff Publishers, Leiden 2008).

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principles, such as the principle of non-discrimination in the public provision of important services or goods, do apply generally.

In the context of biofuels, concerns over inadequate water are expressed by those observing the location of biofuel plantations in Tanzania. As the location of the planned sugarcane plantations is in areas with too little rainfall,⁴³ there will be a need of irrigation. While opinions differ on whether the water used by the plantations will make the rivers dry in the most critical months, the combined effects of irrigation, climate change and population growth will at least pose serious problems for water accessibility and quality for the communities which are depending upon the rivers.

Second, the wording of article 12.2 on 'environmental hygiene' and 'prevention of diseases' has been analysed in General Comment No. 14 on the highest attainable standard of health. The first paragraph has been found by the Committee to relate to the 'adequate supply of safe and potable water'⁴⁴ while the second paragraph has been found to relate to 'environmental safety',⁴⁵ of which the safety and quality of water must be said to be integral. Hence, it cannot be said to be a too expansive reading to say that safe water is integral to both 'environmental hygiene' and 'prevention of diseases'. While irrigation-dependent biofuel plantations are in themselves critical for water access, the biofuel companies might be willing to take on the investment costs to improve the overall infrastructure in the region, which might include better access to safe and potable water. This, however, is not a requirement for the biofuel companies.

Moreover, General Comment No. 15 clarifies the right to water and the corresponding State obligations in international human rights law and international

43 EcoDevelopment in Europe obtained two subsidiaries of the Swedish company Sekab for 400 SEK in October 2009 see SEKAB, 'SEKAB sells subsidiaries in Tanzania and Mozambique to EcoDevelopment in Europe AB' (Press Release) (23 October 2009) <http://www.sekab.com/Eng2/Information%20pages/Information%20PDF/091022_%20Press_SEKAB%20s%C3%A4ljer%20Afrikabolagen%20EN%202.pdf> accessed 5 March 2010; see also --, 'Swedish biofuel company sells Bagamoyo venture' DailyNews (Dar es Salaam 26 March 2010) <<http://www.dailynews.co.tz/home/?n=4939&cat=home>> accessed 5 March 2010, where there are plans for large sugarcane plantations for bioethanol in Bagamoyo and lower Rufiji. These locations are near the Indian Ocean, in order to facilitate the shipping. The four existing sugarcane mills in Tanzania are all in inland, in regions with adequate rainfall. In Brazil, the sugarcane plantations which can be used for bioethanol are not in need of irrigation.

44 ECOSOC 'General Comment 14' in 'Substantive Issues Arising in the Implementation of the International Covenant of Economic, Social and Cultural Rights' (2000) UN Doc E/C.12/2000/4 [5].

45 Ibid [16]; see also General Comment 15(n 41) [8].

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humanitarian law.⁴⁶ Also other treaties emphasise adequate provision of water for human needs. The 1997 UN Convention on the Law of Non-Navigational Uses of Watercourses reads in article 10.2: '...with special regard being given to the requirements of vital human needs.'⁴⁷ Article 10.2 is clarified by the UN Working Group in the following manner: 'In determining 'vital human needs', special attention is to be paid to providing sufficient water to sustain human life, including both drinking water and water required for production of food in order to prevent starvation.'⁴⁸

Both the right to food and the right to water are strengthened by the wording of joint articles 1 of the ICESCR and the International Covenant on Civil and Political Rights (ICCPR). Space, however, does not allow for an in-depth analysis of article 1.2, which recognises the right of peoples to 'freely dispose of their natural wealth and resources.... In no case may a people be deprived of its own means of subsistence.'⁴⁹

This indicates that some environmental concerns will also be addressed in an HRIA. The provisions on environmental safety and safe water (ICESCR, article 12.2) and the peoples' rights not to be deprived of their means of subsistence (ICESCR, article 1.2) link

human rights to the environment, and are hence applicable – together with human rights principles⁵⁰ – to assessments of the impact on communities of large-scale biofuel projects.

Based on this understanding, the two tools will now be assessed, starting with the RSB's Principles.

46 For references to international humanitarian law, see General Comment 15(n 41) fn 21, which refers, *inter alia*, to the provisions under article 54 concerning the 'Protection of objects indispensable to the survival of the civilian population' of the 1977 Additional Protocol I and article 14 of the 1977 Additional Protocol II to the 1949 Geneva Conventions.

47 Convention on the Law of Non-Navigational Uses of Watercourses (adopted 21 May 1997) 36 ILM 700 (1997). Article 10.2 refers to the articles 5-7 of the Convention on equitable and reasonable utilisation and the obligation not to cause significant harm.

48 UN Doc. A/51/869, 5.

49 Similar wording is found in ICESCR, article 25 and ICCPR, article 47.

50 Food and Agricultural Organization(n 29) 2.

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VI. Are the Human Rights Standards and Principles Applicable to Corporate Actors Appropriately Reflected in the RSB's Principles?

In seeking to answer whether the human rights standards and principles are appropriately reflected in the two HRIAs, it is important to keep in mind that corporate actors and States have 'differentiated yet complementary responsibilities'.⁵¹ It was found in Section C above that two bases for identifying human rights responsibilities of corporate actors are the UN Global Compact's two first principles and the 'respect, protect and remedies' framework of the UN Special Representative.⁵² Recently-adopted UN resolutions have emphasised that human rights do hold both the states and the other actors accountable within their respective mandate or their sphere of influence.⁵³

The RSB's Principles address indigenous communities, food security, water and land rights, in principles 5, 6, 9 and 12, respectively. The fact that food, water and land rights concerns are recognised as crucial in any sustainable biofuels production is in itself positive. Principle 2 provides the requirements of either a full Environmental and Social Impact Assessment (ESIA), a Rapid Environmental and Social Assessment (RESA) or a combination, depending on the outcome of

51 A/HRC/11/13(n 22) [58].

52 A/HRC/8/5 and A/HRC/11/13(n 22) and accompanying text.

53 On the phrase 'respective mandates' see E/CN.4/RES/2004/19 [7] and E/CN.4/RES/2005 [8]; on the phrase 'sphere of influence' see E/CN.4/RES/2005/69 [1(c)] and the clarification in A/HRC/8/16(n 23) [5] and [14] starting from the observation that the 'sphere of influence concept combines too many different dimensions ... and that influence by itself is an inappropriate basis for assigning corporate responsibility' and continuing: 'Influence as a basis for assigning responsibility invites manipulation. This is so because influence can only be defined in relation to someone or something'. Rather, he argues for assessing the 'potential and actual human rights impacts resulting from a company's business activities and the relationships connected to those activities' [25].

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the 'scoping exercise'.⁵⁴ The ESIA is frequently referred to in the principles and criteria.

In addition, international human rights are indirectly referred to in criterion 1 to principle 1, which reads: 'Biofuel production shall comply with all applicable laws and regulations of the country in which the production activity occurs and with relevant international law.'⁵⁵ Even if only the non-binding Universal Declaration of Human Rights is mentioned, the explicit reference to human rights, including the recognition of the United Nations Comprehensive Guidelines on Development-Based Displacement as a basis for implementing the principle on land rights,⁵⁶ implying that '[n]o involuntary resettlement shall be allowed for biofuel production',⁵⁷ is a positive aspect of the Principles.

While the Principles have improved considerably since the launch of 'Version Zero', the Principles are wanting in two respects. First, they do not overtly recognise human rights principles, such as non-discrimination. The revised version, however, includes wording which must be understood to encompass non-discrimi

54 On the distinction between an ESIA and an RESA see RSB, 'Version 0.6 Part II' (October 2009) <<http://cgse.epfl.ch/webdav/site/cgse/shared/Biofuels/Version%20One/Version%200.6/RSB%20Version%200%206%20%28part%20II%20-%202,3,4,5,6,7,12%29.pdf>> accessed 26 March 2010 (RSB Version 0.6 Part II), 2-3, which stresses that an ESIA shall be conducted by 'independent professionals'. A RESA, on the other hand, is said to be 'very similar to the Scoping phase for a full ESIA' in RSB, 'Guidelines for Environmental and Social Impact Assessment, Stakeholder Mapping and Community Consultation Specific to the Biofuels Sector,' (RSB Toolkit Version 1.0) (12 November 2009) <<http://cgse.epfl.ch/webdav/site/cgse/shared/Biofuels/Version%20One/Version%201.0/30-11-2009%20ESIA%20guidelines.pdf>> accessed 5 March 2010 (RSB Guidelines for Impact Assessment), 14 and 45. The combination approach shall be adopted if the scoping assessment identifies one problematic impact, requiring a 'specialist study' to analyse this particular impact (45). Moreover, there is an Annex to the Guidelines available at <<http://cgse.epfl.ch/webdav/site/cgse/shared/Biofuels/Version%20One/Version%201.0/ESIA%20Annex%20-%20Soil%20specialist%20guidelines.pdf>> accessed 2 March 2010.

55 RSB, 'Version 0.6 Part I' (September 2009) <<http://cgse.epfl.ch/webdav/site/cgse/shared/Biofuels/Version%20One/Version%200.6/RSB%20Version%200.6%20%28part%20I%20-%201,8,9,10,11%29.pdf>> accessed 26 March 2010 (RSB Version 0.6 Part I), 2.

56 RSB Version 0.6 Part II(n 54) 19. The RSB Guidelines for Impact Assessment, E/CN.4/ Sub.2/1997/7, and Annex, were endorsed by Commission on Human Rights; see E/CN.4/ Res/2004/28 (adopted with 7 abstentions and one vote against).

57 Ibid 20.

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mination.⁵⁸ The emphasis on marginalised persons and communities is still too weak in the monitoring phase. Hence, the principles do not provide for a monitoring system to assess how women and men might be impacted differently. The requirement that the consultative process shall take place through a 'meaningful participation' does not explicitly ensure inclusion of the women of a local community.

Second, there are no explicit requirements regarding the form in which the information is to be made available.⁵⁹ In many of these societies, a certain proportion of the population cannot read or write, and this requires other approaches than written information. The requirement of 'meaningful participation' does not specify how the information is to be presented.

These issues are, however, addressed in more detail in another document on the RSB's homepage, namely the Guidelines for Impact Assessment (RSB's Guidelines).⁶⁰ This document also gives more depth to how the impact assessment process shall proceed, including under which circumstances a project should 'be rejected due to unmitigable impacts.'⁶¹ As the document is available on the RSB's homepage, and there is nothing indicating that this is a draft that is subject to review, it must be considered that this document will be applied in its present form. While the RSB's Guidelines are rigorous, they do leave much power to the company (termed 'Operator').

Also in the RSB's Principles the Operator is given relatively wide responsibilities, including under criterion 5a, which states: 'Skills training shall be provided by the Operator if necessary to ensure the implementation of this criterion.'⁶² It is difficult to identify what is 'necessary' in order to ensure the implementation of

58 Ibid 3; criterion 2b on 'Free, Prior and Informed Consent' under Principle 2 states: 'Special attention shall be made to ensure that women, youth, indigenous and vulnerable people can participate meaningfully in meetings and negotiations...'; see also criterion 5b on 'special measures to encourage participation' and the call for 'gender sensitive approach to participatory planning' and Principle 12, calling for 'particular attention' to women and other vulnerable groups. Moreover, the 'General Guideline' to Principle 4 on 'Human and Labour Rights' says 'All of the rights provided for in this principle shall apply equally to men and women.'

59 Ibid 4; the requirement in criterion 2b of version 0.6, says that the participation of indigenous and vulnerable people shall be 'meaningful'. Even if the same criterion specifies that '[i]n regions of poverty, where the ESIA identifies a significant potential for rights abuses through biofuel productions, the Operator shall provide independent legal advice for local and indigenous communities...', this leaves much power to the Operator and cannot be said to be adequately specific to achieve an adequately inclusive process, particularly for those who cannot read or write.

60 RSB Guidelines for Impact Assessment(n 54).

61 RSB Guidelines for Impact Assessment(n 54) 37.

62 RSB Version 0.6 Part II(n 54) 11.

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criterion 5a on the improvement of 'the socioeconomic status of local stakeholders'. A very positive aspect of the Principles is that they explicitly recognise '[s] hareholding options, local ownership, joint ventures and partnerships with the local communities' as one strategy to 'significantly optimize the benefits to local stakeholders...'⁶³ Moreover, one of the criteria on water states: 'The quality of the surface and groundwater resources that are used for biofuel production shall be maintained or enhanced.'⁶⁴ This must be considered as a demanding requirement.

While the RSB's Guidelines outline the process in great detail, the RSB's Principles are not adequately specific as to the process and do not take into account how vulnerable persons of a community or vulnerable communities or peoples are going to be heard, and how they are to have an impact on the decision-making process. Hence, the application of the RSB's Guidelines can to some extent de- pend on how appropriately the RSB's Guidelines are also complied with. Moreover, the plethora of documents, with background papers, Guidelines and Annex to the Guidelines, makes it difficult to get an easy overview of the RSB.

VII. Are the Human Rights Standards and Principles Applicable to Corporate Actors Appropriately Reflected in the Guide to Human Rights Impact Assessment?

The article will now analyse the Guide – in its current version of a road-testing draft.⁶⁵ The Guide outlines the process within which an HRIA can be conducted. I will now analyse whether the Guide reveals an appropriate understanding of relevant human rights concerns. The emphasis will be on the scope of consultations and community relationships. Both of these relate to the human rights principle of non-discrimination, while the first relates specifically to the human rights principle of transparency, and the second relates specifically to the human rights principle of participation. This is because the failure of presenting information relating to a planned project in a language and a form that is well understood

⁶³ Ibid.

⁶⁴ Ibid 7 (emphasis added).

⁶⁵ Online discussion on the Guide has been facilitated three times during 2009 see -- 'Meetings and Events'

<http://www.unglobalcompact.org/Issues/human_rights/Meetings_and_Workshops.html> accessed 5 March 2010.

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by everyone is one of the most fundamental flaws of the involvement of many stakeholders.

First, in the Guide, language is addressed as an issue in the context of vulnerability,⁶⁶ in the context of 'developing a workable process',⁶⁷ and when faced with illiteracy in the context of 'selecting the right approach', highlighting methods such as 'picture-drawing and story-telling to ensure that individuals fully understand the details of the business project.'⁶⁸ All of these seem suitable. Indeed, the Guide reveals an awareness of the issue of ensuring appropriate information, and providing for transparency in the consultation process.

Second, the issues of power asymmetry in the local context are addressed by reminding the reader of the importance of an inclusive approach in the context of 'legitimate stakeholders'.⁶⁹ One is also asked to be aware of the possible impact on the traditional local hierarchy, insofar as people may have been given 'authority that may not have applied before.'⁷⁰ One is also reminded of the importance of making sure one has an appropriate understanding of the representativeness of the participating representatives when it is not possible to engage with everyone in a community.⁷¹ The Guide also specifies the particular concern for vulnerable groups.

It seems, however, to be implicitly understood that there is no need to engage with all members of a community, unless they are considered to be vulnerable. Consulting with community leaders seems to be preferred to consulting with every affected member of the community. Such a narrow approach cannot be endorsed, as it is obvious that all affected households should have an opportunity to participate in consultations directly, as appropriate.

'Relevant and adequate' information, it appears shall be made available only 'at the start of the consultation...'⁷² This would be cutting it too fine. People should have an opportunity to discuss all relevant issues between themselves before the actual consultation with those representing the project takes place. This is not

67 Ibid 43, which states that ‘...you should also tailor the consultation to the language preferences of the affected communities...’.

68 Ibid 44; see also RSB Guidelines for Impact Assessment(n 54), which emphasise the challenges when communicating with illiterate persons, 25-27, 44 and 52.

69 Ibid 38, which states ‘You may hear from individuals or groups that believe they have a legitimate interest that is not obvious to you. If you do, you will need to carefully consider the consequences of eliminating them from the process.’

70 Ibid 42.

71 Ibid 39.

72 Ibid 43.

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made possible if the information is only made available at the consultation. It is, however, acknowledged that it is seldom possible to achieve the objectives of the consultation in one session,⁷³ but this should not exclude the dissemination of the relevant information prior to the first consultation.

I shall now analyse how the Guide understands an HRIA to apply to the human rights to food and water. The emphasis will be on the ‘Right of communities’ in Appendix 4 to the Guide. Regarding the right to food, the full text reads:

The traditional livelihoods of individuals or communities, including their self-sufficiency in food, can be put at risk through loss of access to traditional natural sources and resources, contamination, inappropriate handling and storage, or the industrialisation of growing and harvesting.⁷⁴

Three observations seem relevant. First, the term ‘livelihood’ is not found in human rights treaties, but is appropriate for identifying the relevant context of farming communities.⁷⁵ Second, the phrase ‘traditional resources’ identifies an appropriate

understanding of what is essential in a farming community. Hence, any notion that the right to food is only about handing out food, is not given support in the Guide. Third, the final phrase of explaining lack of access due to 'industrialisation of growing and harvesting' must also be said to an acknowledgement of the possible tensions that exist between modern and traditional farming.

The Guide seems as such to have an appropriate understanding of the importance of unimpeded access to crucial resources for food production, and the possible threats from modern forms of agriculture on traditional livelihoods.

Also the rights which are introduced in the context of indigenous peoples must be included in the analysis to gain a more comprehensive understanding of the Guide. Under the heading 'Rights to land and natural resources' it is confirmed that land and natural resources are '...at the heart of the issue for indigenous peoples ... [and their] wellbeing and economic survival.'⁷⁶ This is an appropriate understanding, and the fact that the term 'peoples' is used confirms that the Guide recognises indigenous peoples to have rights in accordance with common article 1 of the ICESCR and the International Covenant on Civil and Political Rights (ICCPR).

Under 'Relocation', the full text reads:

73 Ibid.

74 Ibid 76.

75 In the Oxford Pocket Dictionary of Current English(OUP, 2009) livelihood is defined as 'a means of securing the necessities of life.'

76 Road-Testing Draft(n 3) 77.

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ILO Convention 169 further declares that prior, free and informed consent should be a prerequisite of the relocation of a community of indigenous people. If relocation is the only viable option and consent is not possible, then national law should convey a right of return, or resettlement and rehabilitation on lands of equal quality and with full compensation if they cannot eventually return to their original lands. In these circumstances, companies need to work closely with national and local governments to

ensure that these requirements are met.⁷⁷

The World Bank Group's Operational Policy OP 4.12 (replacing the Operational Directive 4.30) on Involuntary Resettlement is the most widely recognised document on involuntary resettlement.⁷⁸ The term 'full compensation' is applied in the Guide, and is also addressed in Operational Policy 4.12. It is addressed first, implicitly, in paragraph 6(c)(i), requiring that: 'any resettlement plan or resettlement policy framework also include measures to ensure that displaced persons ... restore their livelihood and standards of living...'. Second, explicitly, in paragraph 6(c)(iii), by requiring that compensation shall include '...land preparation, credit facilities, training, or job opportunities.'

Moreover, Operational Policy 4.10 (replacing Operational Directive 4.20) on Indigenous Peoples is even more explicit, by stating in paragraph 20 ('Physical Relocation of Indigenous Peoples') that:

the Bank requires the borrower to explore alternative project designs to avoid physical relocation of Indigenous Peoples. In exceptional circumstances, when it is not feasible to avoid relocation, the borrower will not carry out such relocation without obtaining broad support for it from the affected Indigenous Peoples' communities as part of the free, prior, and informed consultation process.⁷⁹

⁷⁷ Ibid.

⁷⁸ 'Operational Manual OP 4.12' <<http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/EXTPOLICIES/EXTOPMANUAL/0,,contentMDK:20195821~menuPK:51508119~pagePK:64141683~piPK:4688102~theSitePK:502184,00.html>> accessed 5 March 2010; see also RSB Version 0.6 Part II(n 54) 21, which states that O.P. 4.12 'shall be used for determining the basis for compensation if resettlement is required.'

⁷⁹ Operational Manual OP 4.10 is available via <www.worldbank.org/indigenous> accessed 5 March 2010. For an analysis on OP 4.10 and OP 4.12, see Malcolm Langford, 'A Sort of Homecoming: The Right to Housing' in Mark Gibney and Sigrun Skogly (eds), *Universal Human Rights and Extraterritorial Obligations* (University of Pennsylvania Press, Philadelphia 2010) 166, 180.

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The principles outlined in paragraph of Operational Policy 4.10 are more detailed than those contained in the Guide, and their wording is stronger. This can be seen for example in the expressions 'avoid relocation' and 'broad support'. The Guide could be improved if it had adopted a similar wording as Operational Policy 4.10. Relocation should only take place after obtaining the broad support of the affected Indigenous Peoples' communities after a free, prior, and informed consultation process.⁸⁰ As shown above, the RSB Principles go even further, by stating that no involuntary resettlement shall be allowed...'.⁸¹

The right to water is recognised as a 'basic' human right in the Guide, and recognised as being under threat. The Guide continues:

...the impact of business operations and projects on the water supplies of their host communities – either through blocking access, drawing unsustainable quantities of the local supply or polluting the water – is adding to the concern.⁸²

All three concerns, relating to impeding access, absorbing too much water at the expense of local and household needs, and pollution, are highly relevant. The fact that the human right to water is explicitly recognised is a positive aspect of the Guide. The operability of the Guide, by integrating HRIA at the various stages of the investment process, as part of the overall management of the project, is another positive aspect.⁸³ The integral relationship between human rights and environment is emphasised in the Guide, in particular in the context of the right to health.⁸⁴

On the negative side, the Guide does not include any indicators to measure corporate compliance with human rights in any detail.⁸⁵ The Guide is a lengthy document, which might discourage some from actually reading and using it.

80 For a reflection on obligations of respect and protect, and the costs of not starting a project because of negative impacts, see Asbjørn Eide, 'State Obligations Revisited', in Wenche Barth Eide and Uwe Kracht (eds), *Food and Human Rights in Development: Vol. II: Evolving Issues and Emerging Applications*(Intersentia, Antwerp 2007) 137, 148-150.

81 RSB Version 0.6 Part II(n 54) 20.

82 Road-Testing Draft(n 3) 76.

83 This is also recognised by O Lenzen and M d'Engelbronner(n 4).

84 Road-Testing Draft(n 3) 76.

85 This lack of indicators in the Guide is emphasised in O Lenzen and M d'Engelbronner(n 4) 33.

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VIII. Conclusions

There can be no doubt that HRIA is both applicable to and relevant for corporate actors. By applying an adequate human rights approach, building on substantive human rights and human rights principles, tension with the local communities might be avoided. The UN Special Representative – and the draft 2007 Guide – both recognise human rights principles as part of the process of conducting an HRIA. While the RSB's Principles do not intend to be an HRIA, the RSB's Guidelines are nevertheless rather explicit in acknowledging human rights principles. If the RSB's Guidelines, which define under which conditions a project should not be going ahead,⁸⁶ will be complied with, this will be a major advantage of the RSB's Principles as compared with the Guide. The Guide would be improved if it could identify those situations where projects should be scaled down or avoided altogether. There can be no doubt, however, that compliance with both the Principles and the Guide will improve corporate conduct of biofuels actors.

86 RSB Guidelines for Impact Assessment(n 54) 36-37; see also p 27 as to when "RSB will not be able to accredit the scheme...".