The Global Initiative
for Economic, Social and Cultural Rights

Working Paper

Human Rights Law Sources:

UN Pronouncements on Extra-Territorial Obligations

Concluding Observations

General Comments and Recommendations

Special Procedures

UPR Recommendations

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I. Introduction

Extra-territorial obligations (ETOs) are increasingly recognized as essential to ensuring a global framework built on human rights. Civil society is demanding that ETOs be applied through human rights monitoring, accountability and remedial mechanisms, resulting in a growing body of pronouncements enforcing ETOs in practice. Indeed, ETOs have been applied by most treaty bodies in the context of periodic reporting and are now included in General Comments and Recommendations. They have also been applied in the analyses of UN Special Procedures including Special Rapporteurs and Independent Experts.

This publication provides a collection of recent pronouncements applying ETOs from United Nations treaty bodies and Special Procedures, including Special Rapporteurs and Independent Experts appointed by the Human Rights Council.

ETOs have long been are supported by the language of the Charter of the United Nations, and this language supports the application of extraterritorial obligations in all other treaties.

Article 55 of the Charter states in relevant part:

> With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote: é
>
> 3. Universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.[1]

Article 56 requires that ñAll Members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55.ò[2]

Furthermore, these articles take precedent over any other international instruments, including bilateral and multilateral agreements. Article 103 of the Charter of the United Nations states:

> In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.[3]

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[1] Charter of the United Nations, Art. 55, 26 June 1945, 59 Stat. 1031, T.S. 993, 3 Bevans 1153, *entered into force* 24 October 1945.
[2] *Id.* at Art. 56.
[3] *Id.* at Art. 103.

The International Law Commission has adopted Articles on Responsibility of States for Internationally Wrongful Acts. These articles are based on conventional and customary international law and international law jurisprudence. The Articles do not recognize a condition related to jurisdiction for a State to be held responsible for an internationally wrongful act, such as human rights violations, but rather whether an act that violates international law can be attributed to a State.[4]

The Articles also recognize that there may be shared responsibility for an internationally wrongful act, in other words while the State in which an internationally wrongful act occurs may also be liable and held accountable for that act, other States that have contributed to that internationally wrongful act share responsibility and consequently can be held accountable. Specifically, Article 16 states that:

> A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:
>
> (*a*) That State does so with knowledge of the circumstances of the internationally wrongful act; and
>
> (*b*) The act would be internationally wrongful if committed by that State.[5]

Furthermore, the Articles on Responsibility of States for Internationally Wrongful Acts address violations of preemptory norms, which could include gross or systemic violations of human rights.[6] Article 40 considers serious breaches of preemptory norms as those that involve ña gross or systematic failure by the responsible State to fulfill the obligationò[7] in question. And Article 41 addresses consequences for such serious breaches, including cooperating ñto bring to an end through lawful means any serious breach within the meaning of Article 40ò[8] and mandates that ñno State shall recognize as lawful a situation created by a serious breach within the meaning of Article 40, nor render aid or assistance in maintaining that situation.ò[9]

The application of extraterritorial obligations under the ICESCR and ICCPR was also reaffirmed by the International Court of Justice in its *Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*.[10]

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[4] *See*, International Law Commission, Articles on Responsibility of States for Internationally Wrongful Acts, Arts. 1, 2 and 3 (adopted by the ILC in 2001).
[5] *Id.* at Art. 16.
[6] The international community has twice stated that forced evictions amount to gross violations of human rights; see UN Commission on Human Rights resolutions 1993/77 and 2004/28.
[7] *Id.* at Art. 40.
[8] *Id.* at Art. 41(1).
[9] *Id.* at Art. 41(2).
[10] International Court of Justice, *Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (9 July 2004).

More recently, the Maastricht Principles on Extra-Territorial Obligations in the Area of Economic, Social and Cultural Rights were adopted in 2011 by leading international human rights experts and provide the most concise restatement of existing customary and conventional international law in the area of extra-territorial human rights obligations.[11]

Below are excerpts from relevant UN treaty bodies and Special Procedures that have applied ETOs in monitoring and enforcing human rights at the international level.

II. Treaty Monitoring Bodies: Concluding Observations and Lists of Issues

A. International Covenant on Economic, Social and Cultural Rights

2016 Concluding Observations: Canada

UN Doc. E/C.12/CAN/CO/6 (4 March 2016)

Official Development Assistance

11. The Committee is concerned about the level of official development assistance (ODA) (0.24% of GNI).

12. The Committee recommends that the State party raise the ODA level so as to meet the internationally recognized target of 0.7% of GNI, and to pursue a human rights-based approach in its development cooperation policy.

Business and economic, social and cultural rights

15. The Committee is concerned that the conduct of corporations registered or domiciled in the State party and operating abroad are, on occasions, negatively impacting on the enjoyment of Covenant rights by local populations. The Committee is also concerned about the limited access to judicial remedies before courts in the State party by victims and that existing non-judicial remedial mechanisms, such as the Office of the Extractive Sector CSR Counsellor have not always been effective. The Committee is further concerned about the lack of impact assessments explicitly taking into account human rights prior to the negotiation of international trade and investments agreements.

16. The Committee recommends that the State party strengthen its legislation governing the conduct of corporations registered or domiciled in the State party in their

[11] The Maastricht Principles are a restatement of law based on existing conventional and customary international law. The were adopted by leading experts from around the world, including a former member of the Human Rights Committee and members and former members of other treaty bodies. Drawn from international law, the Maastricht Principles clarify the content of extra-territorial State obligations to realize economic, social and cultural rights but also explicitly apply to the full spectrum of civil, cultural, economic, political and social rights.

activities abroad, including by requiring these corporations to conduct human rights impact assessments prior to making investment decisions. It also recommends that the State party introduce effective mechanisms to investigate complaints filed against these corporations, and adopt the necessary legislative measures so as to facilitate access to justice before domestic courts by victims of these corporationsô conduct. The Committee further recommends that the State party ensure that trade and investment agreements negotiated by Canada recognize the primacy of Canada's international human rights obligations over investors' interests, so that the introduction of investor-State dispute settlement procedures shall not create obstacles to the full realization of Covenant rights.

2015 List of Issues: United Kingdom

UN Doc. E/C.12/GBR/Q/6 (16 October 2015)

2. Please provide information on measures taken, including legislative, regulatory, policies and guidance, to ensure that corporations respect economic, social and cultural rights throughout their operations, including when operating abroad, in particular in the extractives sector and commercial operations involving the appropriation of land.

2015 Concluding Observations: Taiwan

UN Doc. E/C.12/THA/CO/1-2 (19 June 2015)

Transnational corporations and other business enterprises

12. The Committee is concerned at the lack of a regulatory framework to ensure that companies which are incorporated or have their main offices under the State partyôs jurisdiction fully respect economic, social and cultural rights when acting abroad (art. 2.1).

The Committee recommends that the State party establish a clear regulatory framework with a view to ensuring that companies incorporated or with their main offices under the State partyôs jurisdiction are legally accountable regarding violations of economic, social and cultural rights in their projects abroad, in particular in cross-border development projects. The State party should also take into account its obligations under the Covenant when negotiating international agreements. The Committee draws the attention of the State party to its statement on the obligations of State parties regarding the corporate sector and economic, social and cultural rights (E/2012/22-E/C.12/2011/3, annex VI, section A).

2014 Concluding Observations: China

UN Doc. E/C.12/CHN/CO/2 (13 June 2014)

International cooperation

12. While the Committee welcomes the fact that, in the framework of international cooperation, the State party has provided economic and technical assistance to over 2,100 projects in more than 120 developing countries, the Committee is concerned that some of

those projects have reportedly resulted in violations of economic, social and cultural rights in the receiving countries (arts. 2 and 11).

The Committee calls upon the State party to adopt a human rights-based approach to its policies of international cooperation, by:

(a) Undertaking a systematic and independent human rights impact assessment prior to making funding decisions;

(b) Establishing an effective monitoring mechanism to regularly assess the human rights impact of its policies and projects in the receiving countries and to take remedial measures when required;

(c) Ensuring that there is an accessible complaint mechanism for violations of economic, social and cultural rights in the receiving countries.

Business and economic, social and cultural rights

13. The Committee is concerned about the lack of adequate and effective measures adopted by the State party to ensure that Chinese companies, both State-owned and private, respect economic, social and cultural rights, including when operating abroad (art. 2, para. 1).

The Committee recommends that the State party:

(a) Establish a clear regulatory framework for companies operating in the State party to ensure that their activities promote and do not negatively affect the enjoyment of economic, social and cultural human rights;

(b) Adopt appropriate legislative and administrative measures to ensure the legal liability of companies and their subsidiaries operating in or managed from the State partyôs territory regarding violations of economic, social and cultural rights in the context of their projects abroad.

The Committee draws the attention of the State party to its statement on the obligations of States parties regarding the corporate sector and economic, social and cultural rights (E/2012/22, annex VI, sect. A).

2013 List of Issues: China

UN Doc. E/C.12/WG/CHN/Q/2 (13 June 2013)

2. Please provide information on measures taken, including legislation, regulations, policies and guidance, to ensure that businesses respect economic, social and cultural rights throughout their operations ï including when operating abroad ï , in particular in the extractives sector and in commercial operations involving the appropriation of land.

2013 Concluding Observations: Austria

UN Doc. E/C.12/AUT/CO/4 (29 November 2013)

10. The Committee regrets that the State partyôs contribution of its official development assistance decreased from 0.47 per cent of the gross national income in 2006 to 0.28 per cent in 2012 (art.2).

The Committee recommends that the State party increase the level of its contribution of official development assistance to achieve the international target of 0.7 per cent of its gross national income as expeditiously as possible.

11. The Committee is deeply concerned that the State partyôs official development assistance provides support to projects that have reportedly resulted in violations of economic, social and cultural rights in the recipient countries. It is further concerned that the State partyôs agriculture and trade policies, which promote the export of subsidized agricultural products to developing countries, undermine the enjoyment of the right to an adequate standard of living and the right to food in the receiving countries (arts.2 and 11).

The Committee calls upon the State party to adopt a human rights-based approach to its policies on official development assistance and on agriculture and trade, by:

(a) undertaking a systematic and independent human rights impact assessment prior to making funding decisions;

(b) establishing an effective monitoring mechanism to regularly assess the human rights impact of its policies and projects in the receiving countries and to take remedial measures; and

(c) ensuring that there is an accessible complaint mechanism if violations of economic, social and cultural rights occur in the receiving countries.

12. The Committee is concerned at the lack of oversight over Austrian companies operating abroad with regard to the negative impact of their activities on the enjoyment of economic, social and cultural rights in host countries (art.2).

The Committee urges the State party to ensure that all economic, social and cultural rights are fully respected and rights holders adequately protected in the context of corporate activities, including by establishing appropriate laws and regulations, together with monitoring, investigation and accountability procedures to set and enforce standards for the performance of corporations, as underlined in the Committeeôs statement on the obligations of States parties regarding the corporate sector and economic, social and cultural rights (E/C.12/2011/1).

2013 Concluding Observations: Belgium

UN Doc. E/C.12/BEL/CO/4 (23 December 2013)

22. The Committee is concerned by reports that the State partyôs policy for promoting agrofuels, in particular its new Agrofuels Act of 17 July 2013, is likely to encourage large-scale cultivation of these products in third countries where Belgian firms operate and could lead to negative consequences for local farmers (art. 11).

The Committee recommends that the State party systematically conduct human rights impact assessments in order to ensure that projects promoting agrofuels do not have a negative impact on the economic, social and cultural rights of local communities in third countries where Belgian firms working in this field operate.

2013 Concluding Observations: Norway

UN Doc. E/C.12/NOR/CO/5 (13 December 2013)

6. The Committee is concerned that the various steps taken by the State party in the context of the social responsibility of the Government Pension Fund Global have not included the institutionalization of systematic human rights impact assessments of its investments.

The Committee recommends that the State party ensure that investments by the Norges Bank Investment Management in foreign companies operating in third countries are subject to a comprehensive human rights impact assessment (prior to and during the investment). The Committee also recommends that the State party adopt policies and other measures to prevent human rights contraventions abroad by corporations that have their main offices under the jurisdiction of the State party, without infringing the sovereignty or diminishing the obligations of the host States under the Covenant. The Committee draws the attention of the State party to its statement on the obligations of State parties regarding the corporate sector and economic, social and cultural rights (E/2012/22, annex VI, section A).

2011 Concluding Observations: Germany

UN Doc. E/C.12/DEU/CO/5 (12 July 2011)

9. The Committee notes with deep concern the impact of the State partyôs agriculture and trade policies, which promote the export of subsidized agricultural products to developing countries, on the enjoyment of the right to an adequate standard of living and particularly on the right to food in the receiving countries (arts. 2.1, 11, 22 and 23).

The Committee urges the State party to fully apply a human rights-based approach to its international trade and agriculture policies, including by reviewing the impact of subsidies on the enjoyment of economic, social and cultural rights in importing countries. In this regard, the Committee draws the attention of the State party to the guidelines on international measures, actions and commitments as contained in the FAO Voluntary Guidelines on the Right to Food (2004).

10. The Committee expresses concern that the State partyôs policy-making process in, as well as its support for, investments by German companies abroad does not give due consideration to human rights (arts. 2.1, 11, 22 and 23).

The Committee calls on the State party to ensure that its policies on investments by German companies abroad serve the economic, social and cultural rights in the host countries.

11. The Committee is concerned that the State partyôs development cooperation programme has supported projects that have reportedly resulted in the violation of economic, social and cultural rights, such as in the case of the land-titling project in Cambodia (arts. 2.1, 11, 22 and 23).

The Committee recommends that the development cooperation policies to be adopted by the State party contribute to the implementation of the economic, social and cultural rights of the Covenant and do not result in their violation.

2010 Concluding Observations: Switzerland

UN Doc. E/C.12/CHE/CO/2-3 (26 November 2010)

24. The Committee recommends that the State party comply with its Covenant obligations and take into account its partner countriesô obligations when negotiating and concluding trade and investment agreements. In this regard, the Committee draws the attention of the State party to its statement to the Third Ministerial Conference of the World Trade Organization, adopted in 1999 (E/C.12/1999/9). The Committee also recommends that the State party undertake an impact assessment to determine the possible consequences of its foreign trade policies and agreements on the enjoyment by the population of the State partyôs partner countries of their economic, social and cultural rights. For example, the imposition by the State party of strict intellectual property protection that goes beyond the standards agreed upon in the World Trade Organization can adversely affect access to medicines, thereby compromising the right to health. In addition, the Committee is of the view that the so-called ñTRIPS-plusò provisions concerning accession to the International Convention for the Protection of New Varieties of Plants increase food production costs, seriously undermining the realization of the right to food.

B. International Covenant on Civil and Political Rights

2015 Concluding Observation: Republic of Korea

UN Doc. CCPR/C/KOR/CO.4 (October 2015)

Business and Human Rights

10. The Committee notes that Korean companies may be acting abroad allegedly in contravention of relevant Human Rights standards, and is concerned that any remedies from the State party have proven difficult to access (art. 2).

11. The State party is encouraged to set out clearly the expectation that all business enterprises domiciled in its territory and/or subject to its jurisdiction respect human rights standards in accordance with the Covenant throughout their operations. It is also encouraged to take appropriate measures to strengthen the remedies for people who have been victims of activities of such business enterprises operating abroad, as well as strengthen the safeguards to prevent people from becoming victims to these.

2015 Concluding Observations: Canada

UN Doc. CCPR/C/CAN/CO/6 (July 2015)

Business and Human Rights

6. While appreciating information provided, the Committee is concerned about allegations of human rights abuses by Canadian companies operating abroad, in particular mining corporations and about the inaccessibility to remedies by victims of such violations. The Committee regrets the absence of an effective independent mechanism with powers to investigate complaints alleging abuses by such corporations that adversely affect the enjoyment of the human rights of victims, and of a legal framework that would facilitate such complaints (art. 2).

The State party should: a) enhance the effectiveness of existing mechanisms to ensure that all Canadian corporations, in particular mining corporations, under its jurisdiction respect human rights standards when operating abroad; b) consider establishing an independent mechanism with powers to investigate human rights abuses by such corporations abroad; c) and develop a legal framework that affords legal remedies to people who have been victims of activities of such corporations operating abroad.

2015 Concluding Observations: United Kingdom

UN Doc. CCPR/C/GBR/CO/7 (July 2015)

Accountability for human rights violations committed by British forces abroad

The Committee, while welcoming the mechanisms in place to investigate allegations of serious human rights violations, including torture, arbitrary detention and enforced disappearances, committed by British forces operating overseas, is concerned about (a) the slow progress in proceedings before the Intelligence and Security Committee of Parliament (ISC) in relation to the Detainee Inquiry; (b) the adequacy of the ISC as an investigation mechanism, *inter alia,* given concerns about its independence from the executive power and the power of the government to withhold sensitive information from it. The Committee is also concerned about the slow progress of the Iraq Historical Allegations Team (IHAT) and the very small number of criminal proceedings completed

so far. Finally, the Committee is concerned about the lack of information on what, if any, investigations took place into allegations about the UK Special Forces personnel handing over detainees to US custody at Camp Nama, a secret prison at Baghdad International airport (arts. 2, 6, and 7).

The State party should:

(a) Ensure that the proceedings before the Intelligence and Security Committee of Parliament (ISC) meet the requirements of the Covenant, including an adequate balance between security interests and the need for accountability for human rights violations, and consider initiating a full judicial investigation in all relevant detainee cases;

(b) Address the excessive delays in the investigation of cases dealt with by the Iraq Historical Allegations Team (IHAT) and consider establishing more robust accountability measures to ensure prompt, independent, impartial and effective investigations;

(c) Ensure that the allegations in connection with Camp Nama are thoroughly, independently and impartially investigated.

2014 Concluding Observations: United States

UN Doc. CCPR/C/USA/CO/4 (23 April 2014)

4. The Committee regrets that the State party continues to maintain the position that the Covenant does not apply with respect to individuals under its jurisdiction, but outside its territory, despite the interpretation to the contrary of article 2, paragraph 1, supported by the Committeeôs established jurisprudence, the jurisprudence of the International Court of Justice and State practice. The Committee further notes that the State party has only limited avenues to ensure that state and local governments respect and implement the Covenant, and that its provisions have been declared to be non-self-executing at the time of ratification. Taken together, these elements considerably limit the legal reach and practical relevance of the Covenant (art. 2).

The State party should:

(a) Interpret the Covenant in good faith, in accordance with the ordinary meaning to be given to its terms in their context, including subsequent practice, and in the light of the object and purpose of the Covenant, and review its legal position so as to acknowledge the extraterritorial application of the Covenant under certain circumstances, as outlined, inter alia, in the Committeeôs general comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant;

2013 List of Issues: United States

UN Doc. CCPR/C/USA/Q/4 (29 April 2013)

Constitutional and legal framework within which the Covenant is implemented (art. 2)

1. Please clarify the following issues:

a) the State partyôs understanding of the scope of applicability of the Covenant with respect to individuals under its jurisdiction but outside its territory; in times of peace, as well as in times of armed conflict;

2012 Concluding Observations: Germany

UN Doc. CCPR/C/DEU/CO/6 (12 November 2012)

16. While welcoming measures taken by the State party to provide remedies against German companies acting abroad allegedly in contravention of relevant human rights standards, the Committee is concerned that such remedies may not be sufficient in all cases (art. 2, para. 2).

The State party is encouraged to set out clearly the expectation that all business enterprises domiciled in its territory and/or its jurisdiction respect human rights standards in accordance with the Covenant throughout their operations. It is also encouraged to take appropriate measures to strengthen the remedies provided to protect people who have been victims of activities of such business enterprises operating abroad.

2012 List of Issues: Germany

UN Doc. CCPR/C/DEU/Q/6 (21 August 2012)

17. Please comment on allegations that families forcibly evicted at gunpoint in August 2001 from their homes and lands in Naluwondwa-Madudu, Mubedne District, Uganda to make way for a large coffee plantation owned by Kaweri Coffee Plantation Ltd., a wholly-owned subsidiary of Neumann Kaffee Gruppe Hamburg continue to live in extreme poverty and explain what the State party has done to investigate the role and responsibility of Neumann Kaffee Gruppe.

C. Committee on the Elimination of Discrimination against Women (CEDAW)

2014 Concluding Observations: India

UN Doc. CEDAW/C/IND/CO 4 - 5 (24 July 2014)

Extraterritorial State obligations

14. While commending the State partyôs cooperation programme in post-conflict areas such as a housing project in the north-east of Sri Lanka, the Committee expresses concern at the lack of a gender perspective in and consultations with women on this project. The Committee is also concerned about the impact on women, including in Nepal, of infrastructure projects such as the Lakshmanpur dam project, including with regard to displacement and loss of livelihood, housing and food security as a result of the subsequent floods.

15. The Committee reaffirms that the State party must ensure that the acts of persons under its effective control, including those of national corporations operating extraterritorially, do not result in violations of the Convention and that its extraterritorial obligations extend to actions affecting human rights, regardless of whether the affected persons are located on its territory, as indicated in the Committeeôs general recommendation Nos. 28 and 30. Accordingly, it recommends that the State party:

(a) Immediately review the impact of the housing project in Sri Lanka, adopt a consultative and gender-sensitive approach in implementing the current and future phases of the project and address the needs and concerns of the most disadvantaged and marginalized groups of women;

(b) Adopt all necessary measures, including an assessment of the impact of the Lakshmanpur dam project on women in Nepal, so as to, among other things, prevent or remedy womenôs loss of livelihood, housing and food security, and provide adequate compensation whenever their rights have been violated.

D. Committee on the Rights of the Child

2015 Concluding Observations: Switzerland

UN Doc. CRC/C/CHE/CO/2-4 (26 February 2015)

22. The Committee notes the information provided by the State party on measures taken and envisaged to regulate the activities of multinational business enterprises, including the development of the Ruggie Strategy for Switzerland. However, the Committee is concerned that the State party solely relies on voluntary self-regulation and does not provide a regulatory framework which explicitly lays down the obligations of companies acting under the State partyôs jurisdiction or control to respect the rights of the child in operations carried out outside the State partyôs territory.

23. In the light of its general comment No. 16 (2013) on State obligations regarding the impact of the business sector on childrenôs rights, the Committee recommends that the State party:

(a) Establish a clear regulatory framework for industries operating in the State party, including through expediting the adoption of the Ruggie Strategy for Switzerland, to ensure that their activities do not negatively affect human rights or endanger environmental, labour and other standards, especially those relating to childrenôs rights, and ensure its effective implementation;

(b) Ensure that business enterprises and their subsidiaries operating in or managed from the State partyôs territory are legally accountable for any violations of childrenôs rights and human rights in general.

2012 Concluding Observations: Australia

UN Doc. CRC/C/AUS/CO/4 (28 August 2012)

27. The Committee is concerned at reports on Australian mining companies´ participation and complicity in serious violations of human rights in countries such as the Democratic Republic of Congo, the Philippines, Indonesia and Fiji, where children have been victims of evictions, land dispossession and killings. Furthermore, the Committee is concerned about reports of child labour and conditions of work of children that are in contravention of international standards in fishing industry enterprises operated by Australian enterprises in Thailand. Furthermore, while acknowledging the existence of a voluntary code of conduct on a sustainable environment by the Australian Mining Council (¨Enduring Values¨), the Committee notes the inadequacy of this in preventing direct and/or indirect human rights violations by Australian mining enterprises.

28. In light of Human Rights Council resolutions 8/7 of 7 April 2008 adopting the report ¨Protect, Respect and Remedy¨ Framework and 17/4 of 16 June 2011, in which it is noted that the rights of the child should be included when exploring the relationship between business and human rights, the Committee recommends that the State party:

(a) Examine and adapt its legislative framework (civil, criminal and administrative) to ensure the legal accountability of Australian companies and their subsidiaries regarding abuses to human rights, especially child rights, committed in the territory of the State party or overseas and establish monitoring mechanisms, investigation, and redress of such abuses, with a view to improving accountability, transparency and prevention of violations;

(b) Take measures to strengthen cooperation with countries in which Australian companies or their subsidiaries operate to ensure respect for child rights, prevention and protection against abuses and accountability;

(c) Establish that human rights impact assessment, including child rights impact assessments, are conducted prior to the conclusion of trade agreements with a view to ensuring that measures are taken to prevent child rights violations from occurring and establish the mechanisms for the Export Credit Agency of Australia to deal with the risk of abuses to human rights before it provides insurance or guarantees to facilitate investments abroad.

2012 Concluding Observations: Canada

UN Doc. CRC/C/CAN/CO/3-4 (6 December 2012)

28. The Committee joins the concern expressed by the Committee on the Elimination of Racial Discrimination that the State party has not yet adopted measures with regard to transnational corporations registered in Canada whose activities negatively impact the rights of indigenous peoples in territories outside Canada, (CERD/C/CAN/CO/19-20, para. 14), in particular gas, oil, and mining companies. The Committee is particularly

concerned that the State party lacks a regulatory framework to hold all companies and corporations from the State party accountable for human rights and environmental abuses committed abroad.

29. The Committee recommends that the State party establish and implement regulations to ensure that the business sector complies with international and national human rights, labour, environment and other standards, particularly with regard to child rights, and in light of Human Rights Council resolutions 8/7 of 18 June 2008 (para. 4(d)) and resolution 17/4 of 16 June 2011 (para. 6(f))). In particular, it recommends that the State party ensure:

(a) The establishment of a clear regulatory framework for, inter alia, the gas, mining, and oil companies operating in territories outside Canada to ensure that their activities do not impact on human rights or endanger environment and other standards, especially those related to childrenôs rights;

(b) The monitoring of implementation by companies at home and abroad of international and national environmental and health and human rights standards and that appropriate sanctions and remedies are provided when violations occur with a particular focus on the impact on children;

(c) Assessments of, and consultations with companies on their plans to address environmental and health pollution and the human rights impact of their activities and their disclosure to the public;

(d) In doing so, take into account the United Nations Business and Human Rights Framework adopted unanimously in 2008 by the Human Rights Council.

2011 Concluding Observations: Republic of Korea

UN Doc. CRC/C/KOR/CO/3-4 (6 December 2011)

Child rights and the business sector

26. The Committee welcomes increasing interest by the business sector in the State party, one of the most dynamic economies in the world, in corporate social responsibility, which for now seems to focus exclusively on environmental issues. While noting aspects of the State partyôs legislation which, inter alia, address labour standards and minimum wage, the Committee notes that there is no comprehensive legislative framework regulating the prevention and mitigation of adverse human rights impacts of companies´ activities, either in the State partyôs territory or abroad. In particular, the Committee further notes with concern that:

(a) The State party is importing products from countries which are under investigation by the International Labour Organization (ILO) (and the European

Parliament) for reportedly using forced child labour, thus becoming complicit with a serious breach to child rights;

(b) Businesses from the State party are reported to be signing or planning to sign land leases in various countries with negative implications for, inter alia, the right to water and housing; and

(c) No human rights impact assessment seems to have preceded negotiations for free trade agreements that the State party has entered into or is pending entry into.

27. In light of Human Rights Council resolution 8/7 of 2008 adopting the report ¨Protect, Respect and Remedy¨ Framework and of resolution 17/4 of 16 June 2011 requesting the new Working Group to follow up on this matter, both of which note that the rights of the child should be included when exploring the relationship between business and human rights, the Committee recommends that the State party:

(a) Further promote the adoption of effective corporate responsibility models by providing a legislative framework that requires companies domiciled in Korea to adopt measures to prevent and mitigate adverse human rights impacts in their operations in the country and abroad, whether by their supply chains or associates. The inclusion of child rights indicators and parameters for reporting should be promoted and specific assessments on business impacts on child rights should be required;

(b) Monitor the entry of products to prevent the importation of those which are produced with forced child labour and to use its trade agreements and national legislation to require that the products entering its market are child-labour free;

(c) Take measures to ensure that its companies respect child rights when engaging in projects abroad and cooperate with foreign Governments that are carrying out processes of free, prior and informed consent when projects affect indigenous peoples or impact assessments on human/child rights; and

(d) Ensure that prior to the negotiation and conclusion of free trade agreements, human rights assessments including child rights are conducted and measures adopted to prevent violations.

E. International Convention on the Elimination of Racial Discrimination

2014 Concluding Observations: United States

UN Doc. CERD/C/USA/CO/7-9 (25 September 2014)

Disparate impact of environmental pollution

While welcoming the acknowledgment by the State party that low-income and minority communities are exposed to an unacceptable amount of pollution, as well as the initiatives taken to address the issue, the Committee is concerned that individuals belonging to racial and ethnic minorities, as well as indigenous peoples, continue to be disproportionately affected by the negative health impact of pollution caused by the extractive and manufacturing industries. It also reiterates its previous concern regarding the adverse effects of economic activities related to the exploitation of natural resources in countries outside the United States by transnational corporations registered in the State party on the rights to land, health, environment and the way of life of indigenous peoples and minority groups living in those regions (para. 30) (arts. 2 and 5 (e)).

The Committee calls upon the State party to:

(a) Ensure that federal legislation prohibiting environmental pollution is effectively enforced at state and local levels;

(b) Undertake an independent and effective investigation into all cases of environmentally polluting activities and their impact on the rights of affected communities; bring those responsible to account; and ensure that victims have access to appropriate remedies;

(c) Clean up any remaining radioactive and toxic waste throughout the State party as a matter of urgency, paying particular attention to areas inhabited by racial and ethnic minorities and indigenous peoples that have been neglected to date;

(d) Take appropriate measures to prevent the activities of transnational corporations registered in the State party which could have adverse effects on the enjoyment of human rights by local populations, especially indigenous peoples and minorities, in other countries.

2012 Concluding Observations: Canada

UN Doc. CERD/C/CAN/CO/19-20 (4 April 2012)

14. While noting that the State party has enacted a Corporate Responsibility Strategy, the Committee is concerned that the State party has not yet adopted measures with regard to transnational corporations registered in Canada whose activities negatively impact the rights of indigenous peoples outside Canada, in particular in mining activities (art. 5).

The Committee recommends that the State party take appropriate legislative measures to prevent transnational corporations registered in Canada from carrying out activities that negatively impact on the enjoyment of rights of indigenous peoples in territories outside Canada, and hold them accountable.

2011 Concluding Observations: United Kingdom

UN Doc. CERD/C/GBR/CO/18-20 (14 September 2011)

29. The Committee is concerned at reports of adverse effects of operations by transnational corporations registered in the State party but conducted outside the territory of the State party that affect the rights of indigenous peoples to land, health, environment and an adequate standard of living. The Committee further regrets the introduction of a legislative bill in the State party which, if passed, will restrict the rights of foreign claimants seeking redress in the State partyôs courts against such transnational corporations (arts. 2, 5 and 6).

Recalling its general recommendation No. 23 (1997) on the rights of indigenous peoples, the Committee encourages the State party to take appropriate legislative and administrative measures to ensure that acts of transnational corporations registered in the State party comply with the provisions of the Convention. In this regard, the Committee recommends that the State party should ensure that no obstacles are introduced in the law that prevent the holding of such transnational corporations accountable in the State partyôs courts when such violations are committed outside the State party. The Committee reminds the State party to sensitize corporations registered in its territory to their social responsibilities in the places where they operate.

2010 Concluding Observations: Australia

UN Doc. CERD/C/AUS/CO/15-17 (4 April 2010)

13. The Committee notes with concern the absence of a legal framework regulating the obligation of Australian corporations, at home and overseas, whose activities, notably in the extractive sector, when carried out on the traditional territories of indigenous peoples, have had a negative impact on indigenous peoplesôrights to land, health, living environment and livelihoods (arts. 2, 4 and 5).

In the light of the Committeeôs general recommendation No. 23 (1997) on the rights of indigenous peoples, the Committee encourages the State party to take appropriate legislative or administrative measures to prevent acts by Australian corporations which negatively impact on the enjoyment of rights of indigenous peoples domestically and overseas and to regulate the extra-territorial activities of Australian corporations abroad. The Committee also encourages the State party to fulfil its commitments under the different international initiatives it supports to advance responsible corporate citizenship.

III. Treaty Monitoring Bodies: General Comments / Recommendations

A. Committee on Economic, Social and Cultural Rights: General Comment No. 12

<u>International obligations</u>

States parties

36. In the spirit of article 56 of the Charter of the United Nations, the specific provisions contained in articles 11, 2.1, and 23 of the Covenant and the Rome Declaration of the World Food Summit, States parties should recognize the essential role of international cooperation and comply with their commitment to take joint and separate action to achieve the full realization of the right to adequate food. In implementing this commitment, States parties should take steps to respect the enjoyment of the right to food in other countries, to protect that right, to facilitate access to food and to provide the necessary aid when required. States parties should, in international agreements whenever relevant, ensure that the right to adequate food is given due attention and consider the development of further international legal instruments to that end.

37. States parties should refrain at all times from food embargoes or similar measures which endanger conditions for food production and access to food in other countries. Food should never be used as an instrument of political and economic pressure. In this regard, the Committee recalls its position, stated in its General Comment No. 8, on the relationship between economic sanctions and respect for economic, social and cultural rights.

States and international organizations

38. States have a joint and individual responsibility, in accordance with the Charter of the United Nations, to cooperate in providing disaster relief and humanitarian assistance in times of emergency, including assistance to refugees and internally displaced persons. Each State should contribute to this task in accordance with its ability. The role of the World Food Programme (WFP) and the Office of the United Nations High Commissioner for Refugees (UNHCR), and increasingly that of UNICEF and FAO is of particular importance in this respect and should be strengthened. Priority in food aid should be given to the most vulnerable populations.

39. Food aid should, as far as possible, be provided in ways which do not adversely affect local producers and local markets, and should be organized in ways that facilitate the return to food self-reliance of the beneficiaries. Such aid should be based on the needs of the intended beneficiaries. Products included in international food trade or aid programmes must be safe and culturally acceptable to the recipient population.

B. Committee on Economic, Social and Cultural Rights: General Comment No. 15

International obligations

30. Articles 2(1), paragraph 1, and articles 11(1), paragraph 1, and 23 of the Covenant require that States parties recognize the essential role of international

cooperation and assistance and take joint and separate action to achieve the full realization of the right to water.

31. To comply with their international obligations in relation to the right to water, States parties have to respect the enjoyment of the right in other countries. International cooperation requires States parties to refrain from actions that interfere, directly or indirectly, with the enjoyment of the right to water in other countries. Any activities undertaken within the State partyôs jurisdiction should not deprive another country of the ability to realize the right to water for persons in its jurisdiction.

32. States parties should refrain at all times from imposing embargoes or similar measures, that prevent the supply of water, as well as goods and services essential for securing the right to water. Water should never be used as an instrument of political and economic pressure. In this regard, the Committee recalls its position, stated in its General Comment No. 8 (1997), on the relationship between economic sanctions and respect for economic, social and cultural rights.

33. Steps should be taken by States parties to prevent their own citizens and companies from violating the right to water of individuals and communities in other countries. Where States parties can take steps to influence other third parties to respect the right, through legal or political means, such steps should be taken in accordance with the Charter of the United Nations Charter and applicable international law.

34. Depending on the availability of resources, States should facilitate realization of the right to water in other countries, for example through provision of water resources, financial and technical assistance, and provide the necessary aid when required. In disaster relief and emergency assistance, including assistance to refugees and displaced persons, priority should be given to Covenant rights, including the provision of adequate water. International assistance should be provided in a manner that is consistent with the Covenant and other human rights standards, and sustainable and culturally appropriate. The economically developed States parties have a special responsibility and interest to assist the poorer developing States in this regard.

35. States parties should ensure that the right to water is given due attention in international agreements and, to that end, should consider the development of further legal instruments. With regard to the conclusion and implementation of other international and regional agreements, States parties should take steps to ensure that these instruments do not adversely impact upon the right to water. Agreements concerning trade liberalization should not curtail or inhibit a countryôs capacity to ensure the full realization of the right to water.

36. States parties should ensure that their actions as members of international organizations take due account of the right to water. Accordingly, States parties that are members of international financial institutions, notably the International Monetary Fund, the World Bank, and regional development banks, should take steps to ensure that the

right to water is taken into account in their lending policies, credit agreements and other international measures.

C. Committee on Economic, Social and Cultural Rights: General Comment No. 19

4. International obligations

52. Article 2, paragraph 1, and articles 11, paragraph 1, and 23 of the Covenant require that States parties recognize the essential role of international cooperation and assistance and take joint and separate action to achieve the full realization of the rights inscribed in the Covenant, including the right to social security.

53. To comply with their international obligations in relation to the right to social security, States parties have to respect the enjoyment of the right by refraining from actions that interfere, directly or indirectly, with the enjoyment of the right to social security in other countries.

54. States parties should extraterritorially protect the right to social security by preventing their own citizens and national entities from violating this right in other countries. Where States parties can take steps to influence third parties (non-State actors) within their jurisdiction to respect the right, through legal or political means, such steps should be taken in accordance with the Charter of the United Nations and applicable international law.

55. Depending on the availability of resources, States parties should facilitate the realization of the right to social security in other countries, for example through provision of economic and technical assistance. International assistance should be provided in a manner that is consistent with the Covenant and other human rights standards, and sustainable and culturally appropriate. Economically developed States parties have a special responsibility for and interest in assisting the developing countries in this regard.

56. States parties should ensure that the right to social security is given due attention in international agreements and, to that end, should consider the development of further legal instruments. The Committee notes the importance of establishing reciprocal bilateral and multilateral international agreements or other instruments for coordinating or harmonizing contributory social security schemes for migrant workers.33 Persons temporarily working in another country should be covered by the social security scheme of their home country.

57. With regard to the conclusion and implementation of international and regional agreements, States parties should take steps to ensure that these instruments do not adversely impact upon the right to social security. Agreements concerning trade liberalization should not restrict the capacity of a State Party to ensure the full realization

of the right to social security.

58. States parties should ensure that their actions as members of international organizations take due account of the right to social security. Accordingly, States parties that are members of international financial institutions, notably the International Monetary Fund, the World Bank, and regional development banks, should take steps to ensure that the right to social security is taken into account in their lending policies, credit agreements and other international measures. States parties should ensure that the policies and practices of international and regional financial institutions, in particular those concerning their role in structural adjustment and in the design and implementation of social security systems, promote and do not interfere with the right to social security.

D. Committee on the Rights of the Child: General Comment No. 16

C. Childrenôs rights and global operations of businesses

38. Business enterprises increasingly operate on a global scale through complex networks of subsidiaries, contractors, suppliers and joint ventures. Their impact on childrenôs rights, whether positive or negative, is rarely the result of the action or omission of a single business unit, whether it is the parent company, subsidiary, contractor, supplier or others. Instead, it may involve a link or participation between businesses units located in different jurisdictions. For example, suppliers may be involved in the use of child labour, subsidiaries may be engaged in land dispossession and contractors or licensees may be involved in the marketing of goods and services that are harmful to children. There are particular difficulties for States in discharging their obligations to respect, protect and fulfil the rights of the child in this context owing, among other reasons, to the fact that business enterprises are often legally separate entities located in different jurisdictions even when they operate as an economic unit which has its centre of activity, registration and/or domicile in one country (the home State) and is operational in another (the host State).

39. Under the Convention, States have the obligation to respect and ensure childrenôs rights within their jurisdiction. The Convention does not limit a Stateôs jurisdiction to ñterritoryò. In accordance with international law, the Committee has previously urged States to protect the rights of children who may be beyond their territorial borders. It has also emphasized that State obligations under the Convention and the Optional Protocols thereto apply to each child within a Stateôs territory and to all children subject to a Stateôs jurisdiction.[12]

40. Extraterritorial obligations are also explicitly referred to in the Optional Protocol on the sale of children, child prostitution and child pornography. Article 3, paragraph 1,

[12] General comment No. 6 (2005) on treatment of unaccompanied and separated children outside their country of origin, *Official Records of the General Assembly, Sixty-first Session, Supplement No. 41* (A/61/41), annex II, para. 12.

provides that each State shall ensure that, as a minimum, offences under it are fully covered by its criminal or penal law, whether such offences are committed domestically or transnationally. Under article 3, paragraph 4, of Optional Protocol on the sale of children, child prostitution and child pornography, liability for these offences, whether criminal, civil or administrative, should be established for legal persons, including business enterprises. This approach is consistent with other human rights treaties and instruments that impose obligations on States to establish criminal jurisdiction over nationals in relation to areas such as complicity in torture, enforced disappearance and apartheid, no matter where the abuse and the act constituting complicity is committed.

41. States have obligations to engage in international cooperation for the realization of childrenôs rights beyond their territorial boundaries. The preamble and the provisions of the Convention consistently refer to the ñimportance of international cooperation for improving the living conditions of children in every country, in particular in the developing countriesò.[13] General comment No. 5 emphasizes that ñimplementation of the Convention is a cooperative exercise for the States of the worldò.[14] As such, the full realization of childrenôs rights under the Convention is in part a function of how States interact. Furthermore, the Committee highlights that the Convention has been nearly universally ratified; thus realization of its provisions should be of major and equal concern to both host and home States of business enterprises.

42. Host States have the primary responsibility to respect, protect and fulfil childrenôs rights in their jurisdiction. They must ensure that all business enterprises, including transnational corporations operating within their borders, are adequately regulated within a legal and institutional framework that ensures that they do not adversely impact on the rights of the child and/or aid and abet violations in foreign jurisdictions.

43. Home States also have obligations, arising under the Convention and the Optional Protocols thereto, to respect, protect and fulfil childrenôs rights in the context of businessesô extraterritorial activities and operations, provided that there is a reasonable link between the State and the conduct concerned. A reasonable link exists when a business enterprise has its centre of activity, is registered or domiciled or has its main place of business or substantial business activities in the State concerned.[15] When adopting measures to meet this obligation, States must not violate the Charter of the United Nations and general international law nor diminish the obligations of the host State under the Convention.

44. States should enable access to effective judicial and non-judicial mechanisms to provide remedy for children and their families whose rights have been violated by business enterprises extraterritorially when there is a reasonable link between the State and the conduct concerned. Furthermore, States should provide international assistance and cooperation with investigations and enforcement of proceedings in other States.

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[13] See Convention on the Rights of the Child, arts. 4; 24, para. 4; 28, para. 3; 17 and 22, para. 2; as well as Optional Protocol on the sale of children, child prostitution and child pornography, art. 10, and Optional Protocol on the involvement of children in armed conflict, art. 10.

[14] General comment No. 5, para. 60.

[15] See Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights, principle 25 (2012).

45. Measures to prevent the infringement of childrenôs rights by business enterprises when they are operating abroad include:

(a) Making access to public finance and other forms of public support, such as insurance, conditional on a business carrying out a process to identify, prevent or mitigate any negative impacts on childrenôs rights in their overseas operations;

(b) Taking into account the prior record of business enterprises on childrenôs rights when deciding on the provision of public finance and other forms of official support;

(c) Ensuring that State agencies with a significant role regarding business, such as export credit agencies, take steps to identify, prevent and mitigate any adverse impacts the projects they support might have on childrenôs rights before offering support to businesses operating abroad and stipulate that such agencies will not support activities that are likely to cause or contribute to childrenôs rights abuses.

46. Both home and host States should establish institutional and legal frameworks that enable businesses to respect childrenôs rights across their global operations. Home States should ensure that there are effective mechanisms in place so that the government agencies and institutions with responsibility for implementation of the Convention and the Optional Protocols thereto coordinate effectively with those responsible for trade and investment abroad. They should also build capacity so that development assistance agencies and overseas missions that are responsible for promoting trade can integrate business issues into bilateral human rights dialogues, including childrenôs rights, with foreign Governments. States that adhere to the OECD Guidelines for Multinational Enterprises should support their national contact points in providing mediation and conciliation for matters that arise extraterritorially by ensuring that they are adequately resourced, independent and mandated to work to ensure respect for childrenôs rights in the context of business issues. Recommendations issued by bodies such as the OECD national contact points should be given adequate effect.

D. International organizations

47. All States are called upon, under article 4 of the Convention, to cooperate directly in the realization of the rights in the Convention through international cooperation and through their membership in international organizations. In the context of business activities, these international organizations include international development, finance and trade institutions, such as the World Bank Group, the International Monetary Fund and the World Trade Organization, and others of a regional scope, in which States act collectively. States must comply with their obligations under the Convention and the Optional Protocols thereto when acting as members of such organizations and they should not accept loans from international organizations, or agree to conditions set forth by such organizations, if these loans or policies are likely to result in violations of the rights of children. States also retain their obligations in the field of development cooperation and should ensure that cooperation policies and programmes are designed and implemented in compliance with the Convention and the Optional Protocols thereto.

48. A State engaged with international development, finance and trade organizations must take all reasonable actions and measures to ensure that such organizations act in accordance with the Convention and the Optional Protocols thereto in their decision-making and operations, as well as when entering into agreements or establishing guidelines relevant to the business sector. Such actions and measures should go beyond the eradication of child labour and include the full realization of all childrenôs rights. International organizations should have standards and procedures to assess the risk of harm to children in conjunction with new projects and to take measures to mitigate risks of such harm. These organizations should put in place procedures and mechanisms to identify, address and remedy violations of childrenôs rights in accordance with existing international standards, including when they are committed by or result from activities of businesses linked to or funded by them.

E. Committee on the Elimination of Discrimination against Women: General Recommendation No. 28

36. é The obligations of States parties requiring them to establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination and to take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise, also extend to acts of national corporations operating extraterritorially.

IV. Treaty Monitoring Bodies: Jurisprudence

[FORTHCOMING]

V. Special Procedures

2015: Special Rapporteur on the rights to freedom of peaceful assembly and of association

Report of the Special Rapporteur
on the rights to freedom of peaceful assembly and of association:
UN Doc. A/HRC/29/25 (28 April 2015)

18. The complexities of influence between the host State and States of origin is replicated among corporations, where parent companies domiciled in one State may have subsidiaries in other countries exercising various degrees of influence on the policies and

practices of the latter entities. Furthermore, international and national financial institutions often have a significant stake in natural resource exploitation activities that they may be supporting financially. Their actions or inaction, primarily through the leverage they have as financiers, could have an impact on the human rights of affected communities, including peaceful assembly and association rights. The Special Rapporteur subscribes to the premise that international human rights law ascribes the primary duties to States, acting individually or as members of multilateral institutions. These obligations apply within the territory of the State and extraterritorially. Similarly, non-State actors have responsibilities in relation to human rights, as will be discussed below.

25. Many States consider that their obligations in relation to human rights apply only within their borders. In recent years, efforts have been made to highlight Statesô extraterritorial obligations, which are inherent in international human rights law. The Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights were compiled by international experts as a restatement of international law clarifying Statesô extraterritorial obligations. Although conceived in relation to economic, social and cultural rights, the principles are also applicable to civil and political rights. Of interest to the Special Rapporteur is the obligation for States to adopt and enforce measures to realize rights not only where the threat or harm occurs within their territory, but also ñwhere the corporation or its parent or controlling company, has its center of activity, is registered or domiciled, or has its main place of business or substantial business activities, in the State concernedò (principle 25 (c)). Broadening the concept of responsibility to include more than one State not only strengthens underlying rights, it also increases the chances of victims obtaining redress when violations occur.

36. The obligations of States to ensure the respect of human rights by corporations engaged in natural resource exploitation in their own territory is clear. Less well-developed and understood are the extraterritorial obligations of States arising from the international human rights standards to which they have voluntarily acceded. At a minimum, States of origin should ensure that victims of human rights violations have effective judicial remedies. Doing so also entails a monitoring responsibility to ensure that companies operating abroad adhere to international human rights standards. States from the global North and Brazil, China, India, the Russian Federation and South Africa, where many of the companies engaged in natural resource exploitation around the world are domiciled, have an especially important role to play in this regard. For example, civil society groups in Latin America have in public hearings at the Inter-American Commission on Human Rights highlighted the significant role of Canadian companies in human rights violations in the region, and the support provided by the Government of Canada, despite these allegations.

37. The Special Rapporteur strongly urges all Governments to weigh carefully their involvement in natural resource exploitation activities that have the potential to violate human rights. Introspection is especially needed in view of the State practice of merging foreign affairs, trade and international development portfolios and thus encouraging the alignment of sometimes disparate objectives.

38. As a starting point, he commends the decisions of various State institutions, such as the government pension funds of Norway and Sweden, to divest themselves of interests in corporations deemed to engage in acts of environmental degradation or violations of human rights and labour standards.16 Some States have enacted laws that prohibit and punish the bribery of foreign public officials and sanction companies that do not prevent bribery.17 The Special Rapporteur notes that these laws are a step in the right direction but more still needs to be done. He encourages similar initiatives in respect of violations of human rights abroad.

72. The Special Rapporteur recommends that States:

(c) Take appropriate measures to meet extraterritorial obligations, particularly by providing access to remedy for victims of violations of the rights to freedom of peaceful assembly and of association; measures should include but are not limited to:

(i) Strengthening the independence and capacity of judicial authorities to ensure that cases relating to violations of the rights to freedom of peaceful assembly and of association are adjudicated in accordance with international human rights law;

(ii) Enacting, implementing and enforcing laws that prohibit and provide penalties for conduct by corporations that violates human rights abroad;

(iii) Ensuring that trade and other agreements on investment in natural resource exploitation activities, whether concluded bilaterally or multilaterally, recognize and protect the exercise of peaceful assembly and association rights for affected individuals and groups;

(iv) Consider the elaboration of an international legally binding instrument on human rights standards for businesses, as proposed by the Human Rights Council in its resolution 26/9, and ensure that these standards apply to businesses working domestically as well as internationally;

2015: Special Rapporteur on the right to food

Report of the Special Rapporteur
on the right to food:
The way forward
UN Doc. A/HRC/28/65 (12 January 2015)

V. Extraterritorial obligations

A. Economic globalization and right to food

38. The universality of human rights has been the underlying inspiration for all human rights law and standards. While much emphasis has been placed on achieving the universal acceptance of the content of rights, less attention has been given to attaining universality as to the content of obligations.[16] Economic globalization and the increasing involvement of corporate entities in State affairs have challenged the traditional understanding of territoriality of human rights. The powerful influence of transnational corporations (TNCs)[17] and international financial institutions (IFIs) has led to a marked change in the way in which the principles of territoriality intersect with international human rights standards.

39. Within the food and agriculture sector, approximately ten corporations control and monopolize the commercial seed and global pesticide markets, as well as food retailers.[18] In addition to their financial power, TNCs significantly influence law and policymaking processes both at the international and national level.[19] Similarly, IFIs exercise considerable influence over national decision-making in relation to food and agricultural policies. Many developing countries are compelled to implement projects that jeopardize economic, social, and cultural rights in return for economic and financial aid. In recent decades, there have been significant efforts to alter the policy approach undertaken by IFIs, especially the World Bank, in relation to supporting development projects that have a harmful effect on human rights and the environment. Moreover, bilateral, and regional foreign trade agreements have facilitated the privatization, deregulation and growth of extractive industries around the globe, a development that has had significant impacts on food security and health. Globalization has highlighted and exacerbated socioeconomic disparities throughout the world, with the result that global social inequality is not only expressed in terms of inter-State justice, but as implicating human rights obligations as well.[20] States are often placed in a precarious situation as a result of dubious corporate activities. Developing countries are particularly vulnerable, as in an attempt to attract foreign investors they accept trade rules that adversely impact agricultural policies and follow growth-oriented economic policies to achieve short-term political and budgetary benefits.

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[16] Sigrun I. Skogly, ñRight to adequate food: national implementation and extraterritorial obligationsò, in *Max Plank Yearbook of United Nations Law*, vol. 11 (2007), p. 341.

[17] See Global Trends, *Corporate clout 2013: Time for responsible capitalism – Executive summary*. Available from www.globaltrends.com/knowledge-center/features/shapers-and-influencers/190-corporate-clout-2013-time-for-responsible-capitalism.

[18] See www.econexus.info/sites/econexus/files/Agropoly_Econexus_BerneDeclaration_wide-format.pdf.

[19] See interim report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, E/CN.4/2006/97; Jennifer Westaway, ñGlobalization, Transnational Corporations and Human Rights ï A New Paradigmò, *International Law Research*, Vol. 1, No. 1 (2012), p. 63 ff.

[20] Thomas Pogge, *World Poverty and Human Rights: Cosmopolitan Responsibilities and Reforms* (Cambridge, Polity Press, 2002).

40. Development-induced displacement is an increasingly widespread phenomenon with devastating impact. An estimated 15 million people each year are forced to relocate and resettle as a result of such interventions.[21] Despite some of the more recent efforts to highlight land dispossession, as yet global institutions have been unable to discourage the practices and processes that undermine land rights, prevent equitable access and establish the context for large and small-scale displacements.[22] The expanding mining sector has contributed to strong economic growth in some countries, with mining and oil concessions dramatically increasing in countries. The industry has however also generated social conflict in many States, particularly in rural areas, with mining activities coming into direct competition with small-scale agriculture. Indigenous peoples are particularly vulnerable as they are often forced to leave their land and sources of livelihood. A lack of engagement and opportunities for participation in decisions that affect their lives has left many communities in situations of dire poverty and without access to adequate food and nutrition.

B. Extraterritorial obligations of States

41. In recent years the scope of a Stateôs human rights obligations has progressively evolved to include duties to exercise jurisdiction over activities that are connected to one State but have an impact in another. In principle, corporations can also be held accountable either by States responsible for regulating, monitoring and preventing human rights violations; or through intergovernmental instruments or voluntary codes of conduct.

42. Although international human rights law presupposes the consent of a State to establish an obligation, the evolution of human rights has included the extension of duties under international law directly to non-State actors, including individuals and business enterprises.

1. Obligation to respect

43. States should ensure that their policies and practices do not lead to violations of the right to food, either directly or indirectly, for people living in other countries, as well as their own citizens. This obligation is simply the extension of the ñno harmò principle of States in international law. The extraterritorial obligations of States in relation to the right to food are referred to in general comment No. 12 which notes that ñfood should never be used as an instrument of political and economic pressureò. States should therefore refrain from implementing food embargoes or similar measures that endanger conditions for food production and water supply, and access to goods and services essential for securing

[21] Penny Green, Kristian Lasslett and Angela Sherwood, ñEnclosing the commons: predatory capital and forced eviction in Papua New Guinea and Burmaò in *The Routledge Handbook on Migration and Crime* (Abingdon, Routledge, 2014).

[22] Lea Brilmayer and William J. Moon, ñRegulating Land Grabs: Third Party States, Social Activism, and International Lawò, in *Rethinking Food Systems* (2014); Saturnino M. Borras Jr. and Jennifer Franco, ñTowards a broader view of the politics of global land grab: rethinking land issues, reframing resistanceò, *ICAS Working Paper Series No. 001*.

the right to food.[23] Similarly IFIs should also refrain from taking decisions that could lead to potential violations of the right to food in other countries. As multi-State actors, IFIs should be held accountable for human rights violations by other member States that have ratified the Covenant.

2. Obligation to protect

44. The majority of extraterritorial cases derive from the host States failure to fulfil its obligation to protect where private companies are impacting upon human rights. While home States of companies operating abroad have an obligation to clearly set out the expectation that such companies respect human rights throughout their operations, it is the host States which have the primary responsibility to prevent human rights violations, including by TNCs operating within its jurisdiction. However, agreements between TNCs and host governments often limit the host Stateôs ability to perform these duties. Indeed some States have even taken retrogressive steps in this regard. A recent study[24] indicates that some jurisdictions have formulated laws that effectively shield business from being held accountable for human rights violation and make it difficult for victims to obtain an effective remedy. In some instances, States themselves may have been complicit in perpetrating violations. In many cases, however, TNCs also impact positively on a countryôs development, the political relevance of which can significantly influence the judicial process.[25]

45. Implementing national legislation is essential to ensuring that States hold TNCs accountable abroad. Indeed, member countries of the Organisation for Economic Co-operation and Development (OECD) have already made voluntary commitments in this regard by developing a code of conduct. The European Union has also developed a resolution for European corporations operating in developing countries. Under international law, however, States are generally not liable for the conduct of non-State actors, unless the non-State actors are de facto agents of the State, or were acting ñon the instructions of, or under the direction or control of, that State in carrying out the [wrongful] conductò.[26] To date, there is no international jurisprudence on the issue of home State accountability for TNC actions.

46. Some States have failed to take vigorous steps to ensure that victims have access to judicial remedies for human rights abuses that have arisen extraterritorially owing to the activities of businesses or their subsidiaries. By creating or allowing these obstacles and

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[23] Committee on Economic, Social and Cultural Rights, general comments No. 12, para. 37, and No. 15 (2002) on the right to water, para. 32. See Ziegler et al., *The Fight For the Right to Food* (Basingstoke, UK: Palgrave Macmillan, 2011), p. 81.

[24] Gwynne Skinner, Robert McCorquodale and Olivier De Schutter, ñThe Third Pillar: Access to Judicial Remedies for Human Rights Violations by Transnational Businessò (International Corporate Accountability Roundtable (ICAR), CORE and the European Coalition for Corporate Justice (EECJ), 2013).

[25] Ibrahim Kanalan, ñHorizontal effect of human rights in the era of transnational constellations: on the accountability of private actors for human rights violationsò, p. 19.

[26] General Assembly resolution 56/83. See also Smita Narula, ñThe right to food: holding global actors accountable under international lawò, *Colombia Journal of Transnational Law*, No. 44 (2006), pp. 752ï 753.

barriers to remain, States have failed in their duty to protect human rights by ensuring access to effective remedy through the judicial process.[27]

3. Obligation to fulfil

47. Besides being responsible for the activities of TNCs operating abroad, governments have also a duty to support and cooperate in ensuring the fulfilment of the right to food in poorer countries.[28] General comment No. 12 suggests that developing States that do not possess the necessary resources for the full realization of the right to food are obliged to actively seek international assistance, and wealthier States have a responsibility to help (para. 38). The Right to Food Guidelines request that assistance be provided by States in situations of emergency or widespread famine.

C . Holding transnational corporations accountable

1. Interpretative efforts

48. International obligations with extraterritorial dimensions are enunciated in a number of international treaties[29] that emphasize the importance of international cooperation among States to ensure the protection of human rights. At the same time, international human rights instruments refer to how non-State actors have duties to uphold human rights standards. For example, the Universal Declaration of Human Rights states in its preamble ð and binding provisions in universal and regional human rights documents also indicate ð duties for private actors, while the Guiding Principles on Business and Human Rights (A/HRC/17/31), endorsed by the Human Rights Council in its resolution 17/4 in 2011, elaborate on the responsibility of business enterprises to respect human rights.

49. Another consideration supporting the necessity of extraterritoriality is the principle of non-discrimination. It is a fundamental part of human rights law, and the logical extension of the universality principle. If States are able to treat individuals in other countries differently from the way they may treat individuals in their own territory, this is discriminatory practice and goes against the principles of universality of rights enjoyment.[30]

2. Judiciary

50. The application of extraterritorial obligations is supported indirectly by the International Court of Justice, in its advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory.* The Court observed that: ñwhile the jurisdiction of States is primarily territorial, it may sometimes be exercised

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[27] The Third Pillar case studies include Canada, France, Germany, the Netherlands, Switzerland, the United Kingdom and the United States of America.

[28] General comments No. 12, paras. 36 and 37, and No. 15, para. 32. See Ziegler et al., *The Fight for the Right to Food.*

[29] The Charter of the United Nations (arts. 55 and 56); the Universal Declaration of Human Rights (arts. 22 and 28); the Covenant (arts. 2, para. 1, and 11, paras. 1 and 2); the Convention on the Rights of the Child (arts. 4 and 24, para. 4); and the Convention on the Rights of Persons with Disabilities (art. 32).

[30] Skogly, ñRight to adequate foodò, pp. 341ï 342.

outside the national territoryò.[31] At the regional level the American Convention on Human Rights extends to persons ñsubject to [the] jurisdictionò of the State party, and the Inter-American Commission on Human Rights held that in relation to the American Convention, ñjurisdiction [is] a notion linked to authority and effective control, and not merely to territorial boundariesò. The European Court of Human Rights has also indicated that ñas an exception to the principle of territoriality, a Contracting Stateôs jurisdiction under article 1 may extend to acts of its authorities which produce effects outside its own territoryò.[32]

51. There are a number of cases involving TNCs and right to food violations at the domestic level; however, in many of these cases, claims are either based on tort or criminal law rather than human rights legislation, or decisions focus on the involvement of the Government in the violation of rights, and not the company. The case against Nigeria submitted through the African Commission on Human Rights is an example thereof.[33] Another example is the case brought to the Inter-American Commission on Human Rights on behalf of indigenous Guarani people living in the Oriente region in Ecuador against the oil exploitation activities by their own Government and Texaco.[34]

52. There are many relevant domestic court decisions in Brazil, India, Namibia, South Africa and Uganda. Examples can be found also from Australia, Canada and the United Kingdom of Great Britain and Northern Ireland in which TNCs were held responsible under tort law for complicity in human rights violations abroad. In the United States of America, under the Alien Tort Claims Act, TNCs can be held accountable for complicity in the violation of human rights outside of the United States. However, in 2013 the United States Supreme Court in *Kiobel* v. *Royal Dutch Petroleum* case created a most significant barrier to accessing judicial remedies for human rights violations that occur in a host State.[35]

53. In the European Union, the notion of extraterritorial jurisdiction is not as problematic when businesses are domiciled in the European Union. The situation in Switzerland is similar.[36] Barriers exist across all jurisdictions, despite differences in legislation, the approaches of courts, human rights protections at the national level and legal traditions. These barriers have been overcome in only some instances and, in those cases, usually as a result of innovative approaches adopted by lawyers, the patience of victims and responses by perceptive judges.[37]

54. If TNC activities are criminally justiciable and reasonable compensation is enforceable, the issue of extraterritoriality may not arise. However, in cases of indirect violations of the right to food, for instance by way of voluntary displacement or not being able to farm because of a lack of access to necessary resources such as water because of privatization, or seeds because of a monopoly by TNCs, human rights adjudication

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[31] *I.C.J. Reports 2004*, p. 136, para. 109.

[32] Ibid.

[33] African Commission on Human and Peoplesô Rights, *SERAC* v. *Nigeria*, para. 65 ff.

[34] See J.E. Viñuales, ñThe ódormant environment clauseô: assessing the impact of multilateral environmental agreements on foreign investment disputes?ò, p. 4.

[35] Skinner, McCorquodale and De Schutter, ñThe Third Pillarò, p. 5.

[36] Ibid., p. 6.

[37] Ibid., p. 5.

becomes vital. Consequently, such remedies should provide enforceable compensation and restitution. The remedies currently available for individuals whose economic, social and cultural rights are violated are somewhat limited. Considerable improvements in this regard are essential for cases involving violations of the right to food to be protected from violations committed by foreign and national actors.[38]

3. Private arbitrations and dispute mechanisms

55. In relation to IFIs, private dispute mechanisms have been developed, including the establishment of an ombudsperson for international finance corporations, as have complaint mechanisms, such as the World Bankôs International Centre for Settlement of Investment Disputes (ICSID) and the contact point procedure under the OECD Guidelines for Multinational Enterprises.[39] Under these mechanisms ICSID States and private actors are on an equal footing. The flip side is that corporations are in a position to sue governments.

56. Developing countries are increasingly subject to dispute procedures brought by private companies. For example, high water prices and poor water quality following the privatization of the water supply in the Bolivian town of Cochabamba, culminated in protests against Aguas de Tunari, a subsidiary of the United States firm Bechtel.[40] The Government succumbed to public pressure and reversed the decision to privatize, which prompted the company to bring the Government before ICSID. The case posed the fundamental question of whether the property rights of the company could trump the rights to food and to access water and sanitation. In the end, civil society pressure led to a settlement and, as a result, Bolivian water laws were amended with the 2009 Constitution guaranteeing the right to access to water.[41]

57. Other examples include a lawsuit brought by the Oceana Gold mining company against El Salvador through ICSID for US$301 million for failure to grant a mining permit. It was alleged that the project posed a risk to the countryôs livelihood. Having failed to change the domestic law to relax regulation, the company initiated arbitration measures to pressure El Salvador into paying for lost exploration costs and future profits.[42] These cases demonstrate how intervention is necessary to prevent democratic rights from being undermined by global norms.

4. Permanent peoplesô tribunal

58. In recent years, the human rights violations perpetrated by private actors, including those committed by TNCs, have been subject to several Permanent Peoplesô Tribunals. Of particular relevance to the right to food are the tribunals on: Agrochemical

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[38] Skogly, ñRight to adequate foodò, p. 355.

[39] Malcolm Langford et al. (eds.), *Global Justice, State Duties: The Extraterritorial Scope of Economic, Social, and Cultural Rights in International Law* (Cambridge University Press, 2013), p. 7.

[40] *Aguas del Tunari S.A.* v. *Republic of Bolivia*, ICSID Case No. ARB/02/3.

[41] Andreas Fischer-Lescano and Kolja Moller (eds.), *The struggle for transnational social rights: land grabbing and the right to food* (2014).

[42] International Allies Against Mining in El Salvador, ñCall for international supportò. Available from www.stopesmining.org/j25/index.php/campaigns/2014-international-month-of-action.

Transnational Corporations (2001), Neoliberal Policies and European Transnationals in Latin America and the Caribbean (2008), the Role of Transnationals Corporations in Columbia (2006ï 2008), and Global Corporations and Human Wrongs (2000).[43] Permanent Peoplesô Tribunals are only beneficial in raising public awareness of human rights abuses that otherwise cannot be heard. They offer no legal remedy, but are important politically.

5. Extraterritoriality in the United Nations treaty bodies and special procedures

59. United Nations treaty bodies and special procedures have addressed extraterritorial human rights issues in their various reports, including for the universal periodic review and general comments. According to a recent report from the International Network for Economic, Social and Cultural Rights, in the last seven years the various mechanisms of OHCHR have touched upon extraterritorial obligations some 26 times. In so doing, these bodies have played an important role in developing and consolidating an understanding of how to apply the concepts of jurisdiction to the actions and omissions of States.[44] They expressed their concerns and made recommendations on a number of issues addressing extraterritorial obligations, especially on the human rights impact of the exploitation of natural resources in third countries and the role of TNCs in large-scale development projects with respect to forced land evictions, all of which impact directly on the right to food.

60. General comments do not establish legal obligations, but elaborate on the practical implications of those obligations. The treaty bodies, however, have legally binding powers. In February 2013, the Committee of the Rights of the Child adopted general comment No. 16 (2013) on State obligations regarding the impact of the business sector on childrenôs rights to elaborate on the practical implications of those obligations. The Committee also noted that the existing instruments and guidance did not sufficiently address the particular situation and needs of children.[45] The treaty bodies have also contributed to the protection of the rights of groups such as indigenous people and small-scale farmers, whose rights are routinely disregarded by foreign States and private actors based in third countries. Moreover, in recent years a number special procedure mandate holders have sent various communications to States concerning the application of extraterritorial obligations, especially in cases involving allegations of corporate abuse of human rights in host States.

6. Codes of conducts and voluntary guidelines

61. Recent years have witnessed various attempts to regulate the impact of business activities on human rights outside of the territorial boundaries of the home State. Notably the Guiding Principles on Business and Human Rights (2011) underlined that States ñshould set out clearly the expectation that all business enterprises domiciled in their

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[43] See www.tni.org/archives/peoplestribunal-lima.

[44] *Global Economy, Global Rights: A practitioner's guide for interpreting human rights obligations in the global economy* (2014), p. 9.

[45] See Committee on the Rights of the Child, concluding observations on Australia, CRC/C/AUS/CO/4, paras. 27 and 28, and Turkey, CRC/C/TUR/CO/2-3, paras. 22 and 23.

territory and/or jurisdiction respect human rights throughout their operationsò and clarified the responsibility of TNCs and other business enterprises to respect human rights. Similarly The United Nations Global Compact (2000) urges TNCs to respect workersô rights and human rights; and the OECD Guidelines call on enterprises to respect human rights. In 2011, a group of experts in international law and human rights adopted the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights, which provide that States are responsible for violations of economic, social and cultural rights by non-State actors, including corporations in cases where these non-State actors act under the instructions or direct control of the State, or are empowered by the State to exercise elements of governmental authority.

62. The Guiding Principles are considered the most authoritative statement of the human rights responsibilities of corporations and corresponding State duties adopted at the United Nations level. The Guiding Principles offer a noncommittal voice on extraterritoriality but are rapidly developing and cited in established international standards, such as the revised version of the 2011 OECD Guidelines for Multinational Enterprises and the updated International Finance Corporation Performance Standards; the European Union has also cited the Guiding Principles in its latest Corporate Social Responsibility strategy, and many national governments are recognizing the need to regulate in the area of business and human rights. These rules that place obligations on corporations can develop out of the complex interplay between various States and non-State systems and this multidimensional aspects give them legitimacy.

63. The OECD guidelinesô implementation mechanism, the ñNational Contact Pointsò, emphasize due diligence responsibility for human rights. There have been more than 100 cases to date, in which different human rights organizations had approached the National Contact Points alleging violations of the guidelines by corporations and thus violations of human rights law.[46] The Maastricht Principles are also an example of progressive development efforts of international law. A range of academic experts and non-governmental organizations endorsed the Maastricht Principles in September 2011, and they have been acknowledged in paragraph 61 of the Guiding Principles on Extreme Poverty and Human Rights, which were adopted by consensus by the Human Rights Council (resolution 21/11) in September 2012.

64. All of these mechanisms have the common of preventing and addressing human rights abuse by business enterprises but fail to provide sufficient monitoring mechanisms. The voluntary nature of soft law instruments is generally not sufficient to protect human rights and thus fails to close the existing ñaccountability gapò of extraterritorial responsibilities.[47] However, one should not be too quick to rule out categorically the legal applicability of such declarations just because they are of a voluntary nature. Law is not limited to what States set forth. Legal norms can also be formed in society. To treat the concept of law as being entirely dependent on the State is to overlook the unique nature of social norms.[48]

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[46] Details available from http://oecdwatch.org/cases.

[47] Smita Narula, ñThe Right to Foodò, pp. 752ï 753.

[48] Langford et al., *Global Justice, State Duties*, p. 61.

65. The legally binding nature of voluntary rules may also emerge with the help of national law. Voluntary standards can often be enforced in accordance with competition or consumer laws, where they include relevant representations to the consumer. Thus, a corporationôs non-adherence to its own codes can be enforced before courts in the country of the corporationôs headquarters.[49]

66. Transnational campaigns by civil society are also important in developing good practice. For example, Oxfamôs ñBehind the Brandsò campaign called upon TNCs to stop land grabbing. As a result PepsiCo, Coca-Cola and Nestle responded by committing to a ñzero toleranceò policy within their supply chains in relation to land grabbing and protecting the land rights of rural and indigenous communities.[50] These are important victories, yet monitoring and proper enforcement by the companies is essential to ensure that these committments are upheld.

67. The question of accountability in relation to TNCs and IFIs is still a grey area in international law. However, there has been significant progress on the part of some States, human rights organizations, and even some TNCs in developing guidelines to ensure the protection of human rights and the environment. Providing a uniformly enforced regulatory framework may actually encourage foreign investment in developing countries by levelling the business playing field for ethical corporations. Some companies have begun to recognize the merits of operating under enforceable standards that apply to all their competitors, rather than voluntary standards that only really influence companies with prominent public profiles.[51]

68. Following the unanimous adoption of the Guiding Principles on Business and Human Rights in June 2011, the Human Rights Council subsequently called on all Member States in June 2014 to develop national action plans to further the implementation of the Guiding Principles within their respective national contexts. This development followed similar requests to Member States made by the European Union in 2011 and 2012 and Council of Europe in 2014. However, as of 1 December 2014, only six States have developed and published NAPs on business and human rights: Denmark, Italy, the Netherlands, Spain and the United Kingdom.[52] At the same time, a number of other governments have begun the process of developing national action plans on business and human rights or have publicly announced an intention to do so.[53] The Special Rapporteur congratulates those States which have developed plans and encourages others to do so as a matter of priority. In order to encourage more States, business enterprises and civil

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[49] Ibid., p. 62.

[50] Details available from www.oxfamamerica.org/explore/stories/these-10-companies-make-a-lot-of-the-food-we-buy-heres-how-we-made-them-better/.

[51] Langford et al., *Global Justice, State Duties*, p. 7.

[52] See overview of national action plans maintained by the Working Group on Business and Human Rights, available from www.ohchr.org/EN/Issues/Business/Pages/NationalActionPlans.aspx; and ICAR and ECCJ, ñAssessments of Existing National Action Plans on Business and Human Rights (2014).

[53] Including Azerbaijan, Belgium, Chile, Colombia, Finland, Germany, Greece, Ireland, Italy, Lithuania, Mexico, Mauritius, Morocco, Mozambique, Norway, Portugal, Slovenia, Switzerland, the United Republic of Tanzania and the United States.

society actors to engage in the process, the Working Group on Business and Human Rights on 1 December launched its guidance on national action plans.[54]

69. In June 2014, the Human Rights Council decided to establish an open-ended intergovernmental working group with a mandate ñto elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprisesò (resolution 26/9). It was decided that the open-ended intergovernmental working group would hold its first session in 2015 ñto collect inputs é on possible principles, scope and elements of such an international instrumentò and that the Chairperson-Rapporteur of the working group should prepare elements for the draft instrument for substantive negotiations at the commencement of the working groupôs third session.

70. The Special Rapporteurôs predecessor, Olivier De Schutter, in a statement of March 2014 underlined that international human rights law has already gone a long way towards recognizing duties of States to regulate the activities of corporations, and that the negotiation of a new legally binding instrument is one among many alternative ways through which the fight against impunity for human rights violations could be further strengthened. He also suggested that States cooperate with one another in order to ensure that victims are provided with effective remedies in transnational cases. The Special Rapporteur supports the recommendations made by her predecessor and urges States to consider bringing his proposals to the Human Rights Council for further clarification on the Statesô obligation in relation to non-regulatory means; to identify best practices regarding cooperation between States; and for the adoption of a resolution to draw attention to the Maastricht Principles. The Special Rapporteur recommends that the Human Rights Council establish a mechanism to explore the feasibility of seeking an advisory opinion from the International Court of Justice to determine the legal obligations associated with the extraterritorial implementation of the right to food. The advisory opinion of the Court would itself have no legally binding effect, however, as the highest international court, it has an interpretative authority with respect to particular legal questions. Legal clarification would increase the influence of voluntary regulatory efforts having the goal of reaching legally binding agreements.

VI. Conclusion and recommendations

71. The question of justiciability of economic, social and cultural rights has long been debated in the international sphere. States have been reluctant to allow for individual complaint procedures before the Covenant. All human rights are indivisible, and should be protected as such. Economic, social and cultural rights are more than mere aspirations, they are necessary conditions for the stability of the democratic order, and economic power must be subject to democratic control. The newly ratified Optional Protocol is an effort to equalize and operationalize those two categories of rights and empower the justiciability of the economic, social and cultural rights. The Special Rapporteur intends to work closely with civil society and States to promote ratification and use of the Optional Protocol and bring violations to the attention of the Committee on Economic, Social and Cultural Rights as a practical means of eradicating hunger and promoting the

[54] See www.ohchr.org/EN/Issues/Business/Pages/NationalActionPlans.aspx.

right to adequate food. The Optional Protocol has the potential to contextualize and operationalize the right to food at international and national levels. However, we should not be complacent as much remains to be done beyond the scope of the Optional Protocol. Wealthy States not only have moral obligations to address poverty and hunger beyond their borders, they are also legally obliged to do so under international law. International cooperation and development assistance must become the legal norm in an increasingly global world. Despite established duties in a number of human rights documents and voluntary principles, significant barriers and loopholes exist in relation to the extraterritorial application of States obligations in human rights law. A coordinated international response is essential in order to maintain international peace and security and to ensure protection of the most vulnerable in times of economic globalization.

72. The Special Rapporteur recommends that States: é

(k) Enable further clarification on Statesô extraterritorial obligations in relation to non-regulatory means; identify best practices regarding cooperation between States; and adopt within the Human Rights Council a resolution to draw attention to the Maastricht Principles;

(l) Consider requesting an advisory opinion from the International Court of Justice to determine the legal obligations relating to the extraterritorial implementation of the right to food.

2014: Special Rapporteur on the human right to safe drinking water and sanitation

Report of the Special Rapporteur
on the human right to safe drinking water and sanitation:
Common violations of the human rights to water and sanitation
UN Doc. A/HRC/27/55 (30 June 2014)

F. Violations of extraterritorial obligations

70. Violations of extraterritorial obligations are a growing concern in relation to the rights to water and sanitation, for instance in the context of transboundary water resources, the activities of transnational corporations, or donor activities. The Maastricht Principles on Extraterritorial Obligations, adopted by 40 experts to clarify the extraterritorial obligations of States on the basis of existing international law, affirm that the obligations to respect, protect and fulfil extend extraterritorially and that States must ensure the right to a remedy.[55] Human rights obligations also apply to actions of States as members of international organizations.[56] The International Law Commission stated that a State member of an international organization would be breaking international law if it caused

[55] Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights (2012), Principle 37.
[56] Ibid., Principle 15.

that organization to commit an act that would be illegal under international law for a State to carry out itself.[57]

71. Extraterritorial violations may occur, for example, when (a) States fail to regulate activities of companies under their jurisdiction that cause violations abroad; (b) States contribute to human rights violations in the context of development cooperation activities, including by imposing conditions that undermine rights; (c) States adopt sanctions that negatively affect the realization of human rights in other countries; (d) States fail to respect human rights or restrict the ability of others to comply with their human rights obligations in the process of elaborating, applying and interpreting international trade and investment agreements; (e) States fail to prevent harm resulting from greenhouse gas emissions which contribute to climate change that have negative impacts on the realization of human rights;[58] and (f) water contamination or use causes human rights violations in a neighbouring country.

72. Treaty bodies have increasingly addressed violations of extraterritorial obligations. The Human Rights Committee has called for the regulation and monitoring of corporate activities abroad that may violate human rights and for measures to ensure access to remedies in the event of such violations.[59] Both the Human Rights Committee and the Committee on Economic, Social and Cultural Rights have expressed concern about the denial by Israel of access to water and sanitation and about the destruction of infrastructure in the Occupied Palestinian Territory.[60] The Special Rapporteur recommends that increased attention be paid to violations of extraterritorial obligations.

82. To emphasize a comprehensive understanding of violations of the human rights to water and sanitation resulting from failure to meet any human rights obligation, the Special Rapporteur stresses that:

é (k) Violations may occur as a result of State conduct that has effects within a Stateôs territory, or extraterritorially;é .

2013: Special Rapporteur on the human right to safe drinking water and sanitation

Annual Report of the Special Rapporteur
on the human right to safe drinking water and sanitation
UN. Doc. UN Doc. A/68/264 (5 August 2013)

1. Devising appropriate legal frameworks, policies and strategies

45. Water and wastewater are governed by an extensive web of water law and policy, ranging from international to national law, policies, and decrees to local rules

[57] International Law Commission, ñDraft Articles on Responsibility of International Organizations with Commentariesò in Report of the International Law Commission on the work of its 63rd session (2011) (A/66/10), art. 61, para. 1.
[58] See A/HRC/10/61, para. 29.
[59] CCPR/C/DEU/CO/6, para. 16.
[60] CCPR/C/ISR/CO/3, para. 18; E/C.12/ISR/CO/3, para. 29.

and customary law. Water flows across territorial boundaries; hence, its governance also needs to extend beyond national boundaries. Among existing instruments, the 1997 Convention on the Law of Non-Navigational Uses of International Watercourses must be noted. While the convention has not yet entered into force, it represents a codification of customary international law to a large extent. Article 7 requires States to take all appropriate measures to prevent the causing of significant harm to other States sharing an international watercourse.

46. The human rights perspective strengthens those obligations. The Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights, recently adopted by a group of experts in international law and human rights, underscore the obligation of States to avoid causing harm extraterritorially, stipulating that States must desist from acts and omissions that create a real risk of nullifying or impairing the enjoyment of economic, social and cultural rights extraterritorially.30 The principles also affirm the obligation of States to protect human rights extraterritorially,31 i.e., to take necessary measures to ensure that non-State actors do not nullify or impair the enjoyment of economic, social and cultural rights.32 This translates into an obligation to avoid contamination of watercourses in other jurisdictions and to regulate non-State actors accordingly.

2014: Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment

Mapping Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment
UN Doc. A/HRC/25/53 (30 December 2013)

3.Obligations relating to transboundary environmental harm

62. Many grave threats to the enjoyment of human rights are due to transboundary environmental harm, including problems of global scope such as ozone depletion and climate change. This raises the question of whether States have obligations to protect human rights against the extraterritorial environmental effects of actions taken within their territory.

63. There is no obvious reason why a State should not bear responsibility for actions that otherwise would violate its human rights obligations, merely because the harm was felt beyond its borders. Nevertheless, the application of human rights obligations to transboundary environmental harm is not always clear. One difficulty is that human rights instruments address jurisdiction in different ways. Some, such as the Universal Declaration of Human Rights and the African Charter, contain no explicit jurisdictional limitations, and the International Covenant on Economic, Social and Cultural Rights may even provide an explicit basis for extraterritorial obligations (art. 2, para. 1). But other treaties, including the International Covenant on Civil and Political Rights, the Convention on the Rights of the Child, the European Convention on Human Rights and

the American Convention on Human Rights, limit at least some of their protections to individuals subject to or within the jurisdiction of the State, leaving it unclear how far their protections extend beyond the Stateôs territory. Another problem is that many human rights bodies have not addressed extraterritoriality in the context of environmental harm.[61]

64. Nevertheless, most of the sources reviewed that have addressed the issue do indicate that States have obligations to protect human rights, particularly economic, social and cultural rights, from the extraterritorial environmental effects of actions taken within their territory. The Committee on Economic, Social and Cultural Rights has interpreted the International Covenant on Economic, Social and Cultural Rights as requiring its parties ñto refrain from actions that interfere, directly or indirectly, with the enjoyment of the right to water in other countriesò (general comment No. 15, para. 31), and has stated that parties should also take steps to prevent third parties within their jurisdiction, such as their own citizens and companies, from violating the rights to water and health in other countries (general comment No. 15, para. 33; and general comment No. 14, para. 39). Several special Rapporteurs have adopted similar interpretations. In 2011, the Special Rapporteur on the right to food and the Special Rapporteur on extreme poverty and human rights joined with scholars and activists to adopt the Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights.[62] The Special Rapporteur on the human right to safe drinking water and sanitation recently cited those Principles as underscoring ñthe obligation of States to avoid causing harm extraterritoriallyò and affirming ñthe obligation of States to protect human rights extraterritorially, i.e., to take necessary measures to ensure that non-State actors do not nullify or impair the enjoyment of economic, social and cultural rights. This translates into an obligation to avoid contamination of watercourses in other jurisdictions and to regulate non-State actors accordinglyò (A/68/264, para. 46).

65. Such interpretations are in accord with the fundamental obligation of States to carry out their treaty commitments in good faith,[63] which requires them to avoid taking actions calculated to frustrate the object and purpose of the treaty.[64] The International Court of Justice has read this principle of *pacta sunt servanda* as requiring the parties to a treaty to apply it ñin a reasonable way and in such a manner that its purpose can be realizedò.[65] This suggests that parties to a human rights treaty should not engage in conduct that makes it harder for other parties to fulfil their own obligations under the treaty.[66]

66. Other sources, such as the Special Representative of the Secretary-General on business and human rights, have taken a more restrictive view of the scope of extraterritorial human rights obligations. The Special Representative also stated, however, that ñthere is increasing encouragement at the international levelé for home

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[61] See, for example, Council of Europe, *Manual*, p. 25.

[62] http://www.etoconsortium.org/nc/en/library/maastricht-principles/?tx_drblob_pi1%5Bdownload Uid%5D=23

[63] Vienna Convention on the Law of Treaties, art. 26.

[64] Mark E. Villiger, Commentary on the 1969 Vienna Convention on the Law of Treaties (2009), p. 367.

[65] Case concerning the Gabcikovo-Nagymaros project (Hungary/Slovakia), 1997 International Court of Justice 7, para. 142.

[66] See Maastricht Principles, principle 20.

States to take regulatory action to prevent abuse by their companies overseasò (A/HRC/8/5, para. 19), and urged States to do more to prevent corporations from abusing human rights abroad (A/HRC/14/27).

67. Although work remains to be done to clarify the content of extraterritorial human rights obligations pertaining to the environment, the lack of complete clarity should not obscure a basic point: States have an obligation of international cooperation with respect to human rights, which is contained not only in treaties such as the International Covenant on Economic, Social and Cultural Rights (art. 2, para. 1), but also in the Charter of the United Nations itself (arts. 55 and 56). This obligation is of particular relevance to global environmental threats to human rights, such as climate change (A/HRC/10/61, para. 99). As the Human Rights Council noted in its resolution 16/11, principle 7 of the Rio Declaration states that ñStates shall cooperate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earthôs ecosystem.ò

68. Indeed, much of international environmental law reflects efforts by States to cooperate in the face of transboundary and global challenges. Further work to clarify extraterritorial obligations in respect of environmental harm to human rights can receive guidance from international environmental instruments, many of which include specific provisions designed to identify and protect the rights of those affected by such harm.[67]

2013: Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment

Preliminary Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment
UN Doc. A/HRC/22/43 (24 December 2012)

D. Human rights obligations relating to transboundary and global environmental harm

47. Many environmental problems involve transboundary harm. In the words of the 2011 OHCHR report on human rights and the environment, ñOne countryôs pollution can become another countryôs environmental and human rights problem, particularly where the polluting media, like air and water, are capable of easily crossing boundariesò (A/HRC/19/34, para. 65). Such problems have given rise to much of international environmental law, from bilateral and regional agreements on cross-border air and water pollution to multilateral environmental agreements on global challenges such as marine pollution, ozone depletion and climate change.

48. The application of human rights law to transboundary and global environmental harm requires consideration of questions regarding the extraterritorial reach of human rights

[67] See MEA report, sect. IV.A; and Aarhus report.

norms. Those questions are often complex, not least because human rights treaties employ varying language to define the scope of their application. Recent years have seen heightened attention to the extraterritoriality of human rights obligations,34 but there is still a need for more detailed clarification (see A/HRC/19/34, para. 64). These issues are of particular importance in the environmental context, in the light of the number and intensity of transboundary and global environmental threats to the full enjoyment of human rights.

2014: 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

Final report of 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
UN Doc. A/HRC/25/52 (7 March 2014)

A. The obligation of international assistance and cooperation

35. Under international law, States have an obligation of international assistance and cooperation to support the realization of human rights.37 Article 2, paragraph 1 of the International Covenant on Economic, Social and Cultural Rights specifically refers to an obligation to take steps, including through international assistance and cooperation, to realize the rights enshrined in the Covenant. It thus clearly affirms an obligation to engage. Similarly, the Convention on the Rights of the Child enjoins States to take measures to implement the economic, social and cultural rights in the treaty to the maximum extent of their available resources and, where needed, within the framework of international cooperation (art. 4).

36. The Declaration on the Right to Development also embodies the principle of international cooperation. Under article 3, paragraph 1, it indicates that States have the primary responsibility for the creation of national and international conditions favourable to the realization of the right to development. According to the high-level task force on the implementation of the right to development, ñthe responsibility for the creation of this enabling environment encompasses three main levels: (a) States acting collectively in global and regional partnerships; (b) States acting individually as they adopt and implement policies that affect persons not strictly within their jurisdiction; and (c) States acting individually as they formulate national development policies and programmes affecting persons within their jurisdictionò (A/HRC/15/WG.2/TF/2/Add.2, annex, p. 8).

37. The Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights also demand that States take measures either individually or through international cooperation in order to protect the economic, social and cultural rights of people within and beyond their territory.

38. While article 2, paragraph 1, of the International Covenant on Economic, Social and Cultural Rights refers in particular to economic and technical assistance and cooperation, it does not limit the undertaking to such measures. Thus, according to the commentary to the Maastricht Principles, international assistance must be understood as a component of international cooperation: ñInternational assistance may, and depending on the circumstances must, comprise other measures, including provision of information to people in other countries, or cooperation with their state, for example, to trace stolen public funds or to cooperate in the adoption of measures to prevent human trafficking.ò

39. Based on the above interpretation, the Independent Expert considers that the duty of international assistance and cooperation extends to international cooperation in tackling factors that facilitate illicit financial flows and in ensuring the recovery of stolen assets. That is confirmed by the Convention against Corruption and other instruments on corruption, all of which contain provisions on international cooperation and/or mutual legal assistance.

40. In relation to the activities of non-State actors, in particular transnational corporations, the Maastricht Principles underscore that States ñshould cooperate in order to ensure that any victim of the activities of non-state actors that results in a violation of economic, social and cultural rights has access to an effective remedy, preferably of a judicial nature, in order to seek redressò. This requirement is of particular relevance to the issue of addressing the negative impacts of tax evasion and avoidance by transnational corporations.

41. Lastly, where States encourage or facilitate illicit financial flows, or deliberately frustrate the efforts of other States to counter such flows, they could be in breach of their international human rights obligations, particularly with respect to economic, social and cultural rights. In that regard, it is notable that the Maastricht Principles underline that States that receive a request to assist or cooperate and are in a position to do so must consider the request in good faith, and respond in a manner consistent with their obligations. This is of particular importance in relation to requests for repatriation of stolen assets or illicit funds.

2014: Special Rapporteur on extreme poverty and human rights

Report of the Special Rapporteur
on extreme poverty and human rights:
taxation and human rights
UN Doc. A/HRC/26/28 (22 May 2014)

30. As part of international cooperation and assistance, States have an obligation to respect and protect the enjoyment of human rights everywhere, which involves avoiding conduct that would foreseeably risk impairing the enjoyment of human rights by persons beyond their borders, and conducting assessments of the extraterritorial impact of laws, policies and practices.

31. States must refrain from any conduct that impairs the ability of another State to comply with its own human rights commitments. Furthermore, they have an obligation to create an international enabling environment for the fulfilment of economic, social and cultural rights, including in matters relating to taxation. They should also coordinate with each other in order to cooperate effectively in the universal fulfilment of economic, social and cultural rights.

62. The actions of States to facilitate and/or actively promote tax abuse and other illicit financial flows through their tax secrecy laws and policies could jeopardize their compliance with international human rights obligations, particularly with regard to international cooperation and economic, social and cultural rights.[68] States should therefore take concerted and coordinated measures against tax evasion globally as part of their domestic and extraterritorial human rights obligations and their duty to protect people from human rights violations by third parties, including business enterprises (see paras. 1 ï 35 above).

80. With regard to international cooperation and extraterritorial impact, each State should refrain from any conduct that impairs the ability of another State to raise revenue as required by their human rights commitments, and cooperate in creating an international environment that enables all States to fulfil their human rights obligations.

2012: Special Rapporteur on extreme poverty and human rights

Report of the Special Rapporteur
on extreme poverty and human rights:
Guiding Principles on extreme poverty and human rights
UN Doc. A/HRC/21/39 (18 July 2012)

61. States should take into account their international human rights obligations when designing and implementing all policies, including international trade, taxation, fiscal, monetary, environmental and investment policies. The international communityôs commitments to poverty reduction cannot be seen in isolation from international and national policies and decisions, some of which may result in conditions that create, sustain or increase poverty, domestically or extraterritorially. Before adopting any international agreement, or implementing any policy measure, States should assess whether it is compatible with their international human rights obligations.

92. As part of international cooperation and assistance, States have an obligation to respect and protect the enjoyment of human rights, which involves avoiding conduct that would create a foreseeable risk of impairing the enjoyment of human rights by persons living in poverty beyond their borders, and conducting assessments of the extraterritorial impacts of laws, policies and practices.

[68] A/HRC/25/52, para. 42.

93. States in a position to do so should provide international assistance to contribute to the fulfilment of human rights and poverty reduction as an element of the duty of international assistance and cooperation. International assistance should respect partner countriesô ownership of their poverty reduction strategies, and should be aligned with partner countriesô national development strategies, institutions and procedures. Donorsô actions should be harmonized, transparent and coordinated, and both donors and partners should be accountable for their actions and the results of their interventions.

95. In providing or receiving international assistance, States should ensure the effective participation of recipient States and all affected stakeholders, including persons living in poverty, and strengthen their capacity and ownership in the context of international assistance.

96. States must take deliberate, specific and targeted steps, individually and jointly, to create an international enabling environment conducive to poverty reduction, including in matters relating to bilateral and multilateral trade, investment, taxation, finance, environmental protection and development cooperation. This includes cooperating to mobilize the maximum of available resources for the universal fulfilment of human rights.

97. Even when a member of an international organization, a State remains responsible for its own conduct in relation to its human rights obligations within and outside its territory. This includes identifying the possible human rights impact, including on persons living in poverty, of measures agreed at the international level.

98. A State that transfers competences to or participates in an international organization must take all reasonable steps to ensure that the relevant organization acts in accordance with the international human rights obligations of that State and in a manner conducive to poverty reduction.

99. States have a duty, in accordance with their international obligations, to prevent and protect against human rights abuse committed by non-State actors, including business enterprises, which they are in a position to regulate. Where transnational corporations are involved, all relevant States should cooperate to ensure that businesses respect human rights abroad, including the human rights of persons and communities living in poverty. States should take additional steps to protect against abuses of human rights by business enterprises that are owned or controlled by the State, or that receive substantial support and service from State agencies.

VI. Universal Periodic Review recommendations

Universal Periodic Review, Second Cycle: Switzerland

Report of the Working group (A/HRC/22/11), 2012, para 123.85

123.85. Undertake an impact assessment on the possible consequences of its foreign trade policies and investment agreements on the enjoyment of economic, social and cultural rights by the population of its partner countries (Bangladesh).