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# States' Extraterritorial Obligations to Protect Against Corporate Abuses of Economic, Social and Cultural Rights


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# INTRODUCTION

*Context*

International human rights law is concerned with the enjoyment of human rights and was primarily designed to limit abuses by Governments against their citizens. When the first human rights treaties were drafted, only States were recognized as the main actors in the international community. However, our societies are now faced with the new challenges of a globalized world which also involves powerful non-State actors (such as intergovernmental organizations and transnational corporations (hereafter: TNCs)) and where the actions and policies of every State can affect individuals living in other States. In this globalized community, States and non-State actors interrelate and influence the realization of human rights[1]. Non-State actors, such as global corporations, can impact on human rights, for instance through their employment and environmental practices, as well as, in their support for political regimes and for policy changes[2].

Globalization can be associated with development in technology and information processing, as well as, increasing reliance on the free market but it also leads to the diminution of the role and budget of the State and to the privatization of functions which were traditionally considered as being the exclusive competence of the State. Globalization may imply economic growth for certain countries but may as well result in growing inequalities between and within countries. This consequently results in increasing the role and responsibilities given to private actors in the corporate sector and to civil society[3]. The Committee on Economic, Social and Cultural Rights (hereafter: CESCR) has recognized that globalization might not be incompatible with human rights but:

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[1] Maastricht Principles, preamble; Salomon (2007) p.39

[2] UNDP (2002)

[3] CESCR Statement (1998) E/1999/22-E/C.12/1998/26 para 2

> "if not complemented by appropriate additional policies, globalization risks downgrading the central place accorded to human rights by the United Nations Charter in general and the International Bill of Human Rights in particular. This is *especially the case in relation to economic, social and cultural rights [emphasis added]*"[4].

The challenge will rest in the adaptability of human rights law with the globalized world to reach beyond traditional concepts, such as State sovereignty, to secure global justice[5]. In order to adapt to this globalized community, there is a need to widen traditional States' obligations under human rights to include extraterritorial States' obligations. For example, if a German corporation is involved in forced evictions in Uganda, what would be the obligations of the German State under the International Covenant on Economic, Social and Cultural Rights (hereafter: ICESCR) with regard to that German corporation's actions? If a Swedish clothing company is violating workers' rights in Bangladesh, what are the obligations of the Swedish State?

With the prominent expansion of TNCs in the last decades, more attention was given to the interrelationship between States, corporations and human rights. This interrelationship is the source of a long-standing international debate on whether mandatory norms are required. Professor John Gerard Ruggie (hereafter: Ruggie), was appointed in 2005 to the United Nations Commission on Human Rights (now the Human Rights Council (hereafter: HRC)) with a mandate to clarify this debate[6]. Ruggie developed the "Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework" (hereafter: UN Guiding Principles) which were endorsed by the HRC in June 2011[7]. The UN Guiding Principles are based on three core principles pro-

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[4] *Id.* at para 3

[5] Coomans (2004) p.184

[6] CHR (2005) E/CN.4/2005/69

[7] HRC (2011) RES/17/4

posed by the "Protect, Respect and Remedy" Framework (PRR Framework)[8]. Ruggie acknowledged that this perplexed relationship between business and human rights is rooted in the governance gaps created by globalization as these gaps provide for a permissive environment for corporate abuses without adequate reparation[9].

*Demarcation*

Recognizing the importance and the complementary of each of the three core principles suggested by Ruggie, this paper will focus on the first pillar of the PRR Framework – the State duty to protect against human rights abuses –, with a specific focus on the extraterritorial States obligations to protect against corporate violations of economic, social and cultural (ESC) rights. In addition to the UN Guiding Principles (2011), extraterritorial States obligations related to ESC rights have also been addressed, for instance, by the CESCR, the Limburg Principles on the Implementation of the International Covenant on Economic and Social Rights (hereafter: Limburg Principles) (1986), the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights (hereafter: Maastricht Guidelines) (1997), the UN Norms on the Responsibilities for Transnational Corporations (2003), and the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights (hereafter: Maastricht Principles) (2011). For the purpose of this paper the interpretations of the CESCR, the UN Guiding Principles and the Maastricht Principles will be further analyzed.

This is a well-established principle of international law that territorial States (or host States of the TNCs' activities) have the primary responsibility for human rights violations. A more controversial issue is, however, the extension of the State duty to the TNC's home

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[8] The three core principles are: "the State duty to protect against human rights abuses by third parties, including business; the corporate responsibility to respect human rights; and the need for more effective access to remedies", Ruggie (2008) A/HRC/8/5 para 9

[9] *Id.* at para 3, 17

State of incorporation[10]. In this paper, focus will be given to this indirect accountability of States for corporate abuses rather than the direct accountability of corporations for human rights abuses. This paper therefore aims at defining the obligations of State Parties to ICESCR (TNC's home State) to protect against ESC rights violations committed by corporations on individuals living in another State (TNC's host State).

*Research Question*:

*What is the current legal understanding of States' extraterritorial obligations to protect against corporate abuses under the ICESCR?*

This research question will be considered on the basis of the ICESCR, UN Guiding Principles and Maastricht Principles. From this analysis, this paper aims at strengthening the legal character of ESC rights as clarifying the extraterritorial obligations of home States can contribute to better enforcement and realization of ESC rights.

*Why focusing on States' extraterritorial obligations?*

Territorial States (host States) bear the primary responsibility to ensure the enjoyment of human rights to individuals living on their territory. But some States might not always be able/willing to live up to their human rights obligations or they might not even be party of a human rights treaty[11]. The majority of human rights abuses occur in countries where governance is affected by conflicts, corruption, extreme poverty or where the rule of law is deficient[12]. To effectively ensure the enjoyment of human rights, the States of incorporation of TNCs (home States) may have extraterritorial obligations with regards to the individuals located in those States (host States) which might be unable or unwilling to bear the duties of human rights. The reconnaissance of the extraterritorial human rights obligations

[10] *Id.* at para.18,19; Ruggie (2009) A/HRC/11/13 para.15; Ruggie (2010) A/HRC/14/27 para.46-49; Maastricht Principle 2, commentary

[11] Augenstein and Kinley (2013)

[12] Ruggie *supra* note 8 at para 16; Ruggie (2006) E/CN.4/2006/97 para 20-25; Kamatali (2012) p.446

of States could therefore contribute to an effective protection of human rights in a globalized economy where despite the growing of global wealth, poverty and socio-economic inequalities remain omnipresent throughout the world.

*Why emphasizing on States' extraterritorial obligations (public governance) rather than corporate social responsibility (corporate governance)?*

Globalization has given more power to the private sector (i.e.TNCs) [13]. Global companies involve multiple corporate entities within multiple countries enhancing the economic efficiency of companies but also diminishing their ability to manage their global value chains[14]. An increased number of TNCs has been accused of committing human rights abuses[15]. Thus, the challenge of globalization, with regards to business and human rights, lies in enhancing corporate and public governance to reduce governance gaps. Three alternatives are possible to improve the human rights accountability of TNCs: the responsibility of states to control TNCs, self-regulation by TNCs (code of conduct or international framework agreements) or at the global level, direct obligations for corporations under international law.

As highlighted by Ruggie, the existing international human rights framework "rests upon the bedrock role of States"[16]. States hold a unique position to "foster corporate cultures in

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[13] Ruggie (2006) E/CN.4/2006/97 para.20-25

[14] Value Chain refers to the range of activities necessary to bring a product from its conception to its end use.

[15] For example, the pipeline project of TOTAL (French Corporation) in Myanmar resulted in serious human rights violations (source: FIDH); Various Canadian Mining corporations are accused of human rights abuses in developing countries. For instance, Hudbay Minerals, Inc (Canadian Company), the parent company of Compañía Guatemalteca de Níquel (CGN), is now facing accusations of human rights abuses (killings, gang rapes and forced evictions of indigenous population) in Guatemala (source: Choc v. HudBay Minerals Inc. & Caal v. HudBay Minerals Inc.**:** Lawsuits against Canadian company HudBay Minerals Inc. over human rights abuse in Guatemala)

[16] Ruggie *supra* note 8 at para 50

which respecting rights is an integral part of doing business"[17]. The guidance and control necessary for corporations to positively influence the realization of human rights is to be primarily provided by States which are the actors obligated under international human rights law.

Without diminishing the important role companies themselves have with regards to the respect of human rights, this paper will nonetheless focus on defining the content of extra-territorial obligations of States in the existing human rights system. More specifically, this paper is an attempt to flesh out the obligation to protect ESC rights as incumbent to the home State.

*Terminology Clarification*

Basic concepts, such as transnational corporation and State's extraterritorial obligations, have to be defined to clarify the scope of the present paper. A *transnational corporation* should be understood as an economic entity performing activities in more than one country[18]. The term "*States' extraterritorial obligations*"[19] refers to obligations with regards to the acts and omissions of a State, within or outside its territory, which have impacts on the enjoyment of human rights of people living outside that State's territorial borders and could also refer to the global obligations requiring States to realize human rights through cooperation as stated in the Charter of the United Nations and other human rights instruments[20]. This paper will however focus on the first aspect of the definition. Home States and host

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[17] *Id*. at para 29

[18] UN Norms on the Responsibilities for Transnational Corporations, E/CN.4/Sub.2/2003/12/Rev.2, art 20; For other suggestions, refer to Chakraborty (2006)

[19]Extraterritorial obligations can also be referred to as: "transnational obligations, transboundary obligations, transborder obligations, crossborder obligations, international obligations, universal obligations, external obligations, inter-State obligations, extraterritorial jurisdiction, global obligations and third State obligations" (Gibney. *On Terminology: Extraterritorial Obligations* (2013) p.32)

[20] Maastricht Principle 8

States are also two concepts that need to be clearly understood in the context of extraterritorial obligations of States. *Home State* is referred to as the State where the corporation is domiciled or headquartered whereas the *host State* will refer to the State where the TNC exercises its activities. Extraterritorial obligations of the home State might therefore be triggered when a TNC commits human rights abuses in the host State.

*Structure*

This paper is divided into two main sections. The first section deals with the specific features of human rights and more specifically ESC rights as stipulated in ICESCR. The understanding of ESC rights' characteristics and the incumbent territorial obligations of States following the ICESCR are relevant in order to determine the extraterritorial scope of States' obligations under this treaty. The analysis proposed in the second section focuses on the scope of the extraterritorial States obligations to protect ESC rights according to relevant principles of international law, the ICESCR, the UN Guiding Principles and the Maastricht Principles. A case is also presented in order to emphasize the importance of recognizing the extraterritorial obligation to protect of home States.

# 1 Economic, Social and Cultural (ESC) Rights

## 1.1 Characteristics of ESC Rights

### 1.1.1 General Features of Human Rights Law

What are human rights? Human rights are a statement of what human beings require to live fully human lives[21]. Their central foundation is the respect and protection of human dignity[22].

In the aftermath of the Second World War, growing concern to prevent catastrophes led to the establishment of treaties devoted to the protection of human rights and fundamental freedoms at the international level. The UN Charter (1945) is the first international instrument requiring the respect for human rights. Subsequently adopted, the International Bill of Human Rights – Universal Declaration of Human Rights (hereafter: UDHR) (1948), ICESCR (1966: 160 parties to date), the International Covenant on Civil and Political Rights (hereafter: ICCPR) (1966: 167 parties to date), and their protocols – is recognized as the main source of international human rights law providing for a comprehensive coverage of human rights.

In its preamble, the UDHR highlights that the "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world". The UDHR recognizes human rights as moral entitlements whereas the two Covenants convert these moral rights into enforceable legal rights[23].

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[21] OHCHR (2005) p.vii

[22] UN Charter preamble; UDHR preamble, art.1; ICESCR preamble; ICCPR preamble

[23] Minkler (2013) p.3-4

International human rights law is defined around the centrality of States where States are bound through treaties leaving non-State actors outside of this international human rights legal framework[24]. Human rights law was developed on the basis of a state/individual relationship involving unequal relations of power where the state has the potential to commit abuses to the detriment of individuals' interests.[25] For instance, under the two human rights Covenants (ICESCR and ICCPR), it is only each "State party" to each Covenant that undertakes human rights obligations and is thus ultimately accountable for compliance with them[26].

An integral part of the international law framework, human rights law bears some distinguishing features. Human rights treaties are not characterized by the traditional contractual and consensual nature of international treaties but rather by a particular object and purpose, i.e. the protection of human dignity. They are of an objective nature as they protect the fundamental rights of individuals rather than the interests of States[27]. The reciprocal nature of treaties is thence inapplicable to human rights treaties as the contracting States have obligations towards the individuals (vertical obligation) within their jurisdiction rather than towards other contracting States (horizontal obligation)[28]. Human rights obligations are applicable regardless of the acceptance of those obligations by other States[29]. The principle of reciprocity would imply equal treatment and reciprocal exchange of rights for the benefit of the contracting States but human rights protect international common interests rather than reciprocal or bilateral interests. The non-reciprocity nature of human rights treaties follows therefore from the nature of the obligations enshrined in those treaties. The Vienna Convention on the Law of Treaties (hereafter: VCLT) recognizes this special non-

[24] Steiner, Alston and Goodman (2008) p.1385

[25] Ssenyonjo (2008) p.726

[26] ICCPR art.2(1); ICESCR art.2(1)

[27] Orakhelashvili (2003) p.531-53

[28] HRC General Comment 24 (1994) CCPR/C/21/Rev.1/Add.6, para 17

[29] Gondek (2009) p. 24

reciprocal character of human rights instruments[30]. Human rights treaties are also characterized by the continuity of the obligations involved as the rights enshrined in human rights treaties belong to the people living in a State party and continue to belong to them even when a change of government occurs[31].

Another characteristic of human rights worth emphasizing in the context of this paper is the global consensus on the universality, interdependency, indivisibility and interrelatedness of human rights[32]. Universality implies that human rights belong to all human beings and derived from people's inherent dignity. Individuals enjoy human rights because of their humanity and not because of their membership to a society, nationality or ethnicity[33]. The universality of human rights is recognized by the UN Charter and the principal human rights treaties[34]. Following the near-universal ratification of the UN Charter and of these treaties, the principle recognizing that all individuals are to have their rights and fundamental freedoms respected is well established[35]. Human rights treaties are based on universal values rather than contractual values. Furthermore all rights are interrelated meaning that the improvement of one right will influence the advancement of other rights and likewise, the deprivation of one right will adversary affect other rights. Being interdependent, the enjoyment of one right might require the realization of other rights which might or might not be from the same Covenants. For instance, the realization of the right to life (ICCPR, article 6 (1)) might require taking into account the right to an adequate standard of living and the right to health (ICESCR, article 11 and 12). The separation of the rights into two

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[30] VCLT art.60 (5)

[31] HRC General Comment No 26 (1997) CCPR/C/21/Rev.1 /Add.8/Rev.1, para 4-5

[32] Recognized, for instance, by the UDHR preamble, art 1-2; ICESCR preamble; Optional Protocol ICESCR preamble; ICCPR preamble; Vienna Declaration (1993) preamble, para.1, 5; Maastricht Principle 5

[33] Sogkly and Gibney (2007) p.273

[34] UN Charter art.1; UDHR preamble, art 1, 28; ICESCR preamble para 2; ICCPR preamble para 2

[35] Skogly and Gibney (2007) p.269; Martin (2013); the universality of human rights is also criticized by some scholars, e.g. Brown (1997)

Covenants does not preclude for their indivisibility. The UDHR is an example of the expression of fundamental human rights stipulated in one integrated instrument[36].

Human rights law is constantly evolving. As pointed out by Amartya Sen, one of several questions that must still be addressed concerning human rights is the duties and obligations human rights give rise to[37]. Following the acceptance of the universal nature of human rights, who is obligated to provide for their realization and protection? There is an increasing recognition for the extraterritorial application of human rights treaties and more consideration is given to the duty of States to protect[38]. Before focusing on the scope and content of the extraterritorial States obligations to protect ESC rights, the following section will highlight the main characteristics of ESC rights.

### 1.1.2 The Nature of Economic, Social and Cultural Rights

The ICESCR is the foundational treaty for ESC rights containing some of the most significant international legal provisions on ESC rights and shall constitute the basis of the present analysis on extraterritorial States' obligations. All human rights, civil, political, economic, social and cultural rights, are indivisible and interrelated but they might impose different duties on States. The CESCR affirmed that ESC rights can be realized in various economic and political systems which recognize the interdependency and indivisibility of human rights. Notwithstanding the general recognition that all human rights must be treated on an "equal manner, on the same footing, and with the same emphasis"[39], some are still reluctant to protect ESC rights[40]. For instance, the U.S. government maintains that ESC rights are of a different category of rights that should be viewed as goals rather than

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[36] The African Charter on Human and People's Rights also recognized the equality between ESC rights and CP rights; Mzikenge Chirwa (2008)

[37] Sen (2004) p. 322

[38] Shaw (2008) p.276

[39] Vienna Declaration (1993) para.5

[40] For example, Cranston (1973); O'Neill (1986); Rawls (1999)

rights[41]. Despite the criticism that ESC rights might receive, the fact is that ICESCR is a treaty giving rise to obligations with regards to ESC rights. There is a general consensus that there are no fundamental differences between the categories of ESC and CP rights[42]. ESC and CP rights are enforceable and justiciable rights[43].

Article 2(1) of the ICESCR on the general obligation of States is of particular importance for a complete understanding of the Covenant as this provision has "a dynamic relationship with all the other provisions of the Covenant"[44]:

> "Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures".

Contrasting with CP rights, Article 2(1) ICESCR refers to a "progressive" realization of ESC rights rather than requiring the Parties to "respect and ensure" as stipulated in Article 2(1) ICCPR. The term progressive shall be understood in the sense that the full realization of these rights might require some time but shall not deprive the obligation of its meaning[45]. In order to progressively realize ESC rights, States are required to take "immediate" steps[46] and to cooperate, for the progress towards the realization of ESC rights. A progressive realization does not imply the indefinite postponement of actions towards the realization of ESC rights. The steps to be taken should be "deliberate, concrete and targeted as

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[41] Comments submitted by the United States of America, Right to Development (2001) E/CN.4/2001/26, p. 46

[42] Alson and Quinn (1987) p.156-222; Coomans (2009)

[43] CESCR General Comment No. 9 (1998) E/C.12/1998/24, para 10; Coomans (2009) p.310-312

[44] CESCR General Comment No. 3 (1990) E/1991/23, para1

[45] *Id*. at para. 9

[46] Limburg Principles 16, 21-24; CESCR *supra* note 44 at para. 9; Articles requiring immediate steps: ICESCR art 2(2), 7(a)(i), 8, 10(3), 13(2) (a), 13(3), 13(4) and 15(3); Coomans (2009) p.304-305

clearly as possible towards meeting the obligations recognized in the Covenant"[47]. For instance, any process undertaken for the fulfillment of ESC rights should be exercised without discrimination which should be understood as an immediate obligation[48].

To satisfy the obligation to take steps, States must take "all appropriate means including particularly the adoption of legislative measures". This has been interpreted as States parties have flexibility in determining what is necessary for the realization of ESC rights but the importance of legislative measures should still be emphasized[49]. The mere enactment of legislation will however not be sufficient, what is required is the effective implementation of the legislation ensuring the protection of ESC rights[50]. Non-legislative measures (e.g. judicial or other effective remedies, administrative, financial, educational and social measures) will also be required, as all appropriate means should be put in place to secure the protection of ESC rights[51].

The Committee also emphasized that States must "take steps individually and through international assistance and cooperation". In accordance with the UN Charter, principles of international law and the Covenant, it considered that the obligation of cooperation for the realization of ESC rights rests upon all States[52].

The progressive realization of ESC rights will nevertheless differ from State to State depending of their "available resources" whereas States' obligations with regard to civil and political rights are more of an absolute nature[53]. The Covenant refers to "maximum" avail-

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[47] CESCR *supra* note 44 at para 2

[48] ICESCR art.2(2); CESCR *id*. at para 1

[49] Alston and Quinn (1987) p.167, CESCR, *id*. at para 3

[50] Alston and Quinn (1987) p.169

[51] CESCR *supra* note 44 at para.3, 5-7

[52] *Id*. at para.13-14

[53] ICCPR art 2

able resources implying that Governments should consider the realization of ESC rights as a high priority objective and requires them to use efficiently the resources intended for this objective. By incorporating the component of cooperation and of international economic and technical assistance into Article 2(1), the Covenant also recognizes that the realization of ESC rights for some countries will necessitate external resource transfers. States must therefore match their efforts to the realization of ESC rights with their capabilities (nationally generated and externally transferred).

Finally, the recent entry into force of the Optional Protocol to the ICESCR (OP-ICESCR) on 5 May 2013, further contributes to the justiciablity and the effective enforcement of ESC rights and rectifies the longstanding imbalance in the protection of ESC and CP rights. Until 2013, there was only a complaint mechanism for CP rights. Individuals are now entitled to submit a claim for violations of their ESC rights to the CESCR, the supervisory body of the ICESCR[54].

The CESCR also publishes its interpretation of the ICESCR, known as General Comments, which are considered as being authoritative statements on the meaning of the provisions of the Covenant on ESC rights. Although not legally binding, these statements can act as tool for standards setting[55], i.e. on the extraterritorial obligations of States.

The following section will look upon the tripartite typology approach to define States' obligations. This approach also contributes to emphasis the equal nature of ESC and CP rights and is furthermore a valuable tool clarifying the different levels of States obligations.

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[54] Only individuals under the jurisdiction of the eleven State Parties to the Protocol will be entitled to submit complaints to the CESCR: Argentina, Bolivia, Bosnia and Herzegovina, Ecuador, El Salvador, Mongolia, Montenegro, Portugal, Slovakia, Spain, Uruguay.

[55] Ssenyonjo (2009) p.29

## 1.2 Defining States' Obligations under the ICESCR

Human rights are characterized by entitlements of right holders and obligations of duty bearers[56]. Human rights law imposes on these duty bearers (i.e. States) different levels of obligations. The concept of different level of obligations was first developed in the early 1980s by Henry Shue[57]. And was further developed by Absjørn Eide who proposed a model with different levels of obligations: obligation to respect, obligation to protect and obligation to fulfil. The obligation to fulfill comprises an obligation to facilitate and to provide[58]. Eide's suggested model was adopted by the CESCR and is now a well-established interpretative tool[59]. The CESCR added an additional component to the obligation to fulfill which is the obligation to promote[60]. The tripartite typology provides a tool for a better understanding of State obligations imposed by human rights law illustrating the interdependency of all duties, the equal nature of all human rights as well as the scope of the obligations[61]. All levels of the proposed typology of duties are interrelated and can be applied to each human right. Mostly used for ESC rights, the tripartite typology is nevertheless applicable to CP rights also[62]. The full enjoyment of human rights will depend on the performance of all levels of obligations. Finally, it is worth underlying that the tripartite typology model has contributed to overcome the misconception that ESC rights are secondary to CP rights[63]. ESC rights cannot be described as requiring solely positive obligations whereas civil and political rights merely negative obligations[64].

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[56] *Id*. at p.17

[57] Shue (1996) p. 52-64

[58] CESCR General Comment No. 12(1999) E/C.12/1999/5, para.15; CESCR General Comment No. 13(1999) E/C.12/1999/10; Eide, *Economic, Social and Cultural Rights as Human Rights* (2001) p.23

[59] Ziegler (2008) para 20

[60] Eide *supra* note 58 and for instance in CESCR General Comment No.12 *supra* note 57 para.15; CESCR General Comment No.13 *supra* note 58; CESCR General Comment No14 (2000) E/C.12/2000/4, para 33

[61] Sepúlveda (2003) p.170

[62] Gondek (2009) p.60

[63] Sepúlveda (2003) p.247

More specifically, according to the CESCR, each level of obligations entails different duties. The obligation *to respect* requires States to not take measures preventing individuals from the enjoyment of their rights, a negative duty. States should respect the resources owned by individuals and the individuals' use of the necessary resources to realize their rights and satisfy their needs[65].

The obligation *to protect* requires States to take measures to ensure that third parties (individual, groups or corporations) do not violate individuals' rights[66]. This is a positive duty. This obligation of protection is regarded as the most important according to Eide[67]. It requires, for instance, States to uphold the principle of non-discrimination in legislation, to adopt measures to prosecute perpetrators of rights violations and to protect the vulnerable and marginalized groups from human rights abuses. For example, with respect to the right to food, the CESCR stated that "the obligation to protect requires measures by the State to ensure that enterprises or individuals do not deprive individuals of their access to adequate food"[68]. Consequently, the failure of a State to take all necessary measures to protect the individuals within its jurisdiction (such as to regulate the activities of non-State actors within its jurisdiction in order to prevent them to violate ESC rights) will amount into a violation of ESC rights by that State[69]. This obligation of protection entails significant im-

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[64] Craven (1995) p.110

[65] Eide *supra* note 58; for example, CESCR General Comment No 14 *supra* note 60 at para 34

[66] CESCR General Comment No. 16 (2005) E/C.12/2005/4, para 19

[67] Eide *supra* note 58 at p.24

[68] CESCR General Comment 12 *supra* note 58, para 15

[69] CESCR *supra* note 66, para 35; Velesquez Rodriguez v Honduras, IACtHR (1988), the Court stated that the responsibility of the State for human rights is engaged when the failure to prevent violations of human rights is reasonably foreseeable; The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria, ACHPR, (2001): it was alleged that the Government of Nigeria facilitated the destruction of the Ogoniland (environment degradation and health problems among Ogoni People due to the contamination of the environment) despite its obligation to protect against interferences in the enjoyment of individuals' rights (para.58). The Government was directly involved in oil production through the state oil

portance in the context of corporate abuses and shall be further analysed in the following section.

Entailing further positive duties, the obligation *to facilitate (fulfill)* requires States to strengthen people's access to resources and means for the enjoyment of their rights whereas the obligation to *provide (fulfill)* necessitates States to procure individuals unable to enjoy their rights with the resources and means necessary[70]. On the other hand, the obligation to *promote (fulfill)* requires States, inter alia, to provide information to individuals about their rights; to provide training; and to support individual in making informed choices about their enjoyment of rights.

From the tripartite typology analysis, the necessary steps to be taken for the realization of ESC rights become clearer. Human rights are universal and confer entitlements to rights holders and obligations to duty bearers. Notwithstanding some differentiations between the two Covenants, ESC rights and CP rights are both enforceable and of equal nature[71]. ICESCR is a treaty that gives rise to formal obligations for States Parties. Part of the actual legal debate concerning ESC rights lies in the existence of legal States' extraterritorial obligations. The following section will focus on the duty-bearers of ESC rights and the content and scope of their extraterritorial obligations in the context of a globalized world where poverty affects billion of individuals.

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company (the Nigerian National Petroleum Company (NNPC) which was the majority shareholder in a consortium with Shell Petroleum Development Corporation (SPDC). The security forces of the Nigerian government engaged in violation of Ogonis' rights by attacking, burning and destroying various Ogoni villages (para.54)

[70] CESCR General Comment 12 *supra* note 58 at para 15

[71] Andreassen, Smith and Stokke (1992) p.252

# 2 States' Extraterritorial Obligations under ICESCR - Obligation to protect

"[…] the promotion and protection of all human rights is a legitimate concern of the international community"
– *Vienna Declaration and Programme of Action* (1993)

Can, for example, Canada be expected to protect victims of ESC rights abuses located in Guatemala if those abuses are committed by a TNC (mining company) domiciled in Canada but whose activities are in Guatemala? Does Canada have an obligation to cooperate with the authorities of Guatemala to protect the victim of corporate abuses located in Guatemala? The question to answer is whether States parties to ICESCR are bound to provide protection abroad against corporate abuses to non-nationals. States extraterritorial obligations are the concern of a diagonal relationship between States and individuals in other countries rather than a vertical (State and its citizens) or horizontal (State/State) relationship[72].

Following the general recognition of the universality of human rights, Skogly and Gibney, argued that "[o]ne of the great disappointments concerning human rights is the way in which these rights are declared to be "universal", at the same time that the protection of those rights […] has been severely limited by territorial considerations"[73]. The acceptance of extraterritorial human rights obligations provokes controversy for various reasons including: the perception that it is contrary to the equality and sovereignty of States; the mistrust that the bases for such obligations are beyond what is classically accepted with regards to extraterritorial jurisdiction; and the apprehension that it may result in undue limits on States' domestic and foreign policies[74].

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[72] Skogly and Gibney (2007) p.2; Skogly and Gibney (2010) p.6

[73] *Id*. (2007) p.267 : an infamous example is the US position that the protection of U.S. domestic law does not reach as far as Guantanamo Bay, Cuba, where "enemy combatants" are being held (*Rasul v. Bush*, 542 U.S.466 (2004))

[74] *Id*. at p.268

Notwithstanding the general understanding that in a globalized world events and acts can have impact beyond a State's territory, the legal recognition of States' obligations does not reach the same acceptance[75]. But states should be responsible for their acts or omissions within or outside their territory. International human rights law requires the establishment of an international order protecting human rights[76]. Defined extraterritorial human rights obligations would set limitations on States' actions but without prescribing the way States should conduct their international policies[77]. Moreover, in accordance with the duty to eradicate worldwide poverty[78], States could be obliged to contribute directly to the realization of ESC rights for individuals in other countries.

In order to understand the actual legal scope of State obligations for ESC rights in an extraterritorial context, this paper will focus on the bases of these obligations according to principles of international law, the ICESCR, the UN Guiding Principles and the Maastricht Principles.

## 2.1 Principles of International Law

Before considering the bases of extraterritorial States' obligations under international human rights law, it is worth emphasizing the concept of jurisdiction as defined under international law.

In international law jurisdiction is closely related to the equality and sovereignty of states, which constitute two major pillars of international law[79]. The corollaries of the sovereign

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[75] *Ibid.*

[76] UDHR art 28; Gibney, *Establishing a social and international order for human rights* (2013)

[77] Skogly and Gibney (2007) p.281

[78] More details in Pogge (2007)

[79] UN Charter, art. 2(1); Shaw (2008) p.697

equality of States are: a jurisdiction, prima facie exclusive, over the territory and the individuals living on it; a duty of non-intervention in matters related to the exclusive jurisdiction of other states; and the necessity of States' consent to create obligations whether from customary law or from treaties[80]. In accordance with these general rules of international law, the VCLT establishes a general presumption that international treaties are binding on States in respect of their territory[81].

Following the sovereign equality of States and of its corollaries[82], States usually refrain from interfering in the affairs of other States[83]. Grounds for jurisdiction are closely related to the requirement under international law to respect the territorial sovereignty of States. Sovereignty can therefore seem a priori as a bar to the extraterritorial obligations of States.

International law defines the concept of jurisdiction as the limits of the power of a State. This power of States is divided into: the power to make laws, decisions and rules (*prescriptive jurisdiction*) and the power to enforce these laws, decisions and rules (*enforcement or adjudicative jurisdiction*) which can be achieved through legislative, executive and judicial actions. Traditionally, jurisdiction is presumed to be territorial (within the limit of a State's sovereignty) and may be exercised extraterritorially under specific international law bases[84]. The four classical bases for the exercise of extraterritorial prescriptive jurisdiction recognized in international law are: active personality principle/ passive personality principle, security principle, effects doctrine and universal jurisdiction principle[85]. If jurisdiction

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[80] Crawford (2012) p. 447

[81] VCLT, art.29

[82] Crawford (2012) p. 448 : sovereignty is defined as "the collection of rights held by a state, first in its capacity as the entity entitled to exercise control over its territory and second in its capacity to act on the international plane, representing that territory and its people".

[83] UN Charter, art.2 (1), (4), (7)

[84] France v. Turkey, PCIJ, (1927) para. 46

[85] Crawford (2012) p. 456 ; Shaw (2008) p.645-696; Lowe and Staker (2010); O'keefe (2004) p.744

is established in accordance with these bases, extraterritorial States' obligations could be triggered.

Whereas international law creates inter-state obligations, human rights law creates obligations that a State owns to individuals. Within human rights law, jurisdiction is a concept used to define the scope of human rights treaty's obligations. Jurisdiction does not refer solely to the situations where a State is entitled to act but also to the group of individuals to which a State shall secure human rights[86]. As human rights treaties are of a different nature considering their object and purpose[87], the concept of jurisdiction under human rights treaties may have a broader scope and apply to a conduct that might not be considered as under the limits of jurisdiction imposed under international law[88]. In fact, in the current process of globalization and following the need for international cooperation between sovereign States and for protection of universal human rights, there is a trend to widen the interpretation of traditional territorial concepts, such as jurisdiction and national sovereignty in regards to human rights[89]. If a corporation locates its activities in a State that is unwilling or unable to ensure the respect of human rights (host State), the home State of this corporation could play a significant role to ensure that that corporation does not take advantage of this lack of willingness and effective legal framework to commit human rights violations. As a general rule and in correlation with the concept of territorial sovereignty, the primary obligation for the realization of human rights always belongs to national governments. However, the strict application of States' obligations which is limited to States' own territories might be outdated in the current context of globalization and international interactions[90].

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[86] Den Heijer and Lawson (2013) p. 163

[87] Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory [hereafter refer to as Advisory Opinion on the Wall], ICJ, 2004, para 109; Maastricht Principle, commentary p.1105

[88] Milanovic (2011), p.30-34, 39-42

[89] Coomans (2007) p.361; Coomans (2008) p.125; Ţuţuianu (2013) p.29

[90] Skogly (2003) p.407; Narula (2013) p.114-120.

Situations allowing for the exercise of extraterritorial jurisdiction, more particularly with regards to ESC rights, were further developed in the Maastricht Principles. A deeper analysis of these situations will thus be provided in section 2.4 of this paper on the Maastricht Principles.

## 2.2 Legal Basis under ICESCR

ICESCR may offer a basis for defining the content of the extraterritorial human rights obligations of States. As argued by Coomans, the Covenant does not contain an explicit legal basis for the extraterritorial obligations of States but can offer an implicit basis (international assistance and cooperation)[91]. The drafters of the ICESCR included a language indicating that obligations under this Covenant may go beyond the national border of the States Parties[92]. This language is clearly expressed in Article 2(1) which provides for the general States' obligations[93]. Contrary to Article 2(1) ICCPR, Article 2(1) ICESCR does not make a direct reference to jurisdiction and territory[94]. In fact, the term jurisdiction is almost absent of the ICESCR with the exception of Article 14 on compulsory primary education. It was argued that ICESCR provides mainly for territorial obligations but leaves also some scope for extraterritorial application[95]. It can consequently be assumed that States obliga-

[91] Coomans (2004) argues that the notion of international cooperation constitutes the basis for the international obligations of States under ICESCR but this notion needs further clarification and specification. (p.191-192); Coomans (2013) p.15

[92] Craven (1995) p.144; Coomans (2004) p.185; Künnemann (2004) p.201: "The limitation or any " territorial/extraterritorial" distinction is simply not made. There may be some disagreement whether or not his fact alone is sufficient to make a treaty binding outside a state party's territory".

[93] Refer to ICESCR art 2(1) quoted on page 12

[94] In comparison with ICCPR art 2(1): "Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status"; Same comparison can be made with Art.1 ECHR and Art. 1 ACHR where both make reference to "jurisdiction"; King (2009)

[95] Ssenyonjo (2011) p.986; In the Advisory Opinion on the Wall, the ICJ found that the construction of the wall by Israel in the Occupied Palestinian Territory to be contrary to international law. The Court was also

tions under ICESCR were not intended to be limited to their own territory only. This argument is further supported by article 29 VCLT which stipulates that a treaty is binding upon the entire territory of a State Party unless otherwise intended or established. In the case of the ICESCR which is protecting human rights, limiting obligations to the territory of a State would be inadequate to ensure full protection of these rights in the context of a globalized world[96]. The key question seems therefore to be not whether States have extra-territorial obligations under the ICESCR but rather on the nature and content of those obligations[97].

The provision on the general States' obligations also gives an international dimension to ESC rights when highlighting international assistance and cooperation. From the drafting history of this article, it is possible to conclude that international assistance and cooperation -without any territorial or jurisdictional limitations-were viewed as necessary for the realization of the Covenant's rights[98]. International assistance and cooperation between members of the global community might be necessary to deal with challenges impacting beyond national borders[99]. It is suggested that the notion of international assistance and coopera-

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asked to determine whether international human rights treaties to which Israel is party (i.e. ICCPR, ICESCR and CRC) are applicable outside the territory of that state party, more particularly to the Occupied Palestinian Territory. The Court concluded that human rights treaties apply to a State's territory and outside that territory if subject to that State's jurisdiction. The Court held that: "The International Covenant on Economic, Social and Cultural Rights contains no provision on its scope of application. This may be explicable by the fact that this Covenant guarantees rights which are essentially territorial. However, it is not to be excluded that it applies both to territories over which a state party has sovereignty and to those over which that state exercises territorial jurisdiction" (para.112). The ICJ reiterated this finding on the extraterritorial application of human rights treaties in respect of Uganda's occupation of Congolese province of Ituri (Congo v Uganda, ICJ,(2005) para 217)

[96] Ssenyonjo (2011) p.986

[97] Künnemann (2004) p.2

[98] Skogly and Gibney (2007); Ziegler (2005) para 44-45; CESCR *supra* note 44 at para.14; Craven (1998) p.145; Coomans (2004) p.185

[99] Coomans (2004) p.183; CESCR Statement (2012) E/C.12/2012/1 p.2

tion included in the Covenant implies that the obligations to respect, protect and fulfill do not only operate solely at the national level but also at the international level[100]. This assumption is also supported by the preamble of the Covenant which refers to the "obligation of States under the Charter of the United Nations to promote universal respect for, and observance of, human rights and freedoms". States Parties to ICESCR aim at guaranteeing a universal respect of human rights which might necessitate the recognition of an extraterritorial obligation to assist other States to secure the enjoyment of human rights. A few others articles of the Covenant also make direct reference to the international dimension of States obligations under the Covenant[101].

### 2.2.1 CESCR

The CESCR General Comments (refer to Annex) can also give further guidance on the extraterritorial reach of States' obligations as stipulated in the ICESCR. The statements of the CESCR are not legally binding but can nevertheless provide us with useful guidelines.

The CESCR favored the traditional approach of holding States as the primary responsible for human rights[102]. Territorial States bear the primary responsibilities with regards to the realization of human rights within their territory. However the territorial States might be unable or unwilling to ensure the enjoyment of human rights on their territory. Therefore, in its General Comments, the CESCR has expressly addressed the "international obligations" of States recognizing that in order to comply with their obligations under the ICESCR, States obligations might extent outside their national territory[103]. Effectiveness requires that the human rights obligations to respect, protect and fulfill extend extraterritorially including individuals from other states[104]. Ssenyonjo argues that States are responsi-

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[100] Craven (1995) p.147-149

[101] ICESCR Art 11(2), 22, 23

[102] CESCR Statement (2011) E/C.12/2011/1 para 1

[103] Refer to Annex

[104] Ssenyonjo (2011) p.988 referring to CESCR, Concluding Observations: Cameroon (1999)

ble for their policies violating human rights beyond their borders and for policies indirectly supporting violations of ESC rights by third parties. Consequently, under certain circumstances, States may be required to respect, protect and fulfill ESC rights in other States[105].

With regards to the obligation to protect, as expressed in CESCR General Comments, States have to "prevent third parties from violating the right [to the highest standard of health] in other countries, if they are able to influence these third parties by way of legal or political means in accordance with the Charter of the United Nations and applicable international law"[106]. Referring to Article 9 ICESCR, the CESCR explicitly stated that: "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"[107].

More explicitly, in 2011, the CESCR specifically addressed the obligations of States to respect, protect and fulfill with regards to the corporate sector. On the obligation to protect, the CESCR affirmed that: "States Parties [i.e. home States] should also take steps to prevent human rights contraventions abroad by corporations which have their main seat under their jurisdiction, without infringing the sovereignty or diminishing the obligations of the host States under the Covenant"[108]. The Committee clearly held that home States of TNCs have an extraterritorial obligation to protect.

The High Commissioner for Human Rights quoted the CESCR when identifying that States have four different types of extraterritorial obligations which are to:

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[105] *Ibid.*

[106] CESCR *supra* note 58 at para 39; Also refer to Annex

[107] CESCR General Comment No. 19 (2007) E/C.12/GC/19, para 54; Also refer to CESCR General Comment No.15 (2002) E/C.12/2002/11, para 33: "to prevent their own citizens and companies from violating the right to water of individuals and communities in other countries"; CESCR General Comment No.14 (2000) para 39; and CESCR General Comment No.18 (2006) E/C.12/GC/18, para 35

[108] CESCR *supra* note 102 at para.5; Reaffirmed in CESCR *supra* note 99 at p.2

> "•Refrain from interfering with the enjoyment of human rights in other countries;
>
> •*Take measures to prevent third parties (e.g. private companies) over which they hold influence from interfering with the enjoyment of human rights in other countries*; [emphasis added]
>
> •Take steps through international assistance and cooperation, depending on the availability of resources, to facilitate fulfilment of human rights in other countries, including disaster relief, emergency assistance, and assistance to refugees and displaced persons;
>
> •Ensure that human rights are given due attention in international agreements and that such agreements do not adversely impact upon human rights."[109]

This position of the CESCR endorsed by the HRC is also supported by many scholars insisting that at a minimum, States should refrain from adopting regulations negatively impacting on the enjoyment rights abroad and States should also control the activities of private actors, particularly TNCs with their nationality, to ensure that these corporations do not violate the protected rights in foreign territory[110].

It could be argued that the CESCR is interpreting the ICESCR in a manner amending the treaty but it is more appropriate to conclude that the CESCR has clarified vaguely drafted provisions in a manner to give a meaning to these provisions[111]. From the provision of the ICESCR and the interpretation given by the CESCR, it appears that the protection for ESC rights is applicable within a State party's territory and jurisdiction, the latter not being confined by a State's territorial boundaries. The Optional Protocol to the ICESCR (hereafter: OP-ICESCR) enabling individual complaints on ESC rights entered into force in May 2013. Until then the complaints procedure under the ICESCR was inexistent explaining

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[109] HRC ( 2009) A/HRC/10/61, para 86

[110] De Schutter (2010) p.163; Craven (1995) p.147-150; Skogly (2006) chapter 3; Ziegler (2005) para 34-43; Ziegler (2006) para 28-38; Ziegler (2008) para 23; Ssenyonjo (2011) p.988; Coomans (2009) p.316

[111] Khalfan (2012) p.10

why there is no case law with regards to ICESCR. The OP-ICESCR might certainly contribute in the future to further clarify the scope of States' extraterritorial obligations under the ICESCR.

### 2.2.2 UN Charter Principles

A parallel to the UN Charter's principles can shed light on the scope of the ICESCR as the ICESCR recognizes the UN Charter's principles in its preamble. The UN Charter highlights the general extraterritorial obligations of States[112]. Article 1 paragraph 3 of the UN Charter providing for the principle of international protection of human rights underlines the need for international cooperation "in promoting and encouraging respect for human rights and for the fundamental freedoms for all". Additionally, in accordance with articles 55 and 56, the UN Charter requires UN Member States to "take joint and separate action" to realize the objectives of the Charter which include the universal respect for human rights and its fundamental freedoms. The claim that human rights obligations are merely territorial would overlook these provisions of the UN Charter which invite States to collaborate and to act jointly for the respect of human rights[113].

International human rights law should be qualified as "overarching international norms" which must be respected by all States by virtue of their membership to the UN[114]. These norms may give rise to international States' obligations on the basis of general international law or on the basis of being a party to ICESCR or other relevant instruments.

Skogly and Gibney suggest that if human rights protection was something States could achieve individually there would be no need for international treaties to ensure their protection. The universality of human rights should not be limited by territorial borders[115]. Hu-

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[112] Skogly and Gibney (2007) p.270

[113] *Ibid.*

[114] Coomans (2004)

[115] Skogly and Gibney (2007)

man rights are declared to be universal but yet their protection is limited by territorial borders. Universality is applied to the enjoyment of rights, but not to the corresponding obligations. What are rights without obligations? As argued by Henry Shue "[a] proclamation of a right is not the fulfillment of a right, any more than an airplane schedule is a flight"[116]. The sovereignty of states[117] is a central element of international law but state's borders should facilitate rather than restrict the protection of human rights. Henry Shue explained that universal rights might not entail universal duties but certainly full coverage, implying that all the negative duties fall upon everyone, but the positive duties shall be divided among the duty bearers[118].

In fact, following general principles of international law (such as the equal sovereignty of States and the principle of non-intervention enshrined in the UN Charter article 2(1) and (7)), States necessarily have more human rights obligations towards their nationals. But the universality of human rights agreed upon, in for instance, the UN Charter, the UDHR and the ICESCR, must also be recognized and could form a strong basis for the recognition of extraterritorial human rights obligations of States.

### 2.3 UN Guiding Principles (2011)

Over the last decades, efforts were dedicated to develop principles and frameworks defining human rights obligations. None of these principles and frameworks are legally binding but as they codify existing international law, they may become indirectly binding and do reflect the current status of thinking on these issues[119]. In 2003, the UN Sub-Commission on the Promotion and Protection of Human Rights adopted the UN Norms but they were rejected in 2004 due to an overwhelming negative reception by the business community. The UN Norms focus primarily on the responsibilities of corporations but do underline that

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[116] Shue (1996)

[117] UN Charter art.2(1)

[118] Shue (1988) p.690

[119] Vandenhole, *Emerging Normative Frameworks on Transnational Human Rights Obligations* (2012) p.2

States have the main responsibility for the realization of human rights[120]. In the aftermath of the failure to adopt the UN Norms and concerned by the importance of understanding the complex interrelationship between business and human rights, Ruggie was appointed to the UN Secretary-General on the issue of human rights and transnational corporations and other business enterprises. The UN Guiding Principles, developed by Ruggie, were endorsed by the HRC in 2011. By endorsing the UN Guiding Principles, the UN Member States adopted for the first time a common position on the standards of the business and human rights interrelationship. The Principles are the result of a broad consensus and were welcomed with a "widespread positive reception"[121] by business actors, human advocacy groups and governments. For the purpose of this paper, we will look at the guidance the UN Guiding Principles can provide on the extraterritorial obligation of States to protect against corporate abuses. In fact, the Principles do not provide a solution for all the business and human rights challenges but mark "the end of the beginning" by providing a "common global platform for action, on which cumulative progress can be built, step-by-step, without foreclosing any other promising longer-term developments"[122].

The UN Guiding Principles, a set of 31 recommendations including foundational and operational principles, stem from the three pillars of the PRR Framework[123]. It results from these three pillars that the primary human rights responsibility is borne by the State. States shall protect individuals from corporate abuses, obligation imposed by human rights law[124]. Ruggie underlined the challenge of governmental incoherence where governments make human rights commitments without ensuring implementation (vertical incoherence) and

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[120] UN Norms, preamble, art. 1, art. 17: "States should establish and reinforce the necessary legal and administrative framework for ensuring that the Norms and other relevant national and international laws are implemented by TNCs and other business enterprises"; art. 19.

[121] Ruggie (2011) A/HRC/17/31 para 8

[122] UN Guiding Principles preamble para 13

[123] Refer to note 8

[124] Ruggie (2007) A/HRC/4/35 para 18

where some departments' (trade, investment, development) actions produce adverse effects on Governments' human rights obligations[125]. In its Report on human rights and transnational corporations and other business enterprises (2008), Ruggie highlighted the imbalance between the power of host States and TNCs where important protection is given to investors and their TNCs leaving host States in difficult position when faced with the need to strengthen social and environmental standards. Some agreements include a clause mandating the host State to freeze the existing regulations for the duration of the project[126]. On this matter, M. Sornarajah argues that home States should control the conduct of their TNCs. Such an obligation would be the logical counterpart of the wide protection conferred to investors[127]. But Ruggie did not acknowledge that the State obligation to protect extends extraterritorially. In accordance with the UN Guiding Principles, home States are therefore left with a discretionary rather than an imperative duty to regulate their TNCs.

The foundational principles differentiate the obligations between host States and home States following the principle of "differentiated but complementary responsibilities"[128]. According to Principle 1, the host State has the obligation "to respect, protect and fulfill the human rights of individuals within their territory and/or jurisdiction"[129] including a duty to protect from abuses committed by third parties, such as TNCs. The primary responsibility for human rights protection lies on the host State. This duty to protect is considered a standard of conduct implying that States are not in such responsible for human rights abuses committed by private entities. But States can be held accountable if the abuse committed can be attributed to them or if they fail to take appropriate steps to prevent and redress corporate human rights abuses[130].

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[125] Ruggie *supra* note 8 at para 33-42

[126] *Id.* at para. 34-35

[127] Sornarajah (2004) p.182-203

[128] Ruggie *supra* note 8 at para 9

[129] UN Guiding Principle 1, commentary

[130] *Ibid.*

On the other hand, Principle 2 stipulates a much weaker obligation towards the home State[131]. Home States "should set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations". Ruggie maintained that home States are "not generally required" nor are they "generally prohibited" to regulate the extraterritorial activities of corporate entities domiciled in their territory and/or jurisdiction[132]. In the PRR Framework, Ruggie explained that home States of TNCs "may be reluctant to regulate against overseas harm" committed by these TNCs either because "the permissible scope of national regulation with extraterritorial effect remains poorly understood", or "out of concern that those firms might lose investment opportunities or relocate their headquarters"[133]. The UN Guiding principles do not expand on the recognized jurisdiction basis. Consequently, Ruggie affirmed that States are free to but are not required to adopt domestic measures with extraterritorial repercussions (ex.: requiring corporations to report on their global operations) or direct extraterritorial legislation and enforcement (ex.: allowing for prosecutions on the basis of the nationality of the perpetrator with no regard where the offence occurred)[134]. Partnerships between home States and host States are nevertheless encouraged in order to regulate companies and ensure protection of human rights[135].

Operational principle 3 states that the general State duty to protect, applicable to host and home States, implies: the enforcement of laws requiring and enabling business enterprises to respect human rights; guidance on how corporations can respect human rights throughout their operations; and support business enterprises to share their methods on how they

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[131] Host States obligations have been more widely recognized, for instance in the Ogoniland case where the responsibility of Nigeria, the host State, was triggered (Refer to note 69).

[132] UN Guiding Principle 2, commentary

[133] Ruggie *supra* note 8 at para.14

[134] UN Guiding Principle 2, commentary

[135] Ruggie *supra* note 8 at para.45

address human rights impacts. Ruggie underlined the importance of effectively enforcing existing law regulating business for human rights and of clarifying laws in this regard[136].

Additional measures are required if the corporations is owned or controlled by the State (for instance, Statoil where the Norwegian State is the largest shareholder) or received support or services by the State which include requiring human rights due diligence[137]. Human rights abuses committed by a State owned or controlled corporation may result in the violation of that particular State's international law obligations[138]. The closer a business is tied to the State, the stronger is the rationale for ensuring that the business entity respect human rights[139]. This tie between a corporation and the State will place higher expectations on that entity to adhere to international human rights standards. Ruggie suggests that States should encourage and if appropriate obligate the concerned private actors to exercise human rights due diligence[140]. Furthermore, if contracting a corporation for the provision of services (e.g. water supply or waste management), States should apply adequate oversight on the activities of that corporation to ensure that its human rights obligations are met and if conducting commercial transactions with a corporation, States should promote respect of human rights by those corporations[141].

According to Principle 7, States are also required to offer support to business enterprises in conflict zones to ensure that they are not involved in human rights abuses[142] (for example, Chinese mining companies operating in parts of the Democratic Republic of Congo or the

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[136] UN Guiding Principle 3, commentary

[137] UN Guiding Principle 4

[138] UN Guiding Principle 4, commentary; Art. 5, 8 on Responsibility of States for Internationally Wrongful Acts; International Law Commission (2001) A/56/10, p.48-49

[139] UN Guiding Principle 4, commentary

[140] *Ibid.*

[141] UN Guiding Principle 5, 6; the extent of this paper is too limited to go into more details with regards to State-owned enterprises.

[142] The extent of this paper is however too limited to further expand on corporate abuses in conflict zones.

foreign oil companies operating in Sudan[143]). In such conflict situations, home States should also offer support to host States which may be unable to protect human rights properly. Ruggie emphasized that the "neighboring States" can provide further assistance to the host State[144]. This is the only Principle giving a role to the home State. Finally, principles 8-10 emphasize the need for policy coherence within the State. More particularly, according to principle 10, States, as members of multilateral institutions, "should" (soft obligation) "seek to ensure that those institutions neither restrain the ability of their member States to meet their duty to protect nor hinder business enterprises from respecting human rights" and "encourage those institutions […] to promote business respect for human rights and to […] help States meet their duty to protect against human rights abuse by business enterprises".

Ruggie views the human rights treaty monitoring bodies as requiring State to take steps to prevent human rights violations but he claims that it is not clear what are the steps to be taken[145]. He underlines that experts disagree on "whether international law requires home States to help prevent human rights abuses abroad by corporations based within their territory"[146] and concluded that there is simply no prohibition for the exercise of extraterritorial jurisdiction if in accordance with the Charter of the United Nations and applicable international law[147]. Ruggie drew its conclusions taking into consideration the ambiguity on the status of extraterritorial human rights obligations.

In conclusion, according to the UN Guiding Principles, home States are <u>not required</u> to help in preventing human rights violations by corporations based on their territory but are <u>not denied the right to do so</u> in the two following situations: a basis for jurisdiction is rec-

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[143] Amnesty International (2000); Amnesty International (2013)

[144] UN Guiding Principle 7, commentary

[145] Ruggie *supra* note 8 at para.18; Ruggie (2007) A/HRC/4/35/Add.1 para 7-10

[146] Ruggie *supra* note 8 at para 19

[147] Ruggie (2007) *supra* note 145 at para 87

ognized or the reasonableness test requirements are met (such as the respect of the principle of non-intervention in the internal affairs of a State)[148]. In the case of abuses in conflict affected areas, home States "have a role to play" by assisting host States in ensuring that corporations are not involved in human rights abuses.

Vandenhole argued that the UN Guiding Principles offer a "narrow and retrogressive approach to the human rights obligations of home States" as they adopt soft and non-legal terms to address them[149]. Others qualify the PRR Framework and its principles as "diplomatic" implying that the diplomatic language used to connect business and human rights lacks the strength for more radical changes where human rights are actually applied to business, underestimating the role of States and of corporations[150]. Jägers also argued that while the UN Guiding Principles emphasize the duties of States to protect, a stronger wording would have been necessary to ensure that States and corporations respect their human rights obligations. She even considered that the State's duty to protect as formulated in the UN Guiding Principles "weakens existing human rights obligations"[151] referring to the statement of professor Ruggie asserting that "at present States are not generally required under international human rights law to regulate the extraterritorial activities of businesses domiciles in their territory and/or jurisdiction"[152].

Ruggie is entitled to disagree with the view of the CESCR, stating in various General Comments that States do have extraterritorial obligations[153]. The CESCR's comments are not legally binding and there is still no general consensus among the international commu-

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[148] Ruggie *supra* note 8 at para 19; on the basis for jurisdiction, refer to section 2.1

[149] Vandenhole, *Contextualising the State Duty to Protect Human Rights as Defined in the UN Guiding Principles on Business and Human Rights* (2012) p. 10; Vandenhole (2013)

[150] Parker and Howe (2012) p.293- 301

[151] Jägers (2011) p.161

[152] UN Guiding Principle 2, commentary

[153] Refer to section 2.2

nity on the issue of extraterritorial obligations of States. But, as stressed by Knox, Independent Expert on human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, it would have been more accurate to characterise the interpretations of the CESCR as being unsettled rather than stating that the ICESCR does not include binding extraterritorial obligations to protect on States Parties[154]. Ruggie could have acknowledged the current trend towards a greater recognition of such obligations[155].

Following the UN Guiding Principles, the question of whether States have an obligation to regulate the extraterritorial activities of their corporations remains unresolved. The purpose of this paper is certainly not to criticize the outcome of Ruggie's mandate but rather to analyze whether any clarification was given with regard to extraterritorial States' obligation to protect. The UN Guiding Principles were successful in providing the "authoritative focal point [for business and human rights] that had been missing"[156] but very weak extraterritorial obligations were formulated for home States. Ruggie did not have the mandate to solve all the challenges of applying human rights standards to corporations but rather to clarify the standards of responsibility and accountability for TNCs and States which he accomplished.

Finally, Ruggie underscored that "there are strong policy reasons for home States to set out clearly the expectations that business respect human rights abroad, especially where the State itself is involved in or supports those businesses"[157] but he did not go further in specifying any obligations. In 2011 in his proposal for the Human Rights Council to follow-up, Ruggie underlined that certain international legal standards, such as the extension of juris-

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[154] Knox (2012) p.81; De Schutter, *Extraterritorial jurisdiction as a tool for improving the human rights accountability of transnational corporations* (2006) p.18-19

[155] *Ibid.*

[156] Ruggie *supra* note 121 at para 5

[157] UN Guiding Principle 2, commentary

diction abroad and the bases for the exercise of such a jurisdiction require clarification[158]. Ruggie has also highlighted the urge to address the different extraterritorial obligations arising in the context of extraterritorial jurisdiction. When clearly defined, not all categories of extraterritorial obligations might trigger objections[159].

## 2.4 Maastricht Principles (2011)

Building on the Limburg Principles (1986) and the Maastricht Guidelines (1997)[160], the Maastricht Principles were adopted in 2011 by leading experts in international law and human rights law. Signatories include current and former UN Special Rapporteurs of the UN Human Rights Council, current and former members of UN human rights treaty bodies, as well as, scholars and legal advisers from prominent non-governmental organizations, research centres and institutions such as FIAN International, Norwegian Centre for Human Rights and Geneva Academy of International Humanitarian Law and Human Rights. The Maastricht Principles consolidate the jurisprudence and disentangle legal parameters on the extraterritorial obligations of States in the area of ESC rights aiming at clarifying the normative framework and filling the accountability gaps[161]. Particular focus is given to ESC rights as it has been more extensively developed on the basis of international cooperation but shall not be interpreted that the Maastricht Principles are not relevant to CP rights[162].

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[158] Ruggie *Recommendations on Follow-up to the Mandate* (2011) p. 4-5

[159] Ruggie (2010) A/HRC/14/27, para 46-50

[160] According to the Maastricht Guidelines (art.18):

"The obligation to protect includes the State's responsibility to ensure that private entities or individuals, including transnational corporations over which they exercise jurisdiction, do not deprive individuals of their economic, social and cultural rights. States are responsible for violations of economic, social and cultural rights that result from their failure to exercise due diligence in controlling the behaviour of such non-state actors".

[161] Coomans (2013) p. 5, Maastricht Principle preamble

[162] Maastricht Principle 5, Commentary

### 2.4.1 Jurisdiction

The Maastricht Principles focus on the question of jurisdiction as it is a key concept in defining extraterritorial State obligations. Following the Maastricht Principles, jurisdiction is defined as "an application of state power or authority to act pursuant to or as an expression of sovereignty"[163]. Jurisdiction has served as a bar and as a basis for the recognition of extraterritorial human rights obligations[164]. With regards to CP rights, the debate on extraterritorial obligations has mainly been reduced to questions of jurisdiction where extraterritorial jurisdiction was recognized solely in cases of effective control over territory / authority over persons. On the other hand ESC rights may offer more space for the recognition of extraterritorial obligations in other circumstances. Maastricht Principle 9 provides thus for a broader scope of the concept of jurisdiction and stipulates other situations when human rights obligations of States may extend extraterritorially[165].

1) According to Maastricht Principle 9, extraterritorial jurisdiction is applicable, firstly, in "situations over which *[the State] exercises authority or effective control*, whether or not such control is exercised in accordance with international law".

The effective control doctrine was mainly developed though CP rights jurisprudence[166] but following the interdependence, indivisibility and interrelatedness of CP and ESC rights, the notion of effective control can also be applied to ESC rights. For instance, with regards to effective control, in a situation of occupation, the occupying power shall be obligated to respect, protect and fulfill human rights in the occupied territory[167]. This is in accordance

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[163] Maastricht Principle 9, commentary p.1105

[164] *Ibid.*

[165] Vandenhole *supra* note 119 at p.5-6; Den Heijer and Lawson (2013) p.186

[166] Refer to note 169-171

[167] Maastricht Principle 9 and 18, commentary; This closely relates to the Hague Convention of 1907 and its Regulations; Advisory Opinion on the Wall, ICJ, (2004) para 107-113; DRC v Uganda, ICJ, (2005) para 180

with the view of the UN Human Rights Treaties bodies[168] which was endorsed by the International Court of Justice[169]. The HRC has clearly stated that: "it would be unconscionable to so interpret the responsibility under the article 2 of the Covenant [ICCPR] as to permit a State party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory"[170].

This concept of authority or effective control with respect to extraterritorial States obligations has also been extensively considered by the ECtHR with regards to CP rights enshrined in the ECHR[171]. The ECtHR has taken divergent approach with regards to the extraterritorial States obligations. Some argue that the Court's reluctance to affirm that human rights standards cover all international activities could rest in the understanding that States might find themselves ill-equipped to secure each human right in their activities

[168] For example, HRC, General Comment 31:"This means that a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party" (para.10); CESCR, Concluding Observations: Israel,(2003): "[…]the Committee reaffirms its view that the State party's obligations under the Covenant apply to all territories and populations under its effective control" (para 31).

[169] Advisory Opinion on the Wall, ICJ,(2004) para 107-113; The findings of the Wall were reiterated in DRC v Uganda, ICJ, (2005) para.216-220: "international human rights instruments are applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory, particularly outside its own territories"; Additionally, "[…] there is no restriction of a general nature in CERD relating to its territorial application […]", "[…]these provisions of CERD generally appear to apply, like other provisions of instruments of that nature, to the actions of a State party when it acts beyond its territory" ( Georgia v Russian Federation, ICJ, (2008) para 109).

[170] Lopez Burgos v Uruguay, HRC, (1981) para. 12

[171] Soering v UK, ECtHR, (1989); Loizidou v Turkey, ECtHR, (1995) para 62; Cyprus v Turkey, ECtHR, (2001) para. 77; Bankovic v Belgium, ECtHR, (2001) para 115-116; Al Skeini v UK, ECtHR, (2011) para 133, 143-150

abroad[172]. This criterion has also been discussed and applied by the Inter-American system[173].

As previously mentioned, ICESCR does not contain a provision limiting the scope of States' parties obligations which could imply that the obligations apply regardless of the location of the alleged violation[174]. The mention of jurisdiction in the OP-ICESCR[175] refers to the admissibility conditions and does not limit the scope of ICESCR. Furthermore, ICESCR does not specify the rights holders of the obligations stipulated in the Covenant. Consequently, it could be presumed that the obligations stipulated are at least owned to the persons whose human rights enjoyment and protection are within a state' control, power or authority[176]. With respect to TNCs, States could be in situations where they exercise control over corporations, notably in oil companies part of the Organization of the Petroleum Exporting Countries (OPEC)[177]. In a States' owned corporation (e.g. Sinopec or Gazprom) the State might also be considered as exercising effective control on the activities of the corporation[178]. But TNCs might also be mainly controlled by private investors[179] which might not trigger extraterritorial States' obligations following the authority / effective control criterion.

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[172] Den Heijer and Lawson (2013) p.180

[173] For instance, we can refer to the case Coard et al. United States, IACtHR, (1999): "[i]n principle, the inquiry turns not on the presumed victim's nationality or presence within a particular geographic area, but on whether, under the specific circumstances, the State observed the rights of a person subject to its authority and control" (para.37); For more details on the jurisprudence on the extraterritorial application of the American Convention and the American Declaration, refer to: Cerna (2004)

[174] De Schutter (2010) p.124

[175] OP-ICESCR, art. 2

[176] Maastricht Principle 8, commentary, p.1102

[177] Ryngaert (2013) p.201-202

[178] Maastricht Principle 12; Art. 8 of the Articles on Responsibility of States for Internationally Wrongful Acts

[179] Narula (2013) p.141-142; Coomans (2013) p.8

2) Secondly, extraterritorial jurisdiction is applicable in "situations over which State acts or omissions bring about *foreseeable effects* on the enjoyment of economic, social and cultural rights, whether within or outside its territory". In other words, States' obligations may be triggered in situations where the State knew or should have known (foreseeability) that its conduct would impact on the enjoyment of human rights in another State[180]. This standard refers to the requirement to exercise due diligence[181]. Also referring to foreseeability, Maastricht Principle 13 stipulates on the obligation to avoid causing harm extraterritorially[182]. Following this Principle, states' conduct should be based on the precautionary principle.

European and American agricultural subsidies undermining farmers' abilities to earn a basic living in other countries (mostly developing countries) is an example of the impact States can have on other States[183]. Human Rights impact assessments become of primary importance in such situations. According to Maastricht Principle 14, States must assess the impacts of their laws, policies and practices on the realization of ESC rights outside their national territories.

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[180] Mohammad Munaf v. Romania, HRC (2009), para.14.2; Maastricht Principle 9, Commentary p.1109;UK v Albania, ICJ, (Merits),1949

[181] Maastricht Principle 3, Commentary p.1095; Maastricht Guidelines, 18; HRC General Comment No.31 (2004) CCPR/C/21 /Rev.1/Add.13, para. 8; Velasquez Rodriguez v Honduras, IACtHR (1988) para172; Herrera Rubio v. Colombia, HRC (1988); Bosnia and Herzegovina v. Serbia and Montenegro, ICJ (2007) para430; De Schutter, (2010), p.165; In International Law, we could refer for example to: Advisory opinion on Nuclear Weapons, ICJ, (1996), Judge Weeramantry, Dissenting Opinion referring to the principle that "damage must not be caused to other nations"; US v Canada, International Arbitration Tribunal, (1941)

[182] Advisory Opinion on Nuclear Weapons, ICJ (1996) para.29; United Kingdom v Albania, ICJ (1949)

[183] UNDP (2005): "Recent estimates suggest that developing countries lose about $24 billion a year in agricultural income from protectionism and subsidies in developed countries"; Vandenhole (2007)

The place of incorporation of a TNC might trigger obligations for the home State of that TNC. The Home State could have impact on the territorial and extraterritorial activities of a TNC domestically registered which may affect the ESC rights of individuals living in the TNC`s host State. Regulation of corporations is an integral part of the obligation to protect (which will be further detailed below). In order to prevent foreseeable violations of human rights, States might be required to regulate TNC's activities though domestic legislation with an extraterritorial reach[184] .

3) Finally, the obligations of States will be triggered in "situations in which the State, acting separately or jointly, whether through its executive, legislative or judicial branches, is *in a position to exercise decisive influence or to take measures* to realize economic, social and cultural rights extraterritorially, in accordance with international law"[185].

The component referring to the position of a State to take measures to realize ESC rights relates more specifically to the concept of international assistance and cooperation[186]. Concerning the capacity to exercise decisive influence, TNCs might be controlled by private investors. These private actors might be dependent on States with regards to bilateral investment treaties and trade agreements. The support of the home State might therefore be essential for the TNC which would give rise to this decisive influence standard[187]. When a State becomes a market participant, by providing investment insurance or export credits or by financially investing in corporations, it is connected with other market participants, such as TNCs, and it accordingly has the capacity to influence, by legal or political means, these

[184] Narula (2013) p. 146

[185] Maastricht Principle 9

[186] Maastricht Principle 9, commentary p.1109

[187] Ilaşcu and Others v Moldova and Russia, ECtHR (2004) para 392; Bosnia and Herzegovina v. Serbia and Montenegro, ICJ (2007) para 428-429

participants impacting on human rights[188]. Consequently, when a State can exercise decisive influence on a TNC, that particular State has an obligation to protect the human rights of the individuals in the TNC's host State from abuses of that TNC.

The International Court of Justice (hereafter: ICJ) has elaborated criteria to determine the capacity to influence of a State in the context of preventing genocide abroad. These criteria could also be referred to in respect of preventing ESC rights violations abroad[189]: geographical distance of the State concerned from the alleged events; strength of the political links or other links between the authorities of that State and the main actor of the events; and the legal position of that State with regards to the situations and the individuals the danger or the ESC rights violations[190]. If the process of extraterritorial ESC rights violations originates from the TNC's home State, the victims of that violation may fall under the jurisdiction of that home State[191]. In this case, the violation would have a territorial connection with the home State but would remain indirectly extraterritorial. As human rights are universally recognized, their enforcement by a TNC's home state should not be considered to amount to the violation of the TNC's host State's sovereignty[192]. It is argued that "the link with international human-rights law weakens concerns over jurisdictional overreach in view of the universal acceptance of human rights"[193]. De Schutter maintains that extraterritorial home state regulation can contribute to facilitate Host State territorial human rights obligations[194]. In this context, "[h]ome-State regulation then becomes cooperative

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[188] CESCR General Comment No. 14 *supra* note 60 at para.39; Ryngaert (2013) p.206-207; McCorquodale and Simons (2007) p.619-625

[189] Ryngaert (2013) p.203

[190] Bosnia and Herzegovina v. Serbia and Montenegro, ICJ (2007) para.430

[191] Ryngaert (2013) p.205; Wouters and Ryngaert (2009) p. 939-975

[192] Wouters and Ryngaert (2009), p.956

[193] *Id*. at p.957

[194] De Schutter, *Les affaires total et unocal : complicité et extraterritorialité dans l'imposition aux entreprises d'obligations en matière de droits de l'homme* (2006), p.96

rather than antagonistic"[195] as the home State does not seek to protect its own interests but rather the interest of the international community by protecting human rights.

Following the possible situations of extraterritorial jurisdiction, the Maastricht Principles also underline the limits imposed on the exercise of extraterritorial jurisdiction. Maastricht Principle 10 emphasized that the obligations of a State to respect, protect and fulfill human rights cannot be invoked as a justification to violate the UN Charter or general international law. The sovereignty of the host State, the principle of non-intervention and the principle of the equality of all States could impose limits on the obligation of the home State to ensure the full realization of human rights[196]. Consequently, Canada, for instance, will be obligated to protect the rights of individuals failing under its jurisdiction even if these individuals are located in Guatemala. If these individuals do not fall under the jurisdiction of Canada, Canada might still be entitled to secure human rights protection to the individuals in Guatemala. But if there are weak connections between Canada and the individuals from Guatemala and if Guatemala strongly objects the extraterritorial regulation of Canada, Canada may exceed its obligation to protect and violate the principle of non-interference.

### 2.4.2 Obligation to Protect

International human rights law, the ICJ and human rights bodies have recognized that human rights obligations can extend extraterritorially[197]. Based on this recognition, Maas-

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[195] Wouters and Ryngaert (2009), p.956; Rome Statute art. 17 (1)( a)

[196] Maastricht Principle 10, commentary p.1109

[197] Maastricht principle 6; The HRC (General comment No.31 on ICCPR) recognized that article 2(1) ICCPR obliges States parties to ensure the respect of ICCPR rights for "anyone within their power or effective control, even if not situated within the territory of the state party, not limiting this requirement to citizens and including situations outside a State' territory and situations of armed conflict" (CCPR/C/21 /Rev.1/Add.13, para 10-11). But there is no case law specifically on ESC rights as until recently no complaints mechanism was in force. Also refer to: DRC v Uganda, ICJ, (2005); Advisory Opinion on the Wall, ICJ, (2004); Adviso-

tricht Principle 3 and 4 specify that States have obligations to respect, protect and fulfill human rights within their territory and extraterritorially. This does not imply that each State is responsible for the realization of the human rights of every individual in the world but it does imply that States do have extraterritorial obligations (complementary obligations) in certain circumstances identified in the principles[198]. The Maastricht Principles also highlight the obligations of States as members of international organizations and the need for policy coherence[199]. In accordance with the CESCR, the Maastricht Principles refer to the duty to cooperate internationally[200] as the overarching notion supporting the extraterritorial obligation of States with regards to ESC rights. The Maastricht Principles suggest a broad understanding of international cooperation which includes assistance as well as the development of international rules creating an enabling environment for the realization of human rights and an obligation to refrain from undermining human rights in other countries and to ensure that non-state actors are also prohibited from impairing the enjoyment of human rights[201]. The Millennium Development Goals (MDGs), a soft-law instrument agreed upon the UN Member States, also support the view that partnerships and

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ry Opinion on the Legality of Threat or Use of Nuclear Weapons [hereafter refer to as Advisory Opinion on Nuclear Weapons], ICJ, (1996), Judge Weeramantry, Dissenting Opinion referring to the principle that "damage must not be caused to other nations"; Also of particular significance is the decision on provisional measures in Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation, ICJ, 2008). Georgian alleged numerous violations of CERC by the Russian armed forced on Georgian territory. The ICJ affirmed the extraterritorial application of human rights treaties in general and of the CERD in particular (para 109); De Schutter (2010) p.165

[198] Maastricht Principle 3, commentary; Maastricht Principle 4, 9

[199] Maastricht Principle 15, 17

[200] Maastricht Principle 3, commentary p. 1090 –1096 referring to: UN Charter art. 22, 55-56; UDHR art.28; ICESCR art.2(1), 11(1), 22, 23; Declaration on the Right to Development (1986) A/RES/41/128, etc.; CESCR *supra* note 99 p.2

[201] Maastricht Principle 3, commentary p.1090-1096

cooperation are necessary components for the realizations of human rights and the MDGs[202].

As the main focus of this paper is on the scope of the extraterritorial obligation of States to protect, we will therefore limit our analysis to that particular obligation. The Maastricht Principles divide the State duty *to protect* as being an obligation to regulate, influence and cooperate. The obligation to protect is considered an obligation to exercise due diligence[203]. The obligation *to regulate* implies that States "must" take the necessary measures to adopt regulations ensuring that third actors (such as TNCs, private individuals and organizations) will not impair ESC rights in some specific circumstances as stipulated in Maastricht Principle 25 detailed below. This is the strong legal obligation ("must"). This obligation to regulate to protect human rights is well-established in international human rights law[204]. If a State fails to adopt regulations or to implement them effectively and if this omission results in a human rights violation, the responsibility of that State will be triggered[205].

The duty to protect and regulate also implies that a State should not allow its national territory to be used to cause damage to another State which is a recognized principle of interna-

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[202] UN Millennium Declaration (2000) A/RES/55/2: "we [heads of Sates and Governments] recognize that […]we have a collective responsibility to uphold the principles of human dignity, equality and equity at the global level. As leaders we have a duty therefore to all the world's people […]" (para 2).

[203] McCorquodale and Simons (2007)

[204] HRC General Comment No.31 *supra* note 181 at para 8, CESCR, General Comment 12 para 15, CESCR, General comment 14 para 39, CESCR, General comment 15 para 31; Maastricht Principle 24, Commentary; Concerned with environmental human rights abuses more particularly those committed by extractive companies, Sara Seck agrees with the legitimacy of unilateral home State regulation if a voice is given to the persecuted communities (Seck (2008) ); *Cases and Concepts on Extraterritorial Obligations in the Area of Economic, Social and Cultural Rights* (2012)

[205] Maastricht Principle 24, Commentary; Nicaragua v US, ICJ (1986) para 108

tional law[206]. States have a duty to control the activities of private actors on their territory to ensure that not harm is caused within or outside their territory. This was also expressly recognized by the CESCR[207].

Referring to the traditional bases of jurisdiction in international law, Maastricht Principle 25[208] stipulates the jurisdictional bases given rise to an extraterritorial protect-obligation to regulate. Firstly, the State's duty to regulate will be triggered on a territorial or national basis (*active personality principle*), allowing States to regulate the conduct of their nationals abroad. A basis for protection is given when the harm or threat of harm originates or occurs on a State's territory or if the TNC has the nationality of the State concerned. It is now well-established that the nationality concept used for individuals can be used for establishing the nationality of corporations[209]. Corporations' nationality can therefore be derived from the place of incorporation (creation of a legal person), from the links to a partic-

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[206] Maastricht Principle 24, Commentary; Maastricht Principle 13; UK v Albania, ICJ (1949) p.18; US v Canada, Arbitration case (1941); Legality of the threat or use of chemical weapons, ICJ, (1996)

[207] CESCR *supra* note 102 at para.5; CESCR *supra* note 99 at p.2

[208] Maastricht Principle 25:

"States must adopt and enforce measures to protect economic, social and cultural rights through legal and other means, including diplomatic means, in each of the following circumstances:
a) the harm or threat of harm originates or occurs on its territory;
b) where the non-State actor has the nationality of the State concerned;
c) as regards business enterprises, where the corporation, or its parent or controlling company, has its centre of activity, is registered or domiciled, or has its main place of business or substantial business activities, in the State concerned;
d) where there is a reasonable link between the State concerned and the conduct it seeks to regulate, including where relevant aspects of a non-State actor's activities are carried out in that State's territory;
e) where any conduct impairing economic, social and cultural rights constitutes a violation of a peremptory norm of international law. Where such a violation also constitutes a crime under international law, States must exercise universal jurisdiction over those bearing responsibility or lawfully transfer them to an appropriate jurisdiction".

[209] Crawford (2012) p.525

ular State (center of administration/siège social) or from the nationality of the natural or legal persons owning or controlling the corporation[210].

Based on the active personality principle, a basis for protection is given "where the corporation, or its parent or controlling company, has its centre of activity, is registered or domiciled, or has its main place of business or substantial business activities, in the State concerned". In the case that directives are given or measures are taken in the State headquartering a TNC, that particular State should exercise due diligence to prevent measures negating human rights to be taken by TNCs[211].

When abuses take place, the parent company has certainly a role to play and should be held accountable for its actions or omissions. This is referred to as the "*parent-based extraterritorial regulation*". In practice, the reality is that corporations often operate in different states and are organized in different legal entities. An example would be the Netherlands imposing the Royal Dutch Shell (a company incorporated in the United Kingdom) to control the activities of Shell Nigeria (subsidiary of Royal Dutch Shell located in Nigeria)[212].

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[210] Maastricht Principle 25, Commentary, p.1140-1141; Belgium v Spain (1970) para 70; In Guinea v Democratic Republic of the Congo (2007) the International Court of Justice confirmed that the nationality of a corporation is normally decided upon its place of incorporation; De Schutter, *Extraterritorial jurisdiction as a tool for improving the human rights accountability of transnational corporations.* (2006) p.29-45

[211] *Cases and Concepts on Extraterritorial Obligations in the Area of Economic, Social and Cultural Rights* (2012) p. 229

[212] Friday Alfred Akpan v Royal Dutch Shell (2013); Kiobel v. Royal Dutch Petroleum, Co. (2013): Under the Alien Tort Claims Act (ATCA), a foreign victim of human rights violations committed by a corporations sufficiently linked to the United States could seek damages before a Court of the United States. In the Kiobel case, the Dutch parent company Shell and its Nigerian subsidiary (Shell Petroleum Development Company of Nigeria, SPDC) were both accused of complicity in crimes against humanity, acts of torture and arbitrary execution committed by the Nigerian army against Ogoni people pursuant to the ATCA. The Court found that the ATCA does not apply to the conduct of this case which took place outside of the United States. This decision restricts considerably the scope of ATCA. The Court relied on the presumption against extraterrito-

The Netherlands can be entitled to regulate a corporation incorporated in the United Kingdom with activities in Nigeria controlled by a parent company headquartered in the Netherlands. Already in its Barcelona Traction judgement, the ICJ acknowledged that the veil of a company may be lifted to prevent violations of law[213]. The separation of legal personalities should not be used by the parent company or its subsidiaries to limit the scope of their legal liability.

An additional ground to enact regulation for protection is the existence of a "*reasonable link* between the State concerned and the conduct it seeks to regulate". This reasonable link will exist, for instance, if the abuse is carried out in that State's territory. And finally, a basis for protection will be given whenever the abuses constitute a *violation of a peremptory norm of international law*. If the violation constitutes a crime under international law (war crimes, crimes against humanity, genocide, torture, enforced disappearances), universal jurisdiction can be exercised[214]. The Maastricht Principles define the circumstances where the exercise of the extraterritorial obligation to protect does not interfere with other States' rights.

The Maastricht Principles also highlight that extraterritorial obligations of States are no basis for violating other obligations under international law (i.e. principle of non-intervention or principle of sovereignty and equality of States) but it is also important to recognize that international human rights law impose limit on state sovereignty[215]. The exercise of extraterritorial jurisdiction can facilitate the coexistence and cooperation between States in areas of common concern. The Commentary to the Maastricht principles

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riality and underlined that as corporations are represented in many countries, mere corporate presence cannot suffice to displace the presumption.

[213] Maastricht Principle 25, Commentary: referring to Belgium v. Spain, ICJ (1970) para 56-58

[214] O'keefe (2004) p.745

[215] Refer to section 2.1 of this paper; Maastricht Principles 10, 25 and commentary, p.1141-1142 ; CESRC *supra* note 102 at para 5

emphasized the erga omnes character of human rights as reflected in internationally agreed documents such as the MDGs. This erga omnes character of human rights could justify the exercise of extraterritorial jurisdiction in other circumstances than the above mentioned if such exercise seeks to protect such rights. The promotion of erga omnes rights or MDGs is in the interest of the whole international community and is not an attempt to impose values on another state[216].

With regards to the obligation *to influence*, the Maastricht Principles stipulate that States in a position to influence "should" exert their influence (by reporting, using social labeling or indicators to monitor progress, etc.) in accordance with international law in order to protect ESC rights[217]. And finally, States "must" *cooperate* to prevent abuses by non-State actors, to hold them accountable and to ensure that effective remedies are provided[218]. As stipulated in Maastricht Principle 23 on the general obligation to protect, States should take action "separately, and jointly through international cooperation" to protect ESC rights. In fact, each obligation of the tripartite typology (to respect, protect and fulfill) requires States to act separately and jointly through cooperation. As argued by Coomans, the Maastricht Principles stipulate the implicit legal basis for the extraterritorial obligation to protect as there is no explicit legal basis in international human rights law[219].

The Maastricht Principles stem from the principal source of international human rights law[220] but they remain vague on their own legal status[221]. Although they might not be the creation of a law-making body, their force and authority should not be underestimated as

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[216] Maastricht Principles 25, commentary

[217] Criteria on the definition of influence presented in this paper on page 47-48; Maastricht Principle 26, commentary; Maastricht Principle 9; more details in UN Guiding Principles 2-10

[218] Maastricht Principle 27; UN Guiding Principles Principles 25-31.

[219] Coomans (2013) p.15-16

[220] Maastricht principle 6

[221] Vandenhole *Emerging Normative Frameworks on Transnational Human Rights Obligations* (2012) p.12; Maastricht Principles, preamble para.8 : "[d]rawn from international law".

they have been endorsed by human rights experts[222]. Scholars such as De Schutter, Ziegler, Skogly, Craven, Coomans and Künneman, have recognized the legal duties of States within their territory and extraterritorially as stipulated in the Maastricht Principles. The Maastricht Principles go beyond the UN Guiding Principles with regards to the obligations to protect of the home States and detail more broadly on the leads for jurisdiction of the home States. As pointed out by Vandenhole, the division of responsibilities between the host and the home State is regrettably still not clearly defined by the Maastricht Principles[223]. TNCs use different legal systems as it fits their purposes. Following the Maastricht Principles, States shall also begin to cooperate at the same level to regulate TNCs. Furthermore, building on the Vienna Declaration and Programme of Action (1993), the Vienna+20 CSO Declaration (2013) stressed the importance of extraterritorial obligations of States to address the challenges of globalization as without the acceptance and implementation of extraterritorial obligations, human rights cannot be universally realized. The Declaration of 2013 also urges States to apply the Maastricht Principles and the law and principles on which they are based[224]. More and more recognition is given to the extraterritorial obligations of States, especially for ESC rights.

## 2.5 Mubende Case

Fons Coomans and Rolf Künnemann presented a collection of cases involving the extraterritorial conduct of States to raise awareness and promote the application of extraterritorial States' obligations[225]. The Mubende case is of particular interest for the purpose of this paper.

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[222] Salomon and Seiderman (2012) p.459; Coomans (2013)

[223] Vandenhole *Contextualising the State Duty to Protect Human Rights as Defined in the UN Guiding Principles on Business and Human Rights* (2012) p.9; Vandenhole *Emerging Normative Frameworks on Transnational Human Rights Obligations* (2012)

[224] Vienna Declaration (2013) preamble and para.15-18

[225] *Case and Concepts on Extraterritorial Obligations in the Area of Economic, Social and Cultural Rights* (2012)

In 2001, the Government of Uganda deployed its army to displace 392 families at gunpoint from their homes and lands in the Mubende District of Uganda to make place for a coffee plantation owned by Kaweri Coffee Plantation, a subsidiary of the German company Neumann Kaffee Gruppe(NRK) Hamburg. Neither adequate compensation nor social assistance was offered to the displaced families (violation of the right to an adequate standard of living – right to housing, article 11(1) ICESCR). The school building was used as the headquarters for the company leaving the children of the community without a school for about a year[226]. Furthermore in 2002, the African Development Bank (hereafter: AfDB) approved a loan of 2,5 million USD to finance the new coffee plantation project. Kaweri plantation is the first large scale coffee plantation in Uganda. Until then, coffee was only produced by small coffee farms. Coffee is one the major source of income for the country accounting for 70% of Uganda's export earnings.

In 2002, the victims sought redress of their grievances by suing the government and Kaweri. The case has been delayed over many years. Finally, in 2013, the High Court in Kampala, Uganda ordered compensation (approximately eleven million Euros) be paid to the 2041 evictees of land now occupied by the Kaweri Coffee Plantation[227]. The judgment clearly condemns NKG, but it remains unclear why the Ugandan Government was acquitted of all responsibility.[228] Following the outcome of the judgment, Kaweri filed an appeal.

Without minimizing the territorial obligations of Uganda, we will nevertheless focus on the extraterritorial obligations of Germany. Germany is the home State of the parent corporation NKG and the one of the governing States of the AfDB. With regards to the ICESCR, the right to an adequate standard of living (art.11 (1)) was violated. Following the Maastricht Principles, the State of Germany, Party to the ICESCR, is obligated to protect nation-

[226] *Id.* at p.245.250

[227] FIAN (2013)

[228] *Ibid.*

als of other countries from abuses committed by German -based companies without infringing on the sovereignty of Uganda (Maastricht Principle 3 and 4 ). In this case, Germany did not comply with its extraterritorial obligation to protect. Germany is required to monitor the activities of German TNCs and could reasonably be expected to have foreseen the violations denounced in this case (Maastricht Principle 23, 24). The failure of Germany to observe its obligation to protect may have facilitated the actions of Kaweri and the forced evictions committed by the Ugandan Government[229]. By providing a loan for the investment, AfDB (of which Germany is a governing State) was complicit in the human rights violations. The extraterritorial protect-obligations of the governing States (Germany) would have required them to ensure that the actions supported by AfDB are in lines with their human rights obligations (Maastricht Principle 15).

In October 2012, in its Concluding Observations on Germany's sixth periodic review under the ICCPR, the HRC expressed concern with respect to Germany's protection against the human rights abuses of German TNCs operating abroad. Recognizing the extraterritorial obligations under the ICCPR, the HRC highlighted that:

> "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 [230]".

It follows from the case studies presented by Coomans and Künnemann that building on the extraterritorial obligations of States for ESC rights can close the gap between accountability and economic globalization. As a result of economic globalization, a mismatch between the influence of States and the scope of their duties was created, the Maastricht Principles aim at better aligning human rights with the challenges of an interdependent world

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[229] *Supra* note 225 at p.249

[230] HRC (2012) Concluding observations on the sixth periodic report of Germany, CCPR/C/DEU/CO/6, p.4

by suggesting to view human rights as “global public goods” and propose a guidance for the reshaping of the international legal order[231].

[231] De Schutter, *Case and Concepts on Extraterritorial Obligations in the Area of Economic, Social and Cultural Rights* (2012) p.vii

## Concluding Remarks

This paper has considered the specific nature of human rights, more particularly ESC rights, in order to clarify the existence, content and scope of States' extraterritorial obligations to protect against corporate abuses of ESC rights. The impact TNCs can have on the realization of human rights is undeniable. The challenge has been in determining legal standards for such situations.

As an intrinsic part of international law, international human rights law is traditionally State-centered but bears specific characteristics as it is governing State-Individuals relations. Human rights are universal, interdependent, indivisible and interrelated implying that all human rights, ESC and CP rights, are to be considered on an equal footing and recognizing that ICESCR, as ICCPR, gives rise to formal obligations to States parties. Consequently, with regards to corporate accountability, States shall continue to be obligated to ensure that corporations acting within their jurisdiction act in accordance with international human rights standards.

In the last decades, much attention was given to the definition of the extraterritorial human rights obligations of States. There might still not be a clear legal recognition of the extraterritorial obligation to protect with regards to ICESCR but there is a growing acceptance that the interdependency of States might impose an obligation on all States to act jointly when facing collective problems[232]. These joint actions may result in an enhanced human rights protection rather than a violation of the equal sovereignty of States. The CESCR has endorsed home States' extraterritorial obligation to protect. The UN Guiding Principles propose a very soft human rights obligation to protect for home States. The Maastricht Principles go beyond the UN Guiding Principles in relation to the extraterritorial obligation to protect. The Maastricht Principles expend the notion of jurisdiction and clearly explain

[232] De Schutter (2009) p.19

how the tripartite typology of obligations can be applied in an extraterritorial context. The Maastricht Principles significantly clarify the scope of extraterritorial obligations of States but the division of obligations between the host and the home State remained ambiguous. Furthermore, following the adoption of the UN Guiding Principles, the OECD Guidelines for Multinational Enterprises (2011) (hereafter: OECD Guidelines) were revised to align with the UN Guiding Principles. The OECD Guidelines, a corporate code of conduct, focus mostly on TNCs' duty to respect human rights but in their newly incorporated part on human rights it is also stipulated that "States have a duty to protect human rights". Adherence to the OECD Guidelines could indicate a recognition by the OECD home States of their obligation to protect against human rights abuses by TNCs incorporated in their countries[233]. The legal framework concerned with the extraterritorial obligations of home States is still in development. It is nevertheless possible to conclude that at the present moment there is a strong argument supporting States' extraterritorial obligation to protect ESC rights against corporate abuses. At a very minimum home States "have the right" to enact regulations requiring companies incorporated in their territory to respect human rights in their conduct abroad[234].

The reconnaissance and acceptance of extraterritorial human rights obligations of States, for instance by endorsing the Maastricht Principles, will contribute to the respect and protection of ESC rights especially when host States lack the ability to regulate TNCs and ensure their compliance with human rights standards. In an area of globalization, extraterritorial obligations of States need to be clearly defined and recognized in order to ensure global justice.

To further clarify the scope of States' extraterritorial obligations, the adoption of a new international instrument establishing a clear division of responsibilities between the home

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[233] Vandenhole (2013) p. 14

[234] *Id*. at p.15

State and the host State in regards to the regulation of TNCs was suggested[235]. This instrument would reaffirm the primary responsibility of the host State in which the TNC conducts its activities and would give a clear subsidiary responsibility to the home State to exercise control on the TNCs over which it has jurisdiction. It is argued that such an instrument would ensure that TNCs are not left scot-free, the victims not left without remedies, the business community a certain degree of certainty and public international lawyers the progression towards international cooperation[236].

[235] De Schutter, *Extraterritorial Jurisdiction as a tool for improving the Human Rights Accountability of Transnational Corporations* (2006) ; Refer also to : Declaration of an Alternative Forum in Business and Human Rights (2013)

[236] De Schutter, *id.* at p. 52

# TABLE OF REFERENCE

## Books and Articles

Alston, Philip and Gerard Quinn. *The Nature and Scope of States Parties' Obligations under International Covenant on Economic, Social and Cultural Rights*. In: Human Rights Quarterly. Vol.9, No.2 (1987), pp.156-229

Andreassen, Bård, Alan G. Smith and Hugo Stokke. *Compliance with Economic and Social Human Rights: Realistic Evaluations and Monitoring in the Light of Immediate Obligations*, In: Human Rights in Perspective. Oxford, (Blackwell Publishers) 1992, pp.252-267.

Augenstein, Daniel and David Kinley. *When Human Rights 'Responsibilities' become 'Duties': The Extra-Territorial Obligations of States that Bind Corporations*. In: Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect? Edited by D. Bilchitz and S. Deva, Cambridge (Cambridge University Press) 2013, Also available on: http://ssrn.com/abstract=2149921[Visited 1 October 2013]

Brown, Chris. *Universal Human Rights: A Critique.* In: The International Journal of Human Rights. Vol.1 No.2 (1997), pp.41-65

*Cases and Concepts on Extraterritorial Obligations in the Area of Economic, Social and Cultural Rights*. Edited by Fons Coomans and Rolf Künnemann. Antwerp, (Intersentia) 2012

Cerna, Christina. *Extraterritorial Application of the Human Rights Instrument of the Inter-American System.* In: Extraterritorial Application of Human Rights Treaties. Edited by Fons Coomans and Menno T. Kamminga. Antwerp (Intersentia) 2004, pp.141-174

Chakraborty, Sagarika. *Transnational Corporations, Other Business Enterprises and Human Rights: The Right Step Toward Corporate Social Responsibility?* In: Business Law Brief (2006), pp.20-27

Christine Parker and John Howe, *Ruggie's Diplomatic Project and Its Missing Regulatory Infracstructure.* In: The UN Guiding Principles on Business and Human Rights: Foundations and Implementation. Edited by Radu Mares. Leiden, (Martinus Nijhoff Publishers) (2012), pp. 273-301

*Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights*. Olivier De Schutter … [et al.]. In: Human Rights Quarterly. Vol.34 (2012) pp.1084–1169

Coomans, Fons. *Application of the International Covenant on Economic, Social and Cultural Rights in the Framework of International Organisations*. In: Max Planck Yearbook of United Nations Law. Vol.11 (2007), pp.359-390

Coomans, Fons. *Situating the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights*. Maastricht (Maastricht University) 2013

Coomans, Fons. *Some Remarks on the Extra-territorial Application of the International Covenant on Economic, Social and Cultural Rights.* In: Extraterritorial Application of Human Rights Treaties. Edited by Fons Coomans and Menno T. Kamminga. Antwerp, (Intersentia) 2004. pp. 183-199

Coomans, Fons. *Sovereignty Fading Away? Prioritising Domestic Health Needs Versus Promoting Free Trade*. In: Changing Perceptions of Sovereignty and Human Rights: Essays in Honour of Cees Flinterman. Edited by Ineke Boerefijn and Jenny Goldschmidt. Antwerpen, (Intersentia) 2008, p. 123-142

Coomans, Fons. *The International Covenant on Economic, Social and Cultural Rights:From Stepchil to Full Member of the Human Rights Family*. In: International Human Rights Law in a Global Context. Edited by Felipe Gomez Isa and Koen de Feyter. Bilbao, (University of Deusto) 2009, pp.293-317

Cranston, Maurice. *What are human rights?* London, (The Bodley Head ) 1973

Craven, Matthew. *The International Covenant on Economic, Social, and Cultural Rights: A Perspective on its Development*. Oxford, (Clarendon Press) 1995

Crawford, James. *Brownlie's Principles of Public International Law*. 8th ed., Oxford, (Oxford University Press) 2012

De Schutter, Olivier. *International Human Rights Law: Cases, Materials, Commentary*. Cambridge, (Cambridge University Press) 2010

De Schutter, Olivier. *Les affaires total et unocal : complicité et extraterritorialité dans l'imposition aux entreprises d'obligations en matière de droits de l'homme*. [*The Total and Unocal Cases: Complicity and Extraterritoriality in the Imposition of Human Rights Obligations on Corporations*], Annuaire Français de droit international [French Yearbook of International Law]. Vol.52 (2006), pp.55-101

Den Heijer, Maarten and Rick Lawson. *Extraterritorial Human Rights and the concept of "jurisdiction"*. In: Global Justice and State Duties: the extraterritorial Scope of Economic, Social and Cultural Rights in International Law. (Edited by Malcolm Langford, Wouter Vandenhole and Martin Scheinin). Cambridge, (Cambridge University Press) 2013

Eide, Asbjørn. *Economic, Social and Cultural Rights as Human Rights*. In: Economic, Social and Cultural Rights: A Textbook. Second Revised Edition. The Hague, (Kluwer Law) 2001. pp. 9-28.

*Freedom from Poverty as a Human Right: Who owes to the very poor?* Edited by Thomas Pogge. Oxford, (Oxford University Press) 2007

Gibney, Mark. *On Terminology: Extraterritorial Obligations*. In: Global Justice, State Duties: The Extraterritorial Scope of Economic, Social and Cultural Rights in International Law. New York, (Cambridge University Press) 2013, pp. 32-47

Gibney, Mark. *Establishing a Social and International Order for the Realization of Human Rights.* In: The State of Economic and Social Human Rights: A Global Overview. Edited by Lanse Minkler. New York, (Cambridge University Press) 2013, pp.251-270

Gondek, Michal. *The Reach of Human Rights in a Globalising World: Extraterritorial Application of Human Rights Treaties.* (School of Human Rights Research Series; Vol. 32) Antwerp, (Intersentia) 2009

Jägers, Nicola. *UN Guiding Principles on Business and Human Rights: Making Headway Towards Real Corporate Accountability?* In: Netherlands Quarterly of Human Rights. Vol.29/2 (2011), pp.159-163

Kamatali, Jean-Marie. *The New Guiding Principles on Business and Human Rights' Contribution in Ending the Divisive Debate over Human Rights Responsibilities of Companies: Is it time for an ICJ Advisory Opinion*? In: Cardozo Journal of International Law and Comparative Law. Vol.20 (2012), pp .437-464

Khalfan, Ashfaq. *Development Cooperation and Extraterritorial Obligations*. In: The Right to Water Theory, Practice and Prospects. Edited by M. Langford. A. Russell. (Cam-

bridge University Press) 2012 [available at:
http://papers.ssrn.com/sol3/papers.cfm?abstract_id =1929968]

King, Hugh. *Extraterritorial Human Rights Obligations of States*. In: Human Rights Law Review 9, No.4 (2009), pp.521-556.

Knox H., John. *The Ruggie Rules: Applying Human Rights Law to Corporations*. In: The UN Guiding Principles on Business and Human Rights: Foundations and Implementation. Edited by Radu Mares. Leiden, (Martinus Nijhoff Publishers) 2012, pp.51-83

Künnemann, Rolf. *Extraterritorial Application of the International Covenant on Economic, Social and Cultural Rights.* In: Extraterritorial Application of Human Rights Treaties. Edited by Fons Coomans and Menno T. Kamminga. Antwerp (Intersentia) 2004, pp.201-231

Lowe, Vaugnan and Christopher Staker. *Jurisdiction*. In: International Law. Edited by Malcolm D. Evans. Oxford, (Oxford University Press) 2010

Martin, Rex. *Are Human Rights Universal?* In: Human Rights: The Hard Questions. Edited by Cindy Holder and David Reidy. Cambridge, (Cambridge University Press) 2013

McCorquodale, Robert and Penelope Simons. *Responsibility Beyond Borders: State Responsibility for Extraterritorial Violations by Corporations of International Human Rights Law*. In: The Modern Law Review Limited, (2007), pp.598-625

Milanovic, Marko. *Extraterritorial Application of Human Rights Treaties: Law, Principles and Policy*. Oxford, (Oxford University Press) 2011

Minkler, Lanse. *Introduction: Why Economics and Social Human Rights?* In: The State of Economic and Social Human Rights: A Global Overview. Edited by Lanse Minkler. New York, (Cambridge University Press) 2013, pp.1-21

Mzikenge Chirwa, Danwood. *African Regional Human Rights System, The promise of Recent Jurisprudence on Social Rights*, In: Social Rights Jurisprudence. Emerging Trends in International and Comparative Law. Edited by Malcolm Langford. (Cambridge University Press) 2008, pp.323-338

Narula, Smita. *International Financial Institutions, Transnational Corporations and Duties of States.* In: Global Justice and State Duties: the extraterritorial Scope of Economic, Social and Cultural Rights in International Law. Edited by Malcolm Langford, Wouter Vandenhole and Martin Scheinin. Cambridge, (Cambridge University Press) 2013

O'Keefe, Roger. *Universal Jurisdiction: Clarifying the Basic Concept*. In: Journal of International Criminal Justice. Vol.2. No.3, (2004), pp.735-760

OHCHR. *Economic, Social and Cultural Rights - Handbook for National Human Rights Institutions - Professional Training Series No.12.* New York, (United Nations) 2005

O'Neill, Onora. *Faces of Hunger: An essay on Poverty, Justice and Development*. London, (Allen & Unwin) 1986

Orakhelashvili, Alexander. *Restrictive Interpretation of Human Rights Treaties in the Recent Jurisprudence of the European Court of Human Rights*. In: European Journal of International Law. Vol. 14 No.3 (2003) pp. 529-568

Rawls, John. *The Law of Peoples*. Cambridge, MA, (Harvard University Press) 1999

Ryngaert, Cedric. *Jurisdiction*. In: Global Justice and State Duties: the extraterritorial Scope of Economic, Social and Cultural Rights in International Law. Edited by Malcolm Langford, Wouter Vandenhole and Martin Scheinin. Cambridge, (Cambridge University Press) 2013

Salomon, E. Margot and Ian Seiderman. *Human Rights Norms for a Globalized World: The Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights*. In: Global Policy. vol.3 issue 4 (2012), pp.458-462

Salomon, E. Margot. *Global Responsibility for Human Rights: World Poverty and the Development of International Law*. Oxford, (Oxford University Press) 2007

Seck, Sara. *Unilateral Home State Regulation: Imperialism or Tool for Subaltern Resistance?* In: Osgoode Hall Law Journal, Vol.46 (2008), pp. 565-603

Sen, Amartya. *Elements of a theory of human rights.* In: Philosophy and Public Affairs. Vol.32 No. 4 (2004), pp.315-356

Sepúlveda, Magdalena. *The Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights.* (School of Human Rights Research Series; Vol. 18) Antwerp, (Intersentia) 2003.

Shaw, Malcolm. *International Law*. 6th ed. Cambridge, (Cambridge University Press), 2008.

Shue, Henry. *Basic Rights: Subsistence, Affluence and U.S. foreign policy*. 2nd ed. New Jersey, (Princeton University Press) 1996

Shue, Henry. *Mediating duties*. In: Ethics. Vol.98 No.4 (1988), pp.687-704

Skogly, Sigrun and Mark Gibney. *Economic Rights and Extraterritorial Obligations.* In: Economic Rights: Conceptual, Measurement, and Policy Issues. Edited by Shareen Hertel and Lanse Minkler, New York, (Cambridge University Press) 2007, pp.267-283

Skogly, Sigrun. *Beyond National Borders: States' Human Rights Obligations in International Cooperation*. Antwerp, (Intersentia) 2006

Skogly, Sigrun. *The Obligation of International Assistance and Co-operation in the International Covenant on Economic, Social and Cultural Rights*. In: Human Rights and Criminal Justice for the Downtrodden: Essays in Honour of Asbjørn Eide. Leiden, (Martinus Nijhoff Publishers) 2003, pp.403-420

Sornarajah, M. *The International Law on Foreign Investment*, Cambridge, (Cambridge University Press) 2004

Ssenyonjo, Manisuli. *Economic, Social and Cultural Rights in International Law*. Portland, (Hart Publishing) 2009

Ssenyonjo, Manisuli. *Reflections on State Obligations with Respect to Economic, Social and Cultural Rights in international Human Rights Law*. In: International Journal of Human Rights.Vol.15 No.6 (2011), pp.969-1012

Ssenyonjo, Manisuli. *The applicability of International Human Rights Law to Non-State Actors: What relevance to Economic, Social and Cultural Rights?* In: International Journal of Human Rights, Vol.12 No.5 (2008), pp.725-760

Steiner, J. Henry, Philip Alston and Ryan Goodman. *International Human Rights in Context: Law, Politics, Morals.* 3rd ed. Oxford, (Oxford University Press) 2008

Ţuţuianu, Simona. *Towards Global Justice: Sovereignty in an Interdependent World.* The Hague, (T.M.C. Asser Press) (2013)

*Universal Human Rights and Extraterritorial Obligations.* Edited by Mark Gibney and Sigrun Skogly. Philadelphia, (University of Pennsylvania Press) 2010

Vandenhole, Wouter. *Contextualising the State Duty to Protect Human Rights as Defined in the UN Guiding Principles on Business and Human Rights.* In: Revista de Estudios Juridicos. No. 12 (2012), pp.1-10.

Vandenhole, Wouter. *Emerging Normative Frameworks on Transnational Human Rights Obligations*. In: EU Working Papers: Global Governance Programme, Robert Schuman Centre for Advanced Studies. 2012/17 (2012), pp.1-24.

Vandenhole, Wouter. *Third State Obligations under the ICESCR: A Case Study of EU Sugar Policy*. In: Nordic Journal of International Law. Vol.76 (2007), pp.73–100

Wouters and Cedric Ryngaert. *Litigation for Overseas Corporate Human Rights Abuses in the European Union: The Challenge of Jurisdiction*. In: George Washington University International Law Review. Vol.40 No. 4 (2009), pp.939-975

## Cases

### Permanent Court of International Justice (PCIJ)

France v Turkey (S.S. Lotus) — PCIJ, The Hague, Serie A, No. 10, 1927

### International Court of Justice (ICJ)

Belgium v Spain (Barcelona Traction, Light and Power Company Limited) — ICJ, The Hague, 5 February 1970

Bosnia and Herzegovina v Serbia and Montenegro (Application of the Convention on the prevention and punishment of the crime of genocide) — ICJ, The Hague, 26 February 2007

Democratic Republic of the Congo (DRC) v Uganda (Armed Activities on the Territory of the Congo) — ICJ, The Hague, 2005

Georgia v Russian The Federation (Application of the International Convention on the Elimination of All forms of Racial Discrimination) — ICJ, Provisional Measures, Hague, 15 October 2008

Guinea v. Democratic Republic of the Congo (DRC) (Ahmadou Sadio Diallo) — ICJ, The Hague , 24 May 2007.

Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ, The Hague, 9 July 2004

Legality of Threat or Use of Nuclear Weapons, Advisory Opinion, ICJ, The Hague, 8 July 1996

Nicaragua v United States of America (Military and Paramilitary Activities in and against Nicaragua) — ICJ, The Hague, 27 June 1986

United Kingdom v Albania (Corfu Channel Case) — ICJ, The Hague, (Merits), 9 April 1949

## Arbitral Awards

United States of America v Canada (Trail Smelter case) — International Arbitral Tribunal, RIAA, 1941

### Human Rights Committee (HRC)

| | |
|---|---|
| Herrera Rubio v Colombia | Communication No. 161/1983, 2 November 1987 |
| Lopez Burgos v Uruguay | Communication No. 52/1979, 29 July 1981, UN Doc. CCPR/C/13/D/52/1979 |
| Mohammad Munaf v Romania | Communication No. 1539/2006, 21 August 2009, UN Doc. CCPR/C/96/D/1539/2006 |

### African Commission on Human and People's Rights (ACHPR)

Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria, Communication No. 155/96**,** 2001

### European Court of Human Rights (ECtHR)

| | |
|---|---|
| Al Skeini v United Kingdom | ECtHR, Strasbourg, 7 July 2011 |
| Bankovic v Belgium | ECtHR, Strasbourg, 12 December 2001 |
| Cyprus v Turkey | ECtHR, Strasbourg, 10 May 2001 |
| IlaŞcu and Others v Moldova and Russia | ECtHR, Strasbourg, 8 July 2004 |
| Loizidou v Turkey | ECtHR, Strasbourg, 23 March 1995 |
| Soering v United Kingdom | ECtHR, Strasbourg, 7 July 1989 |

### Inter-American Court of Human Rights (IACtHR)

| | |
|---|---|
| Coard et al. v | IACtHR, San José, 29 September 1999 |

United States

Velasquez Rodriguez v Honduras — IACtHR, San José, 29 July 1988

### The Netherlands

Friday Alfred Akpan v Royal Dutch Shell — The Hague District Court, (30 January 2013)

### United States of America

Kiobel v Royal Dutch Petroleum, Co. — US Supreme Court, 17 April 2013

## UN Documents

A/56/10, International Law Commission Report of the Fifty Third Session, *Responsibility of States for Internationally Wrongful Acts*, Supplement No. 10, November 2001

A/CONF.157/23, *Vienna Declaration and Programme of Actions* (adopted by the General Assembly Resolution of 12 July 1993)

A/CONF.183/9, *Rome Statute of the International Criminal Court*, 17 July 1998

A/HRC/4/35, Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises. John Ruggie, *Business and human rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts* (adopted by the HRC Resolution of 9 February 2007)

A/HRC/4/35/Add.1, Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises. John Ruggie, *State Responsibility to regulate and adjudicate corporate activities under the*

*United Nations core human rights treaties: an overview of treaty body commentaries* (adopted by the HRC Resolution of 13 February 2007)

A/HRC/7/5, *The right to food: Annual Report of the special Rapporteur on the right to food*. Jean Ziegler (adopted by the HRC Resolution of 10 January 2008)

A/HRC/8/5, Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises. John Ruggie, *Protect, Respect and Remedy: a Framework for Business and Human Rights* (adopted by the HRC Resolution of 7 April 2008)

A/HRC/10/61, *Report of the Office of the United Nations High Commissioner for Human Rights on the relationship between climate change and human rights* (adopted by the HRC Resolution of 19 January 2009)

A/HRC/11/13, Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises. John Ruggie, *Business and human rights: Towards operationalizing the "protect, respect and remedy" framework* (adopted by the HRC Resolution of 22 April 2009)

A/HRC/14/27, Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises. John Ruggie, *Business and human rights: further steps toward the operationalization of the "protect, respect and remedy" framework* (adopted by the HRC Resolution of 9 April 2010)

A/HRC/17/31, Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises. John Ruggie. *Guiding Principles on Business and Human Rights: Implementing the United*

*Nations "Protect, Respect and Remedy" Framework* (adopted by the HRC Resolution of 21 March 2011)

A/HRC/RES/17/4, *Human rights and transnational corporations and other business enterprises* (adopted by the HRC Resolution of 6 July 2011)

A/RES/3/217, *Universal Declaration of Human Rights* (adopted and proclaimed by the UN General Assembly Resolution of 10 December 1948)

A/RES/21/2200, *International Covenant on Civil and Political Rights* (adopted and opened for signature, ratification and accession by General Assembly Resolution 2200A (XXI) of 16 December 1966)

A/RES/21/2200, *International Covenant on Economic, Social and Cultural Rights* (adopted and opened for signature, ratification and accession by General Assembly Resolution 2200A (XXI) of 16 December 1966)

A/RES/41/128, *Declaration on the Right to Development* (adopted by General Assembly on 4 December 1986)

A/RES/55/2, *United Nations Millennium Declaration*, (adopted by the General Assembly Resolution of 8 September 2000)

A/RES/63/117, *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights* (adopted by the UN General Assembly resolution of 10 December 2008)

CCPR/C/21/Rev.1/Add.6, *HRC General Comment No. 24: Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols thereto, or in Relation to Declarations under Article 41 of the Covenant* (adopted by the HRC on 4 November 1994)

CCPR/C/21/Rev.1 /Add.8/Rev.1, *HRC General Comment No. 26: Continuity of Obligations* (adopted by the HRC on 8 December 1997)

CCPR/C/21 /Rev.1/Add.13, *HRC General comment No. 31: The nature of the general legal obligation imposed on States Parties to the Covenant* (adopted by the Human Rights Council on 29 March 2004)

CCPR/C/DEU/CO/6, *Concluding observations on the sixth periodic report of Germany* (adopted by the HRC 106th session, 15 October to 2 November 2012)

*Charter of the United Nations*, 24 October 1945, 1 UNTS XVI

E/1991/23, CESCR *General Comment No. 3: The nature of States parties obligations*, (Art. 2, par.1 of the Covenant) (Adopted by the CESCR on 14 December 1990)

E/1999/22-E/C.12/1998/26, *CESCR Statement on Globalization and its impact on the enjoyment of economic, social and cultural rights* (adopted by the CESCR 18th session of May 1998)

E/C.12/1/Add.40, *CESCR Concluding Observations: Cameroon*, (adopted on 8 December 1999)

E/C.12/1/Add.90, *CESCR Concluding Observations: Israel*, 23 May 2003

E/C.12/1998/24, *CESCR General Comment No. 9: The Domestic Application of the Covenant*, (Adopted by the CESCR on 3 December 1998)

E/C.12/1999/5, *CESCR General Comment No. 12: The Right to Adequate Food* (Art. 11 of the Covenant) (adopted by the CESCR on 12 May 1999)

E/C.12/1999/10, *CESCR General Comment No. 13: The Right to Education* (Art. 13 of the Covenant) (adopted by the CESCR on 8 December 1999)

E/C.12/2000/4, *CESCR General Comment No. 14: The Right to the Highest Attainable Standard of Health* (Art. 12 of the Covenant) (adopted by the CESCR on 11 August 2000)

E/C.12/2002/11, *CESCR General Comment No. 15: The Right to Water* (Arts. 11 and 12 of the Covenant) (adopted by the CESCR on 20 January 2003)

E/C.12/2005/4, *CESCR General Comment No. 16: The Equal Right of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights* (Art. 3 of the Covenant) (adopted by the CESCR on 11 August 2005)

E/C.12/2011/1, *CESCR Statement on the obligations of States parties regarding the corporate sector and economic, social and cultural rights* (adopted by the CESCR at its 46th session of 20 May 2011)

E/C.12/2012/1, *CESCR Statement in the context of the Rio+20 Conference on "the green economy in the context of sustainable development and poverty eradication"* (adopted by the CESCR at its 48th session of 30 April to 18 May 2012)

E/C.12/GC/18, *CESCR General Comment No. 18: The Right to Work* (Art. 6 of the Covenant) (adopted by the CESCR on 6 February 2006)

E/C.12/GC/19, *CESCR General Comment No. 19: The right to social security (*Art. 9 of the Covenant) (adopted by the CESCR on 23 November 2007)

E/CN.4/1987/17, Note verbale dated 86/12/05 from the Permanent Mission of the Netherlands to the United Nations Office at Geneva addressed to the Centre for Human Rights ("*Limburg Principles*"), CHR, 8 January 1987

E/CN.4/2001/26**,** *Report of the Open-Ended Working Group on the Right to Development* (adopted by the CHR Resolution of 20 March 2001)

E/CN.4/2005/47, *The Right to Food: Annual Report of the special Rapporteur on the right to food* (adopted by the CHR Resolution of 24 January 2005)

E/CN.4/2005/69, *Resolution requesting the Secretary-General to appoint a special representative on the issue of human rights and transnational corporations and other business enterprises* (adopted by the CHR Resolution of 20 April 2005)

E/CN.4/2006/44, *The right to food: Annual Report of the special Rapporteur on the right to food*. Jean Ziegler, (adopted by the CHR Resolution of 16 March 2006)

E/CN.4/2006/97, *Interim Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*. John Ruggie, (adopted by the CHR Resolution of 22 February 2006)

E/CN.4/Sub.2/2003/12/Rev.2, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, UN Sub-Commission on the Promotion and Protection of Human Rights, 26 August 2003

UNDP, *Human Development Report 2002: Deepening Democracy in a fragmented world*. New York (Oxford University Press), 2002

UNDP, *Human Development Report 2005: International cooperation at a crossroads: Aid, trade and security in an unequal world*. New York (UNDP), 2005

*Vienna Convention on the Law of Treaties*, United Nations, Treaty Series, vol. 1155, Vienna 23 May 1969

### Regional Documents

Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950

Organization of African Unity (OAU), *African Charter on Human and Peoples' Rights*, 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982

### Miscellaneous Documents

Amnesty International. *Profits and Loss: Mining and Human Rights in Katanga, Democratic Republic of Congo*. London, (Peter Benenson House) 2013

Amnesty International. *Sudan: The Human Price of Oil*. (2000), http://www.amnesty.org/en/library/info/AFR54/001/2000 [Visited 14 October 2013]

*Choc v. HudBay Minerals Inc. & Caal v. HudBay Minerals Inc. : Lawsuits against Canadian company HudBay Minerals Inc. over human rights abuse in Guatemala*, http://www.chocversushudbay.com/ [Visited 15 October 2013]

*Declaration on an Alternative Forum on Business and Human Rights*. (2013) http://www.fian.org/fileadmin/media/publications/Declaration_Busines_and_HR_Regional_Forum_Medellin_EN.pdf [Visited 20 November 2013]

De Schutter, Olivier. *Extraterritorial Jurisdiction as a tool for improving the Human Rights Accountability of Transnational Corporations*. Background paper to seminar in Brussels on 3-4 November 2006. http://198.170.85.29/Olivier-de-Schutter-report-for-SRSG-re-extraterritorial-jurisdiction-Dec-2006.pdf [Visited 15 July 2013]

FIAN, *Ugandan court orders compensation be paid to evictees of the Kaweri-Coffee Plantation.* 2013. http://www.fian.org/news/article/detail/ugandan-court-orders-

compensation-be-paid-to-evictees-of-the-kaweri-coffee-plantation/ [Visited 1 October 2013 2013]

FIDH, Burma, *TOTAL and Human Rights: Dissection of a Project*. Report N° 224/2, http://www.fidh.org/IMG/pdf/my_total1996a.pdf [Visited 20 October 2013]

International Conferences (The Hague), *Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land*, 18 October 1907

*Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*, Maastricht, January 22-26, 1997

*Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights*. 28 September 2011. http://www.rtfn-watch.org/uploads/media/Maastricht_ETO_Principles__EN.pdf [Visited 2 June 2013]

Ruggie, John. *Recommendations on Follow-up to the Mandate*. 11 February 2011. http://www.business-humanrights.org/media/documents/ruggie/ruggie-special-mandate-follow-up-11-feb-2011.pdf [Visited 20 July 2013]

Vandenhole, Wouter. *Companies and the Extraterritorial State Duty to Protect Human Rights*. International Conference : The Implementaiton of the UN Guiding Principles on Business and Human Rights in Spain (Seville, 4-6 November). http://www.conference businesshr.com /uploads /1/8/2/6/18263573/vandenhole_wouter.pdf [Visited 20 November 2013]

*Vienna + 20 CSO Declaration*, 26 June 2013. http://www.etoconsortium.org /fileadmin/media/etoconsortium.org/Vienna_20/Vienna_20_CSO_Declaration_FINAL-post2.pdf [Visited 25 July 2013]

# Annex

## CESCR, General Comments
## -Emphasis on States' Extraterritorial Obligations-

| No | Subject | Year | Emphasis on States' Extraterritorial Obligations |
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| 21 | Right of Everyone to Take Part in Cultural Life | 2009 | International Obligations<br><br>56. In its general comment No. 3 (1990), the Committee draws attention to the obligation of States parties to take steps, individually and through international assistance and cooperation, especially through economic and technical cooperation, with a view to achieving the full realization of the rights recognized in the Covenant. In the spirit of Article 56 of the Charter of the United Nations, as well as specific provisions of the International Covenant on Economic, Social and Cultural Rights (art. 2, para. 1, and arts. 15 and 23), States parties should recognize and promote the essential role of international cooperation in the achievement of the rights recognized in the Covenant, including the right of everyone to take part in cultural life, and should fulfil their commitment to take joint and separate action to that effect.<br><br>57. States parties should, through international agreements where appropriate, ensure that the realization of the right of everyone to take part in cultural life receives due attention.53<br><br>58. The Committee recalls that international cooperation for development and thus for the realization of economic, social and cultural rights, including the right to take part in cultural life, is an obligation of States parties, especially of those States that are in a position to provide assistance. This obligation is in accordance with Articles 55 and 56 of the Charter of the United Nations, as well as articles 2, paragraph 1, and articles 15 and 23 of the Covenant.54<br><br>59. In negotiations with international financial institutions and in concluding bilateral agreements, States parties should ensure that the enjoyment of the right enshrined in article 15, paragraph 1 (a), of the Covenant is not impaired. For example, the strategies, programmes and policies adopted by States parties under structural adjustment programmes should not interfere with their core obligations in relation to the right of everyone, especially the most disadvantaged and marginalized individuals and groups, to take part in cultural life.55 |

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| | | | [53] See general comment No. 18 (2005), para. 29<br>[54] General comment No. 3 (1990), para. 14. See also general comment No. 18 (2005), para. 37.<br>[55] See general comment No. 18 (2005), para. 30. |
| 20 | Non-Discrimination in Economic, Social and Cultural Rights (art. 2, para. 2) | 2009 | Scope of State Obligations<br>14. Under international law, a failure to act in good faith to comply with the obligation in article 2, paragraph 2, to guarantee that the rights enunciated in the Covenant will be exercised without discrimination amounts to a violation. Covenant rights can be violated through the direct action or omission by States parties, including through their institutions or agencies at the national and local levels. States parties should also ensure that they refrain from discriminatory practices in international cooperation and assistance and take steps to ensure that all actors under their jurisdiction do likewise. |
| 19 | The right to Social Security | 2007 | 4. International Obligations<br><br>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.<br><br>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.<br><br>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.<br><br>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.<br><br>56. States parties should ensure that the right to social security is given due attention in international agreements and, to that end, |

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| | | | 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.33Persons temporarily working in another country should be covered by the social security scheme of their home country.<br><br>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.<br><br>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.<br><br>33 See International Convention on the Protection of the Rightsof All Migrant Workers and Members of Their Families, article 27. |
| 18 | The Right to Work (art. 6) - Final edited version | 2005 | International Obligations<br><br>29. In its general comment No. 3 (1990) the Committee draws attention to the obligation of all States parties to take steps individually and through international assistance and cooperation, especially economic and technical, towards the full realization of the rights recognized in the Covenant. In the spirit of Article 56 of the Charter of the United Nations and specific provisions of the Covenant (arts. 2.1, 6, 22 and 23), 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 work. States parties should, through international agreements where appropriate, ensure that the right to work as set forth in articles 6, 7 and 8 of the Covenant is given due attention.<br><br>30. To comply with their international obligations in relation to article 6, States parties should endeavour to promote the right to work in other countries as well as in bilateral and multilateral negotiations. In negotiations with international financial institutions, |

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| | | | States parties should ensure protection of the right to work of their population. States parties that are members of international financial institutions, in particular the International Monetary Fund, the World Bank and regional development banks, should pay greater attention to the protection of the right to work in influencing the lending policies, credit agreements, structural adjustment programmes and international measures of these institutions. The strategies, programmes and policies adopted by States parties under structural adjustment programmes should not interfere with their core obligations in relation to the right to work and impact negatively on the right to work of women, young persons and the disadvantaged and marginalized individuals and groups.<br><br>Violations of the Obligation to Protect<br><br>35. Violations of the obligation to protect follow from the failure of States parties to take all necessary measures to safeguard persons within their jurisdiction from infringements of the right to work by third parties. They include omissions such as the failure to regulate the activities of individuals, groups or corporations so as to prevent them from violating the right to work of others; or the failure to protect workers against unlawful dismissal. |
| 17 | The right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author (art. 15 (1) (c)) - Final edited version | 2005 | III. STATES PARTIES' OBLIGATIONS<br>International Obligations<br><br>36. In its general comment No. 3 (1990), the Committee drew attention to the obligation of all States parties to take steps, individually and through international assistance and cooperation, especially economic and technical, towards the full realization of the rights recognized in the Covenant. In the spirit of Article 56 of the Charter of the United Nations, as well as the specific provisions of the Covenant (arts. 2, para. 1, 15, para. 44 and 23), States parties should recognize the essential role of international cooperation for the achievement of the rights recognized in the Covenant, including the right to benefit from the protection of the moral and material interests resulting from one's scientific, literary and artistic productions, and should comply with their commitment to take joint and separate action to that effect. International cultural and scientific cooperation should be carried out in the common interest of all peoples.<br><br>37. The Committee recalls that, in accordance with Articles 55 and 56 of the Charter of the United Nations, well-established principles of international law, and the provisions of the Covenant itself, international cooperation for development and thus for the realization of economic, social and cultural rights is an obligation of all States parties and, in particular, of States which are in a position to assist.[31] |

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| | | | 38. Bearing in mind the different levels of development of States parties, it is essential that any system for the protection of the moral and material interests resulting from one's scientific, literary and artistic productions facilitates and promotes development cooperation, technology transfer, and scientific and cultural cooperation,[32]while at the same time taking due account of the need to preserve biological diversity.[33]<br><br>31 Committee on Economic, Social and Cultural Rights, fifth session, general comment No. 3 (1990), at paragraph 14.<br>32Committee on Economic, Social and Cultural Rights, twenty-seventh session, Human Rights and Intellectual Property, Statement by the Committee on Economic, Social and Cultural Rights, 29 November 2001, E/C.12/2001/15, at paragraph 15.<br>33See article 8 (j) of the Convention on Biological Diversity. See also Sub-Commission on the Promotion and Protection of Human Rights, 26th meeting, Resolution 2001/21, E/CN.4/Sub.2/Res/2001/21. |
| 16 | The equal right of men and women to the enjoyment of all economic, social and cultural rights (art.3) | 2005 | none |
| 15 | The right to water (arts. 11 and 12) | 2002 | International Obligations<br><br>30. 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 right to water.<br><br>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 party's jurisdiction should not deprive another country of the ability to realize the right to water for persons in its jurisdiction.[25]<br><br>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.26 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.<br><br>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 |

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| | | | 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 and applicable international law.<br><br>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.<br><br>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 country's capacity to ensure the full realization of the right to water.<br><br>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.<br><br>25 The Committee notes that the United Nations Convention on the Law of Non-Navigational Uses of Watercourses requires that social and human needs be taken into account in determining the equitable utilization of watercourses, that States parties take measures to prevent significant harm being caused, and,in the event of conflict, special regard must be given to the requirements of vital human needs: see arts. 5, 7 and 10 of the Convention.<br>26 In General Comment No. 8 (1997), the Committee noted the disruptive effect of sanctions upon sanitation supplies and clean drinking water, and that sanctions regimes should provide for repairs to infrastructure essential to provide clean water. |
| 14 | The right to the highest attainable standard of health (art. 12) | 2000 | International Obligations<br><br>38. In its General Comment No. 3, the Committee drew attention to the obligation of all States parties to take steps, individually and through international assistance and cooperation, especially eco- |

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| | | | nomic and technical, towards the full realization of the rights recognized in the Covenant, such as the right to health. In the spirit of article 56 of the Charter of the United Nations, the specific provisions of the Covenant (articles 12, 2.1, 22 and 23) and the Alma-Ata Declaration on primary health care, 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 health. In this regard, States parties are referred to the Alma-Ata Declaration which proclaims that the existing gross inequality in the health status of the people, particularly between developed and developing countries, as well as within countries, is politically, socially and economically unacceptable and is, therefore, of common concern to all countries.26<br><br>39. To comply with their international obligations in relation to article 12, States parties have to respect the enjoyment of the right to health in other countries, and to prevent third parties from violating the right in other countries, if they are able to influence these third parties by way of legal or political means, in accordance with the Charter of the United Nations and applicable international law. Depending on the availability of resources, States should facilitate access to essential health facilities, goods and services in other countries, wherever possible and provide the necessary aid when required. 27 States parties should ensure that the right to health is given due attention in international agreements and, to that end, should consider the development of further legal instruments. In relation to the conclusion of other international agreements, States parties should take steps to ensure that these instruments do not adversely impact upon the right to health. Similarly, States parties have an obligation to ensure that their actions as members of international organizations take due account of the right to health. Accordingly, States parties which are members of international financial institutions, notably the International Monetary Fund, the World Bank, and regional development banks, should pay greater attention to the protection of the right to health in influencing the lending policies, credit agreements and international measures of these institutions.<br><br>40. States parties have a joint and individual responsibility, in accordance with the Charter of the United Nations and relevant resolutions of the United Nations General Assembly and of the World Health Assembly, 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 to the maximum of its capacities. Priority in the provision of international medical aid, distribution and management of resources, such as safe and potable water, food and medical supplies, and financial aid should be given to the most vulnerable or marginalized groups of the population. Moreover, given that some |

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| | | | diseases are easily transmissible beyond the frontiers of a State, the international community has a collective responsibility to address this problem. The economically developed States parties have a special responsibility and interest to assist the poorer developing States in this regard.<br><br>41. States parties should refrain at all times from imposing embargoes or similar measures restricting the supply of another State with adequate medicines and medical equipment. Restrictions on such goods should never be used as an instrument of political and economic pressure. In this regard, the Committee recalls its position, stated in General Comment No. 8, on the relationship between economic sanctions and respect for economic, social and cultural rights.<br><br>42. While only States are parties to the Covenant and thus ultimately accountable for compliance with it, all members of society - individuals, including health professionals, families, local communities, intergovernmental and non-governmental organizations, civil society organizations, as well as the private business sector - have responsibilities regarding the realization of the right to health. State parties should therefore provide an environment which facilitates the discharge of these responsibilities.<br><br>26Article II, Alma-Ata Declaration, Report of the International Conference on Primary Health Care, Alma-Ata, 6-12 September 1978, in: World Health Organization, "Health for All" Series, No. 1, WHO, Geneva, 1978<br>27. See para. 45 of this General Comment |
| 13 | The right to education (art. 13) | 1999 | Specific Legal Obligations<br><br>52. In relation to article 13 (2) (b)-(d), a State party has an immediate obligation "to take steps" (art. 2 (1)) towards the realization of secondary, higher and fundamental education for all those within its jurisdiction. (…)<br><br>56. In its General Comment 3, the Committee drew attention to the obligation of all States parties to take steps, "individually and through international assistance and cooperation, especially economic and technical", towards the full realization of the rights recognized in the Covenant, such as the right to education.28 Articles 2 (1) and 23 of the Covenant, Article 56 of the Charter of the United Nations, article 10 of the World Declaration on Education for All, and Part I, paragraph 34 of the Vienna Declaration and Programme of Action all reinforce the obligation of States parties in relation to the provision of international assistance and cooperation for the full realization of the right to education. In relation to the negotiation and ratification of international agreements, States parties should take steps to ensure that these instruments do not adversely impact upon the right to education. Similarly, States parties have an obligation to ensure that their actions as members of international organi- |

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| | | | zations, including international financial institutions, take due account of the right to education |
| 12 | The right to adequate food (art. 11) | 1999 | Obligations and Violations<br><br>19. Violations of the right to food can occur through the direct action of States or other entities insufficiently regulated by States. These include: the formal repeal or suspension of legislation necessary for the continued enjoyment of the right to food; denial of access to food to particular individuals or groups, whether the discrimination is based on legislation or is proactive; the prevention of access to humanitarian food aid in internal conflicts or other emergency situations; adoption of legislation or policies which are manifestly incompatible with pre-existing legal obligations relating to the right to food; and failure to regulate activities of individuals or groups so as to prevent them from violating the right to food of others, or the failure of a State to take into account its international legal obligations regarding the right to food when entering into agreements with other States or with international organizations.<br><br>International Obligations of States Parties'<br><br>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.<br><br>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. |
| 11 | Plans of action for primary education (art. 14) | 1999 | 9. Obligations. […]Where a State party is clearly lacking in the financial resources and/or expertise required to "work out and adopt" a detailed plan, the international community has a clear obligation to assist. |

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| 10 | The role of national human rights institutions in the protection of economic, social and cultural rights | 1998 | none |
| 9 | The domestic application of the Covenant | 1998 | none |
| 8 | The relationship between economic sanctions and respect for economic, social and cultural rights | 1997 | none |
| 7 | The right to adequate housing: forced evictions (art.11 (1)) | 1997 | none |
| 6 | The economic, social and cultural rights of older persons | 1995 | none |
| 5 | Persons with disabilities | 1994 | none |
| 4 | The right to adequate housing | 1991 | none |
| 3 | The nature of States parties' obligations (art.2 (1)) | 1990 | 14. The Committee wishes to emphasize that in accordance with Articles 55 and 56 of the Charter of the United Nations, with well-established principles of international law, and with the provisions of the Covenant itself, international cooperation for development and thus for the realization of economic, social and cultural rights is an obligation of all States. |
| 2 | International technical assistance measures (art. 22) | 1990 | none |
| 1 | Reporting by States parties | 1989 | 3. A second objective is to ensure that the State party monitors the actual situation with respect to each of the rights on a regular basis and is thus aware of the extent to which the various rights are, or are not, being enjoyed by all individuals within its territory or under its jurisdiction. |