



FOR HUMAN RIGHTS BEYOND BORDERS

**How to hold States accountable
for extraterritorial violations**

HANDBOOK

**For human rights beyond
borders: How to hold
States accountable for
extraterritorial violations**



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Acronyms

CESCR UN Committee on Economic, Social and Cultural Rights

CP rights Civil and political rights

CSOs Civil society organisations

ESC rights Economic, social and cultural rights

EC European Commission

ECHR European Convention on Human Rights

ETOs Extraterritorial obligations

ETOP Extraterritorial Obligations Principle/Maastricht Principle

EU European Union

HRC Human Rights Council

HRIA Human Rights Impact Assessment

IACHR Inter-American Commission on Human Rights

IFI International Financial Institution

IGO Intergovernmental Organisation

IPR Intellectual Property Rights

ISDS Investor-state dispute settlement

MS Member State

NGO Non-governmental organisation

OEIGWG Open-ended intergovernmental working group

OHCHR Office of the United Nations High Commissioner for Human Rights

TNC Transnational Corporation

UDHR Universal Declaration of Human Rights

UN United Nations

WTO World Trade Organisation

Introduction



In today's highly interdependent world, decisions by States often have impacts beyond their own national borders. These decisions can affect the enjoyment of human rights in other countries. Through their domestic and foreign policies and practices, as well as the international norms and standards they promote, States individually and jointly shape the international legal, political and economic environment in which other States operate.

In shaping the international environment, they also influence the policy space, political will and capacities of other States to comply with their human rights obligations. This can be in a way that is conducive to the universal realization of human rights, for example, by encouraging international standards that improve environmental protection or labour conditions. It can also, however, create restrictions or disincentives that hinder other States in the implementation of measures to protect and fulfil human rights. Two examples are the case of austerity measures that require cuts in social spending (see **Case Study 2.2**), or the case of international investment protection rules that can deter States from adopting regulatory measures (see **Case Study 1.2**).

In addition to the influence that States carry on other States' room for manoeuvre and ability to guarantee human rights in their territory, they may also, through their policies and practices, interfere directly with the enjoyment of human rights in other countries, for example, through aggressive dumping practices or embargos. Moreover, there are certain transboundary human rights challenges, such as the impunity of transnational corporations, tax evasion, or climate and eco-destruction, which require coordinated action by States (see **Chapters 3 and 6**).

A cornerstone of international human rights law is the universality of human rights, which means that they are inherent to all human beings regardless of their place of birth or residence, sex, ethnicity, religion, or social status. In view of the strong interdependencies that exist between countries, the universal realisation of human rights can only be achieved through the concerted efforts and cooperation of all States. The United Nations (UN) Charter of 1945, which is legally binding on virtually all States, is very clear on this. Under Article 56, UN Member States pledge to "take joint and separate action in co-operation with the Organization" towards achieving the purposes of the UN, which include "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion" (Art. 55c).¹

The Universal Declaration of Human Rights (UDHR) and subsequent international human rights treaties, including the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR) further elaborate on the individual and joint obligations of States to respect, protect and fulfil human rights, at home and in other countries. They require States to take steps to ensure that their policies and practices, including those pursued in the context of international organisations, are compliant with and do not harm human rights. They also place positive duties on States to cooperate with each other in creating the international framework conditions necessary for human rights to flourish.

1 *Charter of the United Nations*. October 24, 1945 (1 UNTS XVI). www.refworld.org.

Despite the universality of human rights and the evident impact that States' actions have on people outside their national borders, many States continue to interpret their human rights obligations as purely domestic, i.e., to apply only with regard to people in their own countries.² Some States have also used human rights as a pretext for military interventions in other countries (e.g., US-led intervention in Iraq). Such disregard and misinterpretation by States of their *extraterritorial obligations (ETOs)*, i.e., the human rights obligations they carry with respect to people in other countries, has created significant gaps in the international protection of human rights and presents a major stumbling stone in the universal realisation of human rights.

The Maastricht Principles on States' Extraterritorial Obligations

In response to the struggles of numerous communities around the world whose rights are being adversely affected by the actions of foreign States and their reluctance to assume responsibility for these, a group of renowned international human rights experts drafted the *Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights* ('Maastricht Principles') in 2011.³

Based on over a decade of extensive legal analysis and review of case studies, the Maastricht Principles summarize and clarify the human rights obligations States have under international law in relation to people living in other countries. They are drawn from different sources of international law, including the UN Charter, the UDHR and subsequent human rights treaties, customary international law, and the pronouncements and jurisprudence of international human rights bodies and courts. The Principles therefore do not create any new law but rather restate the legal obligations *States have already accepted* under international law. The legal sources upon which they are based are explained in a legal commentary to the Principles.⁴

Since their adoption six years ago, the Maastricht Principles have become an increasingly important point of reference for UN and regional human rights bodies in monitoring and holding States accountable with regard to their extraterritorial obligations.⁵ This has not only enhanced the significance of the Maastricht Principles but has also contributed to the further concretization of States' ETOs in specific situations. A recent example is the General Comment No. 24 adopted by the UN Committee on Economic, Social and Cultural Rights (CESCR) in August 2017, which provides an authoritative interpretation of States' obligations under the ICESCR in the context of business operations (see **Box 3.1**).⁶

2 See, for example, Canada's response in a hearing before the Inter-American Commission on Human Rights on the impact of its mining companies in Latin America, www.youtube.com. See also position held by the United States in the context of its last (and previous) periodic review by the UN Human Rights Committee in 2014, www.ohchr.org.

3 ETO Consortium (2013). *Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights*. Heidelberg: FIAN International. Available at: www.etoconsortium.org.

4 De Schutter, O. et al. "Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights". *Human Rights Quarterly* 1084 (2012). An advance unedited version (29 February 2012) is available at: www.etoconsortium.org.

5 For a compilation of recent pronouncements on ETOs by UN human rights bodies, see: Global Initiative for Economic, Social and Cultural Rights (2015). *Human Rights Law Sources: UN Pronouncements on Extra-Territorial Obligations*. Available at www.globalinitiative.org.

6 UN Committee on Economic, Social and Cultural Rights (2017). *General Comment No. 24 (2017) on State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities*. Available at www.ohchr.org.

As the name indicates, the Maastricht Principles focus on States' ETOs in the field of economic, social and cultural rights (ESC rights). Nevertheless, many of the Principles can equally be applied to civil and political rights (CP rights).⁷ The Maastricht Principles elaborate both on the scope (extent and limitations) and the content of States' ETOs. While they touch upon several specific policy fields, including trade, investment, development cooperation, and the regulation of TNCs, they remain broad in their application. Special attention is placed on questions of accountability and access to remedies in cases of extraterritorial human rights violations.

It should be emphasised that the Maastricht Principles – and ETOs as such – deal with the *obligations of States* and not the direct responsibilities of International Organisations or TNCs. Some Principles may however also be applicable to International Organisations.⁸

Purpose and structure of this handbook

In spelling out the ETOs States have under international law, the Maastricht Principles present a useful tool for human rights advocates and social movements in monitoring and holding States accountable on their compliance with these obligations. The Principles may however appear technical to organisations less familiar with human rights law, which could present difficulties for them in relating and applying the Principles to their work. The intention of this handbook is therefore to make the Principles more accessible and relevant to civil society by illustrating, with concrete examples, how they relate to specific policy fields and sites of social struggle, and can be used in these contexts to hold States accountable for extraterritorial violations.

Many organisations may already be working on what in essence are 'ETO issues', but framing them differently. The Maastricht Principles can provide them with an additional tool in their advocacy efforts by highlighting the underpinning human rights law that can support (add legal weight to) the claims of affected communities against foreign governments.

The handbook is structured in three main parts:

Part One (Overview) provides a basic overview of the extraterritorial obligations States have under international law as spelled out in the Maastricht Principles. This will help familiarize users with the Principles and provide an idea of the main concepts and issues covered.

Part Two (Application of ETOs to Specific Policy Fields) discusses States' ETOs in relation to specific policy fields and sites of social struggles. It contains six chapters on: trade and investment (1); intergovernmental organisations (2); transnational corporations (3); development cooperation (4); climate change and eco-destruction (5); and land and natural resource grabbing (6). Each chapter is accompanied by case studies that illustrate the application and use of the Maastricht Principles in that particular context. As the focus of the Maastricht Principles is on ESC rights, the handbook will also focus on these rights. However, as mentioned before, many of the Principles hold relevance for CP rights as well.

⁷ The legal bases for ETOs are roughly similar for both sets of rights. Only some, such as the obligation of international cooperation, have been more extensively elaborated in relation to ESC rights. For more information, see *Supra* note 4. Commentary to Principle 5.

⁸ For more details, see Commentary to Principle 16, *supra* note 4.

Part Three (Tool Kit) of the handbook (see separate booklet) contains practical tools for analysing and arguing ETO cases, as well as for identifying entry points at the national, regional and international level for denouncing extraterritorial violations of human rights and promoting State adherence to ETOs.

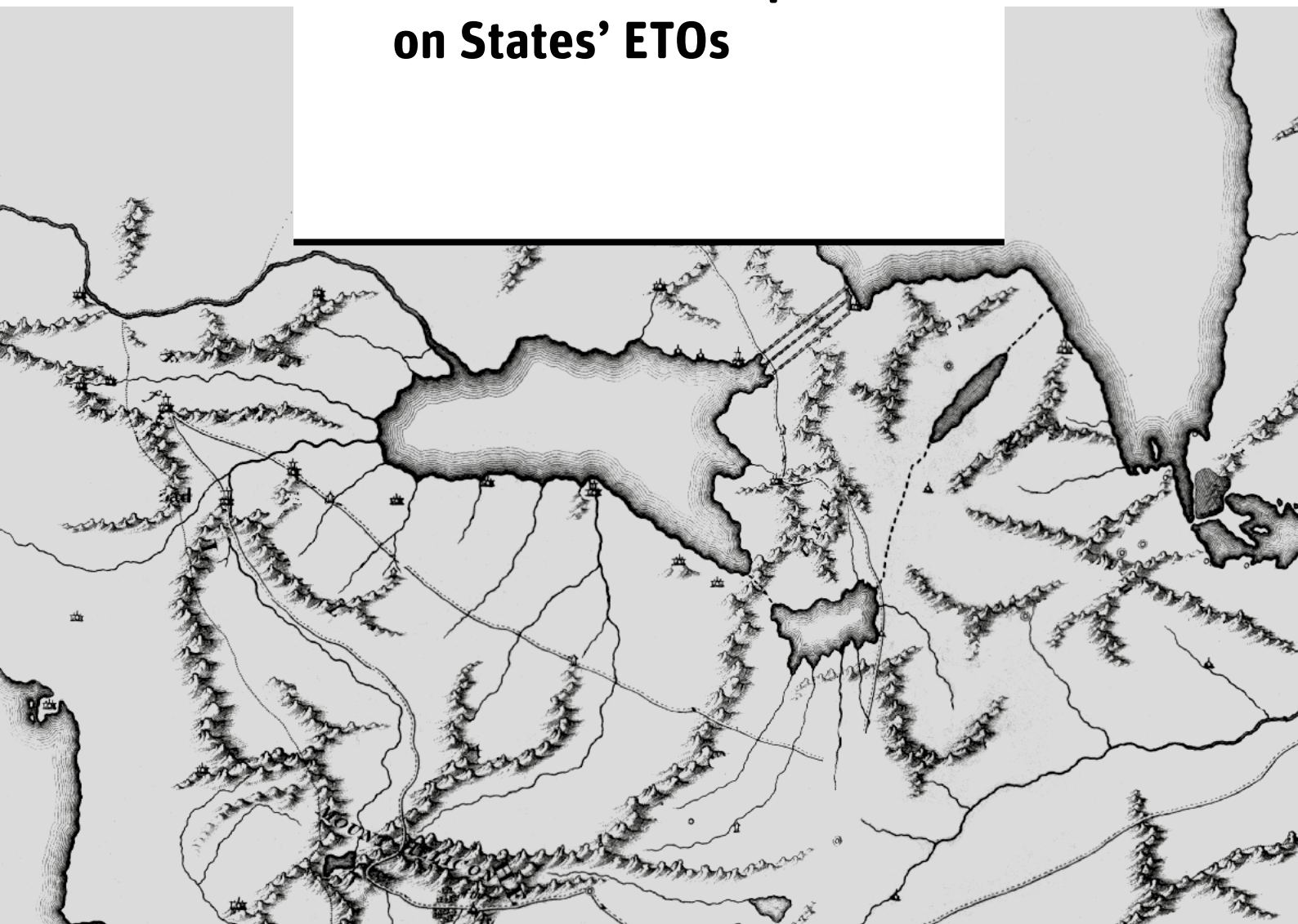
About the Authors

The Handbook is a collaborative effort by members of the ETO Consortium,⁹ coordinated by the Consortium's Secretariat (hosted by FIAN International). It has been reviewed and benefited from the valuable comments from both Consortium members and from colleagues who have not yet, or only marginally, worked with ETOs.¹⁰

9 The ETO Consortium is a global network of over 140 CSOs and academics that seeks to raise awareness on and advance the implementation of ETOs. To learn more, please visit: www.etoconsortium.org.

10 See imprint for list of authors and reviewers.

PART ONE
Overview of the
Maastricht Principles
on States' ETOs





Part One: Overview of the Maastricht Principles on States' ETOs

This section provides a general overview of the Maastricht Principles. It introduces the key issues covered and orients users on how to navigate through the Principles. It thereby serves as a point of reference when reading the chapters in PART II where the Principles are applied to specific policy contexts and more details as well as concrete examples are provided.

Box 1.1: The Maastricht Principles

The *Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights* ('Maastricht Principles') summarize the extraterritorial human rights obligations (ETOs) States have with regard to people and communities in other countries.

They are accompanied by a legal commentary (*Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights*) which explains the international law sources upon which the Principles are based.

You can download the Maastricht Principles and the Commentary in different languages under: www.etoconsortium.org.

Individual Principles will be referred to in the Handbook as 'ETOP' (short for: ETO Principle) or as 'Maastricht Principle'.

States' extraterritorial obligations, just as human rights obligations in general, are three-fold and include:

- › *Obligations to respect human rights abroad*: States must ensure that their policies and actions do not harm the enjoyment of human rights in other countries.
- › *Obligations to protect human rights abroad*: States must put into place mechanisms to ensure that private actors they are in a position to regulate, including companies, do not impair the enjoyment of human rights in other countries, and that they can be held accountable when they do.
- › *Obligations to fulfil human rights abroad*: States must cooperate with each other and contribute to the creation of an international environment that is conducive to the universal fulfilment of human rights.

The Maastricht Principles are divided in seven sections:

- (i) General Principles
- (ii) Scope of Extraterritorial Obligations of States
- (iii) Obligations to Respect
- (iv) Obligations to Protect

- (v) Obligations to Fulfil
- (vi) Accountability and Remedies
- (vii) Final Provisions

Section I: General Principles

Section I introduces the general principles that underpin States' ETOs, and in the light of which the Maastricht Principles should be interpreted. These include:

- › universality of human rights;
- › non-discrimination and equality;
- › indivisibility, interrelatedness and interdependence of human rights;
- › right to informed participation in decisions which affect one's human rights.

Section II: Nature and Scope of ETOs

Section II defines what ETOs are and in which situations they apply. It also describes the limits of ETOs.

KEY MESSAGES:

Maastricht Principle 8 defines ETOs as:

- › Obligations in relation to State acts and omissions that affect people living in other countries (independent of where these take place); and
- › Obligations of global character which require States to take individual and joint action to realize human rights.

There are three types of situations in which States have obligations to respect, protect and fulfil ESC rights abroad (**ETOP 9**):

- › They exercise *authority or effective control* over another territory and/or persons (even where such is not according to international law).
- › Their conduct has a *foreseeable effect* on ESC rights abroad.
- › They are in a *position to exercise decisive influence or take measures* to realize ESC rights abroad.

The Maastricht Principles also draw attention to the **limits of ETOs** and the related permission and prohibition of States to exercise jurisdiction beyond their national borders. States cannot use ETOs to justify acts that would constitute a breach of the UN Charter and general international law (**ETOP 10**).

States must take steps to avoid their policies and practices undermining the enjoyment of ESC rights in another country (**ETOP 13**). They are responsible for extraterritorial harm to human rights whenever such is a foreseeable result of their conduct. The outcomes of an action (or omission) can be considered 'foreseeable' when the State either *knew or should have known*, but failed to seek relevant information, about the potential risks involved.

This in turn places a duty on States to seek information and assess potential risks of taking (or not taking) a specific action (**ETOP 14**):

- › States must conduct prior **human rights impact assessments** (HRIAs) to evaluate the potential impacts of their policies, laws and practices.
- › HRIAs must be conducted with public participation and results made public.
- › Results must inform the measures States need to take to prevent or stop violations of ESC rights and provide effective remedies to victims.

Maastricht Principle 13 also highlights that “uncertainty about potential impacts does not constitute justification for such conduct”. This means that even in cases in which there is no full certainty that ESC rights will be threatened by a certain action, States must take **precautionary measures** to prevent potential serious or irreversible damage.

States remain responsible for their conduct within **international organisations** (**ETOP 15**). When participating in or transferring competences to an international organisation, including international financial institutions, they must ensure that the respective organisation acts in accordance with their human rights obligations. Hence, States cannot hide behind decisions taken under the institutional cover of international organisations but carry full responsibility for their own actions and omissions within such organisations.

States’ ETOs also apply to the elaboration, interpretation and implementation of **international agreements and standards** – including in the area of trade, investment, taxation, finance, development cooperation, environmental protection, and security – which must be consistent with their human rights obligations (**ETOP 17**).

Section III: Obligations to respect ESC rights abroad

Section III describes the obligations States have to respect ESC rights of people living outside their territories.

KEY MESSAGES:

States have an obligation to refrain from conduct that directly or indirectly undermines the enjoyment of ESC rights in other countries (**ETOPs 20-21**). **Indirect interference** refers to situations in which a State:

- › *impairs the ability* of another State or international organisation to comply with its obligations in relation to ESC rights; or
- › *assists, directs or coerces* another State or international organisation to breach its obligations in relation to ESC rights.

Section IV: Obligations to protect ESC rights abroad

Section IV outlines States' obligations to protect ESC rights in other countries.

KEY MESSAGES:

States must individually and in cooperation with other States protect ESC rights at home and abroad (ETOP 23, 27).

- › They must take **regulatory measures** to ensure that non-State actors, including transnational corporations, do not infringe upon ESC rights (ETOP 24).
- › They must not curtail the ability of other States to comply with their protect obligation (ETOP 24).

A State has an obligation to regulate a non-State actor to protect ESC rights in the following situations (ETOP 25):

- › the harm originates in its territory;
- › the non-State actor has that State's nationality;
- › the corporation or its parent/controlling company has its centre of activity or substantial business activities, is registered or domiciled in its territory;
- › there is a reasonable link between the State and the conduct it seeks to regulate (e.g., if the company involved in human rights abuses has assets in the country); or
- › a peremptory norm¹¹ of international law is at risk of being violated.

Even where a State is not in a position to effectively regulate a non-State actor, it should **use its influence** to protect ESC rights, for example through its public procurement policies and diplomacy (ETOP 26).

Section V: Obligations to fulfil ESC rights abroad

Section V elaborates the obligations States have to fulfil ESC rights in other countries.

KEY MESSAGES:

States must take concrete steps, individually and through international cooperation, towards **creating an international environment that is conducive to the universal fulfilment of ESC rights** (ETOP 29). This concerns, among others, matters relating to trade, investment, taxation, finance, environmental protection, and development cooperation. It is to be achieved through:

¹¹ A peremptory norm, also referred to as *jus cogens* or 'compelling law', is a norm that the international community as a whole has recognized and from which no derogation is possible. There is considerable debate however about which norms have the status of peremptory norms. Examples of generally accepted peremptory norms are the prohibition of genocide, torture and slavery.

- › elaboration, implementation, and review of international agreements and standards;
- › domestic and foreign policies and measures (including through international organisations) that can contribute to the fulfilment of ESC rights in other countries.

States efforts to fulfil ESC rights through international cooperation must be guided by the following **principles and priorities (ETOP 32)**:

- › prioritization of the rights of marginalized and vulnerable groups;
- › focus on core obligations to ensure “minimum essential levels” of ESC rights (e.g., access to basic primary health care);
- › observance of international human rights standards (e.g., right to participation and non-discrimination); and
- › avoidance of retrogressive measures¹² (e.g., the privatization of essential public services where such results in reducing existing access or quality).

States have both an **obligation to provide** and **to seek international assistance** as part of their broader obligation to cooperate internationally.

- › States that are in a position to do so must assist others in fulfilling ESC rights, in line with the priorities and principles spelled out in ETOP 32 (**ETOP 33, 35**). A State's obligation to contribute to the extraterritorial fulfilment of ESC rights is commensurate with its available resources, capacities and influence in international decision-making processes (**ETOP 31**).
- › States that are unable to guarantee ESC rights within their territory must approach others for assistance on mutually agreed terms (**ETOP 34**).

Section VI: Accountability and Remedies

Section VI deals with States' obligations to put effective accountability mechanisms into place and ensure access to remedies for extraterritorial violations of ESC rights.

KEY MESSAGES:

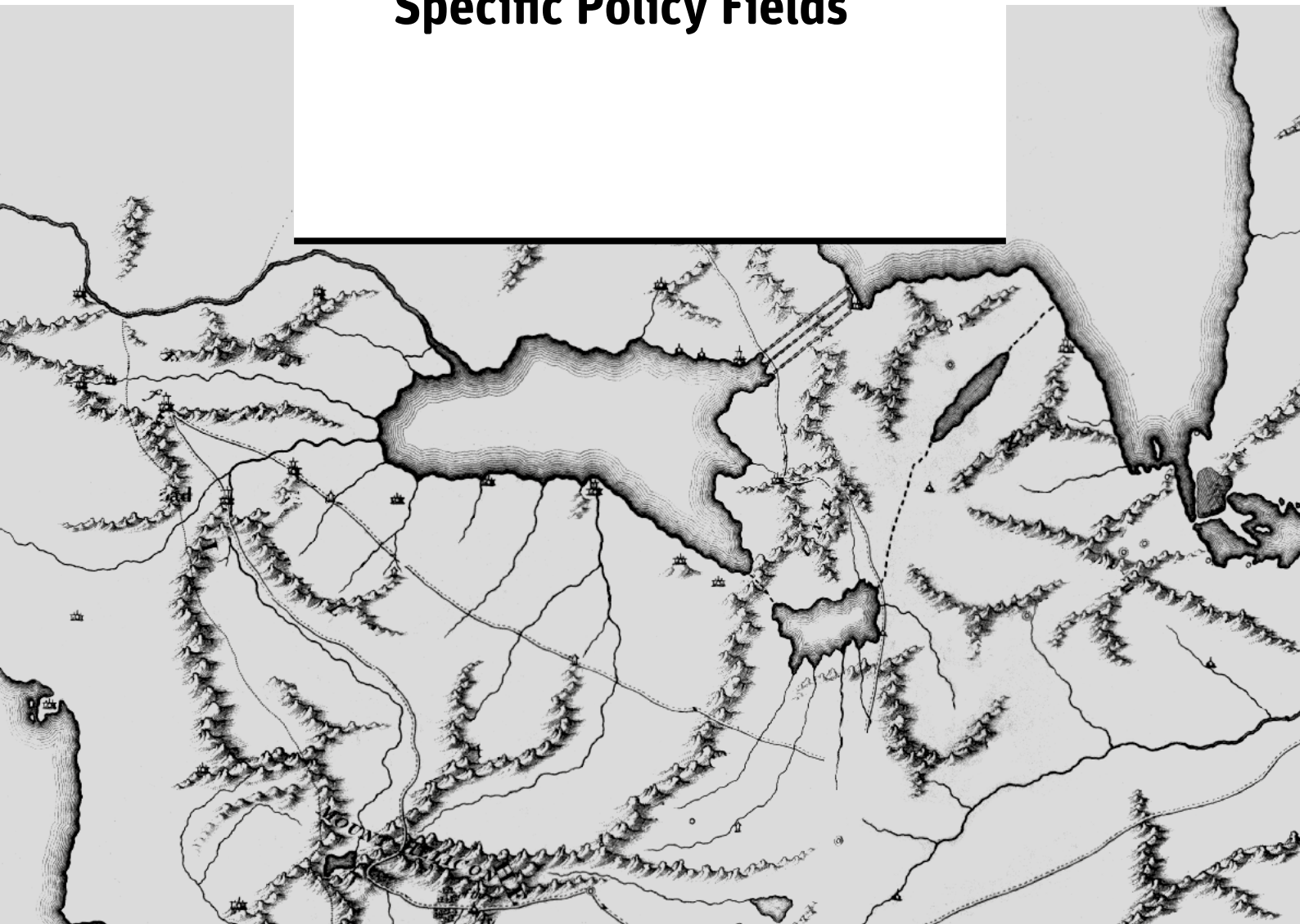
Maastricht Principle 37 reaffirms and provides guidance on States' obligations to guarantee access to effective remedies, including judicial ones, for violations of ESC rights.

- › In the case of extraterritorial violations of ESC rights, **any State concerned must provide remedies to the victims.**
- › States should ensure that victims participate in the determination of appropriate remedies, and that they can access remedies both at the national and international level.

States should strive to develop judicial mechanisms at the international level (**ETOP 37e**), and make use of inter-State complaint mechanisms to seek reparations on behalf of victims in cases of extraterritorial violations (**ETOP 39**).

¹² See CESCR General Comment No. 3 (“The Nature of States Parties' Obligations”) for further explanation of the concepts of core obligations, retrogressive measures, etc. Available at: www.refworld.org.

PART TWO
Application of ETOs to
Specific Policy Fields



Part Two:

Application of ETOs to Specific Policy Fields

This section will look at how ETOs apply to specific policy fields and sites of social struggles, and how they can be used for advocacy in these contexts. The areas covered are: trade and investment (chapter 1), intergovernmental organisations (chapter 2), regulation of transnational corporations (chapter 3), development cooperation (chapter 4), climate change and eco-destruction (chapter 5), and land and natural resource grabbing (chapter 6). There are of course many other areas in which ETOs hold relevance, which however could not be dealt with in-depth in the handbook (e.g., financial regulation and tax justice). Each chapter is followed by illustrative case studies that have been prepared by members of the ETO Consortium.

Chapter 1:

Trade and Investment

Introduction



The international trade and investment regime we have today is fundamentally at odds with the vision of an international economic order that promotes social justice and human rights as put forward in the UN Charter. Its rules tend to be negotiated behind closed doors in highly undemocratic processes, heavily influenced by large corporate and financial elites, while the general public – and even its parliamentary representatives – is largely excluded. The resulting rules and regulations are, as a result, often biased towards corporate interests, rather than promoting the rights and well-being of people. Far from being an engine for economic growth and development in the classical ‘win-win’ situation that governments tend to refer to when promoting trade and investment agreements, the reality is a deepening of the entrenched inequalities between and within countries.

Some of the outcomes of the current trade and investment regime with adverse human rights impacts include:

- › downgrading of environmental, social and public health standards;
- › frustration, suppression and avoidance of local and national democratic processes;
- › destruction of local markets and livelihoods of small-scale food producers, creation of dependencies on imported food and promotion of unhealthy, highly-processed food and related rise in non-communicable diseases (NCDs);
- › privatisation and commodification of public goods and services;

- › constraining of access to essential medicines and seeds due to introduction of highly restrictive intellectual property rights regimes (see **Case Study 1.3**); and
- › further concentration of wealth in the hands of a few transnational corporations (TNCs) at the expense of people and the environment.

One aspect of particular concern from a human rights perspective is the manner in which trade and investment agreements can interfere with the public policy space and thereby effectively curtail the ability of States to take regulatory and other measures required for the realization of human rights. A prominent example is the WTO rules on subsidies and public procurement, which present significant hurdles to countries in the Global South that wish to support their agricultural production to promote national food and nutrition security.¹³ Another example that has recently attracted significant attention is investor-state dispute settlement (ISDS) provisions in international investment agreements (see **Case Study 1.2**).

The latter have allowed TNCs to sue sovereign States in private tribunals for enacting public interest policies aimed at, for example, the protection and promotion of public health, workers' rights, or the environment, because these threatened to reduce returns from their investments. The procedural costs of engaging in investment disputes, as well as the hefty awards placed on States in case of loss, not only drain public resources that could have otherwise been used towards measures aimed at the progressive realization of human rights, but may also have a 'chilling effect' on other States that are considering similar policies. They hence provide a direct mechanism for corporations to interfere with legitimate public policy making of States, and present a significant threat to States' ability to implement measures required to protect and fulfil human rights.¹⁴

What are States' ETOs in relation to Trade and Investment?

OBLIGATIONS TO AVOID NEGATIVE IMPACTS OF TRADE AND INVESTMENT AGREEMENTS

Maastricht Principle 13 describes the general obligation of States to "desist from acts and omissions that create a real risk of nullifying or impairing the enjoyment of economic, social and cultural rights abroad". This also applies to the adoption and implementation of policies and international agreements in the area of trade and investment. When developing and negotiating such policies and agreements, States must take steps to ensure that they are compliant with human rights and will not negatively affect human rights in their own and in other countries (**ETOP 17**).¹⁵ The same applies to their implementation and interpretation, which must be carried out in a manner consistent with States' human rights obligations.

¹³ For more information, see Patnaik, B. "Inequity Unlimited: Food on the WTO Table." *Right to Food and Nutrition Watch: Peoples' Nutrition is not a Business* 7 (2015): 45-49. www.righttofoodandnutrition.org.

¹⁴ For more information, see: CEO and TNI (2012). *Profiting from Injustice: How law firms, arbitrators and financiers are fuelling an investment arbitration boom*. Available at: www.tni.org. See also: Both ENDS (2015). *To change a BIT is not enough: On the need to create sound policy frameworks for investments*. Available at www.bothends.org.

¹⁵ While the primary effects will be felt in those countries that are parties to the agreement, potential impacts on other countries also need to be taken into account.

The Maastricht Principles distinguish between *direct* and *indirect interference* with human rights in other countries (ETOP 20-21). **Direct interference** refers to actions and omissions that have a direct bearing on the enjoyment of ESC rights in other countries. One example could be a policy that by promoting subsidized agricultural exports causes small-scale food producers in other countries to lose access to local markets and related income, and thereby impairs their right to adequate food and nutrition.¹⁶ Another example could be a trade embargo that has direct effects on people’s access to essential medicines or food.

Indirect interference describes situations in which a State knowingly either impairs the ability of another State to comply with its human rights obligations, or assists, puts pressure on, or forces another State to breach its human rights obligations. This could be the case, for example, if a State pressures another State to agree to international trade or investment rules that effectively reduce that State’s ability to implement policy reforms crucial for the progressive realization of ESC rights (e.g., improvements in labour standards or agrarian reform), or which require it to adopt retrogressive measures. For example, the privatization of basic public services or the adoption of Intellectual Property Rights (IPR) rules that undermine access to essential medicines or seeds (see **Case Study 1.3**).

Box 1.1: The Primacy of Human Rights over Trade and Investment Law

All Member States of the United Nations (as of date 193) are bound by the obligations enshrined in the United Nations Charter, which is akin to a world constitution. One of the core purposes of the UN, expressed in Articles 1(3) and 55, is the promotion of “universal respect for, and observance of, human rights and fundamental freedoms for all”. UN Member States have pledged to take individual and joint action to achieve this objective (Art. 56).

Article 103 of the Charter states that “in the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter *shall prevail* [emphasis added].” Thus, the human rights obligations enshrined in the UN Charter, and subsequent human rights instruments, have primacy over obligations arising from other international agreements, including trade and investment treaties. Such treaties must be interpreted in a manner coherent with human rights, and must be adjusted or considered void (invalid) in case of incompatibility.

The **Vienna Convention on the Law of Treaties** provides additional guidance on the hierarchy of norms in international law. Whereas in principle there is no hierarchy between the different sources of international law, an exception is made for ‘peremptory norms’ of international law (Article 53). These norms (also referred to as *jus cogens* or ‘compelling law’) are norms that the international community as a whole has accepted and which are so vital that no

16 For more information, please see: Paasch, A. (2009). “World Agricultural Trade and Human Rights – Case Studies on Violations of the Right to Food of Small Farmers.” In *The Global Food Challenge: Towards a Human Rights Approach to Trade and Investment Policies*, edited by Sophia Murphy and Armin Paasch, 40-49; available at www.in.boell.org. See also: Equitable Cambodia and Inclusive Development International (2013). *Bittersweet Harvest: A Human Rights Impact Assessment of the European Union’s Everything But Arms Initiative in Cambodia*; available at: www.inclusivedevelopment.net.

derogation is permitted. Examples of peremptory norms are the prohibition on the use of force, the law of genocide, principle of racial non-discrimination, crimes against humanity, and the rules prohibiting trade in slaves or human trafficking. Human rights are – at least partially – considered to constitute peremptory norms of international law.¹⁷ Treaties that conflict with a peremptory norm are to be considered void.

For further information, see: *De Zayas, A.* (2015) and *De Schutter, O.* in Murphy and Paasch (2009).

A State that through its trade policies and practices impairs the enjoyment of human rights in another country is internationally responsible whenever it was aware or *should have been aware* (but failed to seek relevant information) of the risks related to its conduct (ETOP 13). As the human rights impacts of trade and investment are not always clear from the outset, States must carry out prior **human rights impact assessments** (HRIAs) to identify potential risks (ETOP 14, see **Case Studies 1.1** and **1.3**).¹⁸

The Maastricht Principles highlight that such assessments should be carried out in a transparent manner and allow for **public participation**, in particular, of groups whose rights might be at risk. Moreover, they must be conducted at an early stage of negotiation, so that they can still meaningfully influence the priorities set for the negotiation and the outcomes. The former UN Special Rapporteur on the right to food, Olivier de Schutter, has developed guiding principles on HRIAs of trade and investment agreements which provide guidance to States on how to ensure consistency of such agreements with their human rights obligations.¹⁹

To avoid harm, States must beyond prior impact assessments, regularly assess the actual impacts of trade and investment agreements and establish mechanisms through which people can raise human rights concerns related to these (ETOPs 36-40). Once it becomes clear that an international agreement or domestic policy has adverse human rights impacts, States must review and adjust the respective policy/agreement, or refrain from implementing it to the extent of the inconsistency with their human rights obligations (ETOPs 17, 20, 21).

OBLIGATIONS TO ENSURE A POSITIVE IMPACT OF TRADE AND INVESTMENT AGREEMENTS

States' extraterritorial obligations require States to take individual and joint steps to "create an international enabling environment conducive to the universal fulfilment of economic, social and cultural rights" (ETOP 29). This also applies to their policies and practices in relation to trade and investment. When designing and implementing trade and investment policies and agreements, States must take "deliberate, concrete and

17 There is no universal agreement as to which human rights have the status of peremptory norms.

18 The obligation to carry out HRIAs has been reaffirmed on several occasions by UN human rights bodies, including most recently by the CESCR in its General Comment No. 24 on State obligations in the context of business activities. Available at: www.ohchr.org.

19 De Schutter, O. *Guiding Principles on Human Rights Impact Assessments of Trade and Investment Agreements*. A/HRC/19/59/Add.5. December 2011. Available at: www.srfood.org.

targeted steps” to ensure that these contribute to the fulfilment of human rights. This entails, among others, regularly reviewing them and interpreting them in a manner that is conducive to the fulfilment of ESC rights at home and in other countries.

States’ obligations in the context of trade and investment also extend to negotiations that are conducted within the framework of international organisations, such as the WTO, or that are conducted on their behalf by a supranational body, such as the EU, to which they have transferred competences (ETOP 15, see Chapter 2).

Box 1.2: The Maastricht Principles: A Tool for Both Civil Society and Governments

Any State ratifying a trade or investment agreement must ensure that its implementation will not cause negative human rights impacts on the people living in its territory. Should such impacts nevertheless occur, it must immediately cease implementation of the agreement, or interpret it in a way that is compliant with its human rights obligations. A State, however, may not always be able or willing to do so. It may place economic and other considerations above human rights, may be convinced by (misleading) promises of economic development, or face pressure from other States to ratify a certain agreement despite human rights risks. Once ratified, there is often little flexibility for States to implement treaty provisions in a manner coherent with their human rights obligations, and sanctions may apply if they do. Moreover, often it is only after several years (unless there is mutual consent) that an agreement can be revised or terminated.

In such cases, the Maastricht Principles provide a useful tool for both civil society and governments to call on other State parties to allow for the cancellation or revision of trade and investment agreements that conflict with human rights. They highlight that this is not only permissible but indeed required under international law when human rights are at risk. Moreover, they clarify that it is a collective responsibility of *all* State parties to an international agreement to ensure that implementation does not undermine human rights in any of the participating countries, or even in third countries.

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De Shutter, O. *Guiding Principles on Human Rights Impact Assessments of Trade and Investment Agreements*. A/HRC/19/59/Add.5. December 2011. Available at www.srfood.org

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Case Study 1.1: EU Trade Policies Ignore ETOs Enshrined in Lisbon Treaty²⁰



By contesting the existence of extraterritorial human rights obligations, the EU and European governments seem to ignore that Articles 3 and 21 of the Lisbon Treaty of the European Union (TEU) clearly oblige the EU to at least respect and promote human rights not only within the EU but also abroad. Without any doubt, these obligations also cover its trade and investment policies. Practice presents a different picture though.

Studies have raised serious concerns about violations or threats to human rights arising from existing and future EU trade agreements with African countries, Columbia, Peru, India and others. Excessive tariff cuts can trigger import surges of milk powder, tomato paste and chicken parts and drive smallholders out of their local markets in West Africa. Excessive intellectual property rights provisions can limit access of farmers to seeds in Peru and Colombia and access to medicines in these countries and in India. Opening retail for big supermarket chains can destroy millions of jobs in the informal sector in India. In all these cases, the right to food and other rights are under threat.²¹

In addition, investment chapters in trade agreements contain provisions on “fair and equitable treatment” and against “indirect expropriation” that protect so called “legitimate expectations” of European investors against regulations, including in areas such as land tenure, water services, and environmental and health protection, with potentially huge human rights implications. The reform proposal of the European Commission in the context of negotiations on the Transatlantic Trade and Investment Partnership (TTIP), which claims to protect the “right to regulate”, does not even mention human rights as a “legitimate welfare objective”. Provisions on “regulatory cooperation” would moreover add another instrument for companies to prevent regulations. A study on behalf of the Catholic Agency for Overseas Development (CAFOD) concludes that TTIP could become a serious obstacle for EU Member States in implementing even the weak UN Guiding Principles on Business and Human Rights.²²

These threats are even greater considering that the EU does not have any effective instruments and mechanisms in place to avoid negative human rights impacts of its trade policies. Sustainability Impact Assessments (SIA), which the EU has been conducting since

²⁰ Prepared by Armin Paasch, Business and Human Rights Officer at MISEREOR.

²¹ See Paasch, A. (2011). *Human Rights in EU Trade Policy – Between Ambition and Reality*. Aachen/Berlin: MISEREOR, Heinrich Böll Foundation and Glropolis. Available at: www.s2bnetwork.org.

²² CAFOD (2016). *Leader or laggard? Is the UK meeting its commitments on business and human rights?* Available at: www.cafod.org.uk.

1999 on all its trade agreements, do not cover human rights so far.²³ The recently updated Handbook for Trade Sustainability Assessments of the European Commission (EC) now includes human rights as one key component of sustainability.²⁴ This is a step in the right direction, however the problem remains that such SIA will be concluded at an advanced stage of negotiations. To have a real impact on the outcome of negotiations, they should be conducted early enough to inform the trade mandate that defines the position of the EC in a given negotiation process.

Human rights clauses are another key instrument, routinely included in all EU trade agreements since the early 1990s. These however fail to meet the ETO requirements of the Lisbon Treaty. While they allow parties to the treaty to take measures against another party when the latter commits serious human rights violations, they do not allow a party to take measures to protect human rights domestically when such measures contradict provisions of the trade agreement.²⁵ They thus do not shield people in third countries against negative human rights impacts of EU trade agreements.

When EU Trade Commissioner Cecilia Malmström announced a new trade strategy in March 2015, she raised the expectation that it would go “beyond our current approaches on labor and human rights”. The result however is disappointing. The new trade and investment strategy²⁶ published in October 2015 does not only fall short of strengthening existing human rights instruments, but may even seriously weaken them. This is especially true for human rights clauses. Instead of reforming these in a way that would protect policy spaces of countries to comply with their human rights obligations, the strategy does not mention the clauses at all. For a 36-page document that claims to focus on sustainability and human rights, this is worrying.

Case Study 1.2: Challenges Posed by International Investment Agreements and Investor-State Dispute Settlement to the Realization of Human Rights²⁷



The problematic nature of the international investment protection regime – comprised of over 3,200 bilateral investment treaties (BITs)²⁸ and investment rules in free trade agreements – stems from the imbalanced approach that focuses on investors' rights and neglects investors' responsibilities. Investment rules often lack express recognition of safeguards for States' sovereign right to regulate in the public interest. This is added to deep concerns regarding democratic governance and accountability under investor-state dispute settlement (ISDS) mechanisms (and similar

23 See Bürgi Bonanomi, E. (2014). *EU Trade Agreements and their Impacts on Human Rights*. Study commissioned by the German Federal Ministry for Economic Cooperation and Development (BMZ). Available at: www.boris.unibe.ch.

24 European Commission (2016). *Handbook for Trade Sustainability Impact Assessment (2nd Edition)*. Available at: www.ec.europa.eu/trade.

25 Lorand, B. (2014). *A Model Human Rights Clause for the EU's International Trade Agreements*. Available at: www.institut-fuer-menschenrechte.de.

26 *Trade for all: Towards a more responsible trade and investment strategy*. Available at: www.ec.europa.eu/trade.

27 Prepared by Kinda Mohamadieh, Advisor to the Arab NGO Network for Development (ANND) and Research Associate at the South Centre.

28 UNCTAD (2015). *World Investment Report 2015: Reforming International Investment Governance*. Geneva: UN. Available at: www.unctad.org.

mechanisms such as the investment court currently proposed by the EU) through which private arbitrators have asserted jurisdiction over a wide scope of issues, including regulatory policies pursuing the fulfilment of ESC rights.

The lack of transparency and available public information on ISDS procedures limits the space for public participation and accountability. Within this context, claims or threats thereof by investors against a particular State are increasingly used as ways to prevent new legislation and other measures from being adopted or applied, thus in effect creating a ‘chilling effect’ on regulatory processes.²⁹ UN experts have highlighted “the potential detrimental impact these treaties and agreements may have on the enjoyment of human rights as enshrined in legally binding instruments, whether civil, cultural, economic, political or social”.³⁰ These include the rights to life, food, water and sanitation, health, housing, education, science and culture, improved labour standards, an independent judiciary, a clean environment and the right not to be subjected to forced resettlement.

According to Article 103 of the UN Charter, trade and investment agreements must be applied in conformance with the UN Charter (see **Box 1.1**). They must not lead to the erosion of or retrogression in human rights protection or compromise a State’s sovereignty and fundamental obligation to guarantee human rights.³¹ Moreover, facilitating the access of companies to foreign markets through investment treaties that do not uphold the supremacy of human rights obligations could be seen as a State aiding or assisting internationally wrongful acts in the case of corporate human rights abuses.³²

Maastricht Principles 17 and 29 clarify the responsibility of States to elaborate, interpret and apply investment agreements, among other economic agreements, in a manner consistent with their human rights obligations. These principles also point to the responsibility of States to “take deliberate, concrete and targeted steps, separately, and jointly through international cooperation, to create an international enabling environment conducive to the universal fulfilment of economic, social and cultural rights”. In light of the severe imbalances and negative human rights impacts outlined above, compliance with this obligation would require a fundamental restructuring of the current investment system.

Some States are taking steps in this direction.³³ A number of countries in the Global South are choosing to withdraw from international investment agreements (IIAs)³⁴ or revert to alternatives such as national investment laws that uphold the protection and promotion of rights enshrined in their constitutions.³⁵ Other countries have been reviewing their investment treaty models. In these processes, some have considered the

29 For more information, see: Cezary Wiśniewski and Olga Górka (30 September 2015) “A Need for Preventive Investment Protection?” *Kluwer Arbitration Blog*. Available at: www.kluwerarbitrationblog.com.

30 *UN experts voice concern over adverse impact of free trade and investment agreement on human rights*. Media statement, Geneva, 2 June 2015. Available at: www.ohchr.org.

31 *Independent Expert calls for an end to secret negotiations of free trade and investment agreements until public consultation and participation is ensured and independent human rights impact assessments are conducted*. Info Note, Monday, 30 March 2015. Available at: www.dezayasalfred.wordpress.com.

32 McCorquodale, R. and Simons, P. (2007). “Responsibility Beyond Borders: State Responsibility for Extraterritorial Violations by Corporations of International Human Rights Law.” *The Modern Law Review* 70: 598-625.

33 South Centre (2015). *Investment Treaties: Views and Experiences from Developing Countries*, available at: www.southcentre.int. See also *Investment Policy Briefs*, available at: www.southcentre.int.

34 A recent example is Ecuador, which in May 2017 terminated its remaining 16 bilateral investment treaties. For further information, see: www.tni.org.

35 See for example: Republic of South Africa *Promotion and Protection of Investment Bill*, under consideration by the South African Parliament at the time of writing (October 2015).

inclusion of elements that would potentially allow the ‘home state’ of the foreign investor to exercise extraterritorial jurisdiction where this appears necessary to avoid impunity and ensure access to effective remedies for victims.³⁶ Other elements considered include an explicit requirement that investors and their investments be subject to and comply with the laws of the ‘host state’, including laws relating to human rights.³⁷

Case Study 1.3: Human Rights Impact of Strict Plant Variety Protection Laws³⁸



Agriculture in most countries of the Global South is characterized by small-scale farming that relies heavily on the farmer seed system – the so-called ‘informal’ rather than the formal or commercial (based on industrial varieties) seed system. Thus, the informal seed system is the basis for farmer livelihoods as well as national food security in many countries. The widespread practice of freely saving, replanting, exchanging and selling seed is one of the primary features of farmer seed systems and cornerstone for the realization of the rights of peasants, as recognized in the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA) and the draft UN Declaration on the Rights of Peasants.³⁹ Unlike in more formal, industrial agricultural systems, purchasing new seed on a yearly basis is relatively rare.

Box 1.3: Plant Variety Protection (PVP) under the International Convention for the Protection of New Varieties of Plants (UPOV Convention)

PVP is a form of intellectual property protection for plant varieties. They share a number of characteristics with patent rights: They provide exclusive commercial rights to the holder, and are granted for a limited period of time after which they pass into the public domain. However, patent rights can cover a wide range of subject matter, whereas PVP covers plants only. Moreover, in contrast to a PVP system, usually a patent system does not provide for exceptions. While there are different models of plant variety protection, national PVP laws are increasingly based on the 1991 Act of the International Convention for the Protection of New Varieties of Plants (UPOV 91). That is, International Union for the Protection of New Varieties of Plants (UPOV) member countries are obliged to implement the respective provisions in their national laws. The most recent version of the UPOV Act substantially restricts farmers’ rights to freely use, exchange and sell farm-saved seeds.

36 See Article 13 of the draft Indian Model BIT, available at: www.mygov.in. Note that this article was not included in the final version of the Indian Model BIT, released by the Indian Government in January 2016.

37 See Article 12 of the draft Indian Model BIT. Article 11 of the final version requires compliance with “all laws, regulations, administrative guidelines and policies of a Party concerning the establishment, acquisition, management, operation and disposition of investment”.

38 Prepared by Thomas Braunschweig, Trade Policy Officer, Public Eye (formerly Berne Declaration).

39 See in particular the preamble and Articles 6 and 9 of the ITPGRFA. The treaty text is available at: www.fao.org. For further information on the right to seeds in the draft UN Declaration on the Rights of Peasants, see: Monsalve Suárez (2016). *The right to seeds and biological diversity in the UN Declaration on the Rights of Peasants and other People working in Rural Areas*. Available at www.fian.be.

There is increasing evidence that introducing strict domestic Plant Variety Protection (PVP) regimes (see **Box 1.3**) reduces the effectiveness of farmer seed systems by restricting the practices of seed management and sharing among farmers. It is worth noting in this context that several of the countries in the Global South joining UPOV 91 have done so under bilateral pressure or due to obligations under North-South trade arrangements, which require ratification of UPOV 91.

Since adequate access to seed is considered a key element to realize the right to food for small-scale farmers and their families, and food and nutrition security more broadly, overly restrictive PVP laws essentially become a human rights issue. Consequently, observers have pointed to the need to analyse the implications of such protection regimes on the enjoyment of the right to food, especially of the rural poor.

While ensuring the right to food for its population lies primarily with national authorities, the UN Committee on Economic, Social and Cultural Rights (CESCR) has repeatedly called on countries in the Global North to “undertake an impact assessment to determine the possible consequences of its foreign trade policies and agreements on the enjoyment by the population of the State party’s partner countries of their economic, social and cultural rights”.⁴⁰ The call has been echoed by the Maastricht Principles in Principle 3: “All States have obligations to respect, protect and fulfil human rights, including civil, cultural, economic, political and social rights, both within their territories and extraterritorially”. And Principle 29 makes clear that State duties also extend to trade policy: “States must take deliberate, concrete and targeted steps [...] to create an international enabling environment conducive to the universal fulfillment of economic, social and cultural rights, including in matters relating to bilateral and multilateral trade [...]”. To date, however, no government has met these obligations in the area of intellectual property rights (IPR) in agriculture.

To raise awareness among actors in both the North and South about the potential human rights effects of UPOV 91-like PVP laws, an international group of NGOs carried out a HRIA.⁴¹ HRIAs differ in three important ways from other types of impact assessments. First, they are firmly rooted in legal norms. Secondly, they focus on poor, vulnerable or otherwise disadvantaged groups whose human rights are most likely to be at risk. Thirdly, the very process of carrying out these assessments must respect human rights, for instance, through an inclusive process.⁴²

The outcome of the ex-ante assessment reveals that the expansion of intellectual property rights on seeds might well restrict small-scale farmers’ practices of seed saving and exchange in farmer seed systems, by limiting access to protected seeds and thus putting farmers’ right to food at risk. Furthermore, they could affect the right to food, as well as other human rights, by reducing the amount of household income that is available for food, healthcare or schooling. Based on the study’s findings, specific recommendations have been made to a range of stakeholders, including governments, the UPOV Members and Secretariat, providers of technical assistance, and civil society organizations.⁴³

40 See, for instance, CESCR’s concluding observations to Switzerland (2010, E/C.12/CHE/CO/2-3). Available at: www.ohchr.org.

41 Braunschweig, T. et al. (2014). *Owning seeds, accessing food: A human rights impact assessment of UPOV 1991 based on case studies in Kenya, Peru and the Philippines*. Zurich: The Berne Declaration. Available at: www.publiceye.ch.

42 The guiding principles on HRIA of trade and investment agreements published by the UN Human Rights Council (A/HRC/19/59/Add.5) are certainly a good starting point when embarking on an HRIA. *Supra* note 19.

43 It is important to note that States also have human rights obligations as members of international organizations, as stated in Principle 15 of the Maastricht Principles (see Chapter 3).

FURTHER INFORMATION:

Braunschweig, T. *et al.* (2014). *Owning seeds, accessing food: A human rights impact assessment of UPOV 1991 based on case studies in Kenya, Peru and the Philippines*. Zurich: The Berne Declaration. See also corresponding factsheet. Available at: www.publiceye.ch.

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Chapter 2

Intergovernmental Organisations

Introduction



Decisions taken by States within intergovernmental organisations (IGOs) and the actions carried out by these organisations can impact the enjoyment of human rights in various ways. For example:

- › Loan conditions imposed by international financial institutions (IFIs) can negatively affect recipient States' capacities to mobilize resources for the domestic fulfilment of ESC rights (see **Case Study 2.2**).
- › Trade and investment agreements concluded by IGOs (e.g., the EU) or in the framework of IGOs (e.g., within WTO) can contribute to downgrading, or impeding the adoption of, standards which serve to uphold people's human rights (see **Chapter 1**).
- › Development projects, such as large-scale energy plants, or tourist resorts financed by international or regional development banks can impact the livelihoods of indigenous peoples and peasant communities (see **Chapter 4** and **Case Study 2.1**).
- › Regional policies adopted by IGOs in areas such as mining, tourism, agrochemicals, or energy can negatively impact a wide spectrum of human rights in member and third countries.

A recent example is the profound impact on ESC rights of the loan conditions imposed on Greece by the 'troika' (namely the European Central Bank, the European Commission and the International Monetary Fund). The former UN Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, in particular ESC rights, Cephias Lumina, described how the troika's adjustment programme policy measures entailed deep cuts in public spending and public sector jobs, tax increases, the privatization of public enterprises, and labour market reforms.⁴⁴ These measures have resulted in homelessness, poverty and social exclusion and severely reduced access to health care and education.

IGOs often claim not to be bound by human rights obligations, and the absence of human rights accountability for their acts and decisions has created an important gap in international human rights protection. Nonetheless, Member States (MS) of IGOs are individually bound by human rights obligations, including extraterritorial obligations (ETOs), and must not ignore or violate these when they come together in IGOs or use them as agents to carry out policies. In addition to the obligations of their Member States, IGOs also carry direct human rights obligations under international law (described further below).

⁴⁴ Lumina, C. *Report of the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights.* (A/HRC/25/50/Add.1). March 27, 2014. Available at: www.ohchr.org.

The Maastricht Principles and their legal commentary present valuable tools for extending State accountability to the acts and omissions of IGOs in which they participate or to which they have transferred competences to. In doing so, they can help fill the current gap in human rights accountability related to IGOs and can complement civil society efforts that seek to hold IGOs directly accountable.

What are States' ETOs as Members of IGOs?

Under international law, a State can be held responsible for both *separate* and *joint acts* with other States or entities which breach its international human rights obligations, including its extraterritorial obligations (ETOP 11). The human rights obligations of States hence extend also to joint actions with other States under the umbrella of IGOs, as detailed in **Maastricht Principle 15**:

As a member of an international organization, the State remains responsible for its own conduct in relation to its human rights obligations within its territory and extraterritorially. A State that transfers competences to, or participates in, an international organization must take all reasonable steps to ensure that the relevant organization acts consistently with the international human rights obligations of that State.

The *respect, protect* and *fulfil* typology of States' human rights obligations also applies to their conduct as members of IGOs.

Maastricht Principles 21 and **22** clarify States' ETOs to **respect** human rights, which require them to refrain from conduct directly or indirectly interfering with the enjoyment of human rights in other countries. Applied to their membership in IGOs, this translates to:

- › refraining from positive steps to encourage actions by an IGO that carry foreseeable risks for the enjoyment of human rights;⁴⁵
- › seeking to minimize negative impacts on human rights once these become clear and to cease actions that could cause further harm.

An example of the latter could be for an EU Member State to push within the European Council for the revision of the EU regulation on agrochemicals with the aim of banning the production and export of certain products proven to impact negatively on people's rights to health, water, food and other related rights.

States' obligations to **protect** can be understood as duties to prevent harmful conduct by IGOs they hold influence over. For instance, by:

- › opposing policies or programmes that could potentially impair the enjoyment of human rights (e.g., structural adjustment programmes that risk reducing people's access to basic public services);
- › demanding the adoption of effective safeguards to ensure human rights consistency of the organisation's policies and activities (e.g., conduct of HRIAs and regular monitoring of activities (ETOP 14), establishment of complaint mechanisms).

45 A State can be held responsible for any harm that is a *foreseeable result* of its conduct (ETOP 13). A harm is considered foreseeable when a State knew or should have known about it, but failed to seek relevant information.

Under the UN Charter and the ICESCR, States have obligations to take separate and joint actions through international cooperation to **fulfil** ESC rights universally and expeditiously (**ETOP 28**).⁴⁶ One important aspect of this – which holds particular relevance for States as members of IGOs – is the obligation to create an “international enabling environment conducive to the universal fulfilment of ESC rights”, including in the area of trade, investment, taxation, finance, environmental protection and development cooperation (**ETOP 29**). Applied to States’ participation in IGOs, this translates into obligations to:

- › ensure that multilateral agreements and international standards adopted within/by the organisation make a positive contribution to the universal fulfilment of ESC rights (e.g., by demanding the regular review of trade agreements to this effect);
- › encourage the development and adoption of international rules and standards that foster the universal fulfilment of ESC rights (e.g., international tax reform), and to not interfere with efforts by other States in this direction.

DIRECT HUMAN RIGHTS OBLIGATIONS OF IGOs

IGOs have obligations under international human rights law to the extent that the respective human rights form part of their constitutions, general international law, or treaties they have entered into. They must always interpret international standards in conformity with these human rights and meet their respective obligations. When they breach these obligations, remedy mechanisms must be available for the victims.

There are several lines of argument to the effect that IGOs are directly bound by human rights obligations. While the Maastricht Principles themselves do not elaborate on the direct obligations of IGOs – as they are focussed on State obligations – the Commentary to **Maastricht Principle 16** presents four different legal sources that can bind IGOs to human rights obligations:⁴⁷

- › **Customary International Law:**
Defined as international law deriving from custom (widely accepted practices and conduct), customary international law is binding upon all subjects of international law, including IGOs. Therefore, IGOs are bound by those human rights obligations which have been agreed upon to be part of customary international law. It has been argued that the Universal Declaration of Human Rights, at the very least, can be understood as part of customary international human rights law.
- › **Treaties:**
IGOs are bound by the human rights obligations enshrined in the human rights conventions they are parties to. As an example, the European Union is party to the UN Convention on the Rights of Persons with Disabilities.
- › **Constitutions:**
IGOs are bound by the human rights obligations contained in their constitutions. United Nations specialized agencies, including the International Monetary Fund and the World Bank Group, are therefore bound by the principles enshrined in the UN Charter which include, amongst other things, the realization of human rights and fundamental freedoms.

⁴⁶ Article 56 and 2(1) respectively.

⁴⁷ De Schutter *et al.* (2012). *Supra* note 4.

› **General Principles of Law:**

As subjects of international law, IGOs are also bound to General Principles of Law. These include legal principles common to a large number of domestic legal systems such as the principle of good faith, the impartiality of judges, or reparation for caused damages.

Box 2.1: The European Union's Human Rights Obligations

The European Union (EU), as an institution, holds human rights obligations under international law as well as under European Union Law. Under Article 3(5) of the Treaty of the European Union (TEU), the EU is required to “uphold and promote its values”. These include “respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities” (Art. 2).

The EU therefore has obligations to respect, protect and fulfil human rights in its foreign relations and to cooperate to this effect. EU domestic policies with an extraterritorial effect must equally be developed and implemented in line with and in pursuance of human rights.

In addition to the human rights obligations enshrined in the TEU and the Treaty on the Functioning of the European Union (TFEU), the EU and its institutions are bound by the human rights obligations established under the Charter of Fundamental Rights of the EU (EU Charter) and general principles of EU Law (Art. 6(1)(3) TEU).

For further information, see: Bartels, L. “The EU's Human Rights Obligations in Relation to Policies with Extraterritorial Effects”. *The European Journal of International Law* 25 (2015): 1071-1091. Available at: www.ejil.org.

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UN CESCR. *Public debt, austerity measures and the International Covenant on Economic, Social and Cultural Rights: Statement by the Committee on Economic, Social and Cultural Rights*. E/C.12/2016/1. 22 July 2016. Available at: www.ohchr.org.

Case Study 2.1: Efforts to Seek Human Rights Accountability of International Financial Institutions (IFIs) in Rio Negro⁴⁸



The *Chixoy Dam* case before the Inter-American Commission on Human Rights provides an example for using ETOs to end the impunity for harm to human rights caused by IFIs. The case deals with the construction of the Chixoy Hydroelectric Dam in Guatemala, a project financed by the World Bank and the Inter-American Development Bank. The project affected 33 Maya Achí communities that lived along the Chixoy River.

During the construction of the dam, several massacres took place as a means to forcibly evict the indigenous population from their ancestral lands. To quell dissent, communities which were perceived to oppose the project suffered several massacres in 1981 and 1982. Over 400 men, women and children were killed, and the community of Rio Negro was literally wiped off the map, leaving only a few survivors. These brutal massacres - carried out by Guatemalan armed forces and associated paramilitary groups operating in the context of Guatemala's internal armed conflict - occurred while the banks supervised the project. Materials from the project were at times used to carry out the massacres. Vehicles from the construction companies were used to transport the perpetrators of the massacres. After the massacres had taken place, rather than using their influence to hold Guatemalan authorities accountable and ensure remedies for the victims of these abuses, the banks disbursed further loans. To date, neither the World Bank nor the Inter-American Development Bank has acknowledged their complicity in these human rights violations, although after years of civil society advocacy they ultimately took steps to support Guatemala in providing reparations for its role in the forced evictions and for economic damages caused by the project.

In 2005, a complaint was filed before the Inter-American Commission on Human Rights, seeking to hold the Member States of the World Bank and Inter-American Development Bank accountable and obtain remedies for the survivors of the massacres and for the 33 dam-affected communities. The complaint focused in particular on the Member States of the boards of directors of the two banks that had both a high share of the decision-making authority at the time and human rights obligations under the Inter-American human rights system. The complaint essentially relied on what were novel arguments at the time but which have now become firmly entrenched in international law. In particular, the complaint argued that Member States of IFIs retain their respective human rights obligations in the context of decisions made within such institutions (See also **Case Study 4.1**).

The complaint based these arguments on Articles 55 and 56 of the United Nations Charter requiring universal respect for human rights, including in international

48 Prepared by Bret Thiele, Executive Director of the Global Initiative for Economic, Social and Cultural Rights.

cooperation, as well as on the Articles on Responsibility of States for Internationally Wrongful Acts, then recently adopted by the International Law Commission. These articles do not require a State to hold territorial jurisdiction in order for it to be held responsible for an internationally wrongful act, such as human rights violations. Instead, what matters is whether an act that violates international law can be attributed to a State. Furthermore, Article 16 of the Articles on Responsibility of States for Internationally Wrongful Acts recognizes that there may be shared responsibility for an internationally wrongful act. Therefore, while the State in which an internationally wrongful act occurs may be liable and held accountable for that act, other States including States acting within inter-governmental organizations such as IFIs that have contributed to that internationally wrongful act also share responsibility and can be held accountable.

Four years after the complaint was filed before the Commission, the Secretariat of the Commission summarily rejected the complaint and has on several occasions refused to provide an explanation for this rejection. In 2011, the dismissal was appealed and the complaint was revised to expressly cite the Maastricht Principles and the underlying international law to which the Principles refer. Although the Commission has yet to consider this appeal, the hope remains that accountability and remedies will finally be achieved.

FURTHER INFORMATION:

Guatemala Sobrevivientes de la Comunidad de Río Negro y otras comunidades similares en Guatemala (The Chixoy Dam Case): Brief in Support of the Appeal Petition filed on December 7, 2011. Submitted to the IACHR by the GI-ESCR, Rights Action and the International Human Rights Clinic at Western New England University School of Law (8 May 2012), available at: www.globalinitiative-escr.org.

Case Study 2.2: Austerity in Greece⁴⁹



Austerity measures adopted in response to the global economic and financial crisis have had a devastating impact on human rights – both economic, social and cultural, and civil and political rights – in Greece. These impacts were not taken into consideration when the measures were implemented, and the State has failed to preserve minimum levels in essential services. Greece also failed to establish that, despite having limited resources at its disposal, its *maximum available resources* had been used to avoid violations of human rights and satisfy its minimum core obligations, as required under international law⁵⁰. Affected groups were not consulted during the design of austerity measures and neither alternative nor less restrictive measures were considered. Austerity measures were not temporary in nature and Greece failed to ensure that they did not disproportionately impact upon the most vulnerable.⁵¹

49 Prepared by Elena Crespi, Director Western Europe at FIDH.

50 UN CESCR. *General Comment No. 3: The Nature of States Parties' Obligations*. (E/1991/23). 14 December 1990. Para. 9-10. Available at: www.refworld.org.

51 On the criteria which austerity measures must meet in order to comply with the human rights framework, see: Office of the High Commissioner for Human Rights. *Report on Austerity Measures and Economic and Social Rights*. (E/2013/82). 2013. Available at: www.ohchr.org.

Based on these considerations, it can be concluded that Greece failed to react to the crisis in a human rights compliant manner. Austerity measures were elaborated and implemented based on agreements between the country and its international creditors (i.e., the European Commission, European Central Bank and International Monetary Fund (IMF)) and were founded on the need for rapid compliance with the requirements set out in these agreements. Although Greece continues to bear primary responsibility for the human rights violations caused by the austerity measures, the European Union (EU), the IMF and their Member States also carry human rights obligations and must be held accountable for violations of these.

The involved States carry extraterritorial human rights obligations for their role in elaborating and implementing austerity measures in Greece, both individually and as members of intergovernmental organisations (IGOs) – namely the EU and the IMF. The States that took part in the negotiations over the economic assistance programmes for Greece had both positive and negative obligations to assist Greece in meeting its human rights obligations. This includes an obligation to ensure that any decision taken by the IGOs in which they are members furthers and does not impair Greece's capacity to respect, protect and fulfil human rights. These obligations should have been discharged during the deliberations that led to adoption of the economic assistance programmes for Greece, by framing the programmes in a way that accounted for human rights obligations and by refusing to take part in programmes that knowingly led to widespread harm to human rights.

In elaborating and implementing austerity measures in Greece, they failed to comply with these obligations. In particular they failed to ensure that human rights impact assessments were conducted prior to, during and after enacting measures to assess potential adverse impacts on human rights. They also failed to ensure participation of potentially affected people and that specific attention be given to impacts on vulnerable groups.

They breached their human rights obligations by setting up mechanisms - such as the European Stability Mechanism (ESM) and its predecessors, the European Financial Stability Facility (EFSF) and the European Financial Stabilisation Mechanism (EFSM) – and entrusting them with the elaboration, negotiation and implementation of economic assistance programmes that make their members' access to vital financial resources contingent on conditions that, had they been imposed by Member States individually or together, would constitute human rights violations.

Their responsibility stands separate from the one that the EU and IMF bear for human rights violations in this context (see **Box 2.1** on the EU's direct human rights obligations).

FIDH carried out a fact-finding mission to Greece in 2014 to investigate the impact that austerity measures had had on human rights. The mission's findings are gathered in a report which also highlights the responsibilities that all the actors involved bear for human rights violations in this context. Based on the report's findings, FIDH engaged in a long-term advocacy strategy targeting the international organisations involved, especially the EU.

At the UN, FIDH and its partner organisation, the Global Initiative for Economic, Social and Cultural Rights, engaged with the UN CESCR when it reviewed Greece in 2015 and advocated for the Committee to acknowledge in its concluding observations that other States – including when acting within IGOs - carry extraterritorial obligations regarding policies which impact economic, social and cultural rights in Greece and should abide by

them. FIDH also provided input into the work that the UN Independent Expert on foreign debt and human rights carried out recently on these issues in Greece and at the EU. Although the impact that austerity policies had on human rights was particularly obvious in countries such as Greece, which had suffered the most from the crisis, their negative effect was felt in most countries across the continent.

The research and advocacy work conducted contributed to raising awareness, including among policy-makers, and launching a debate on these issues, especially at the EU. At the UN, the UN CESCR's concluding observations on Greece reflect to a good extent FIDH and GI-ESCR's recommendations, even though they did not make reference to other States' ETOs in this context. The UN Independent Expert's work reflects FIDH's findings and recommendations. More recently, the UN CESCR has reiterated that States do have obligations in this context, including when acting within IGOs.⁵² Despite these results, there is still a long way to go until other States' ETOs in this context are fully acknowledged at the international level. The Greece research provides a good basis on which to build for further reflection and action in this area.

FURTHER INFORMATION:

FIDH (2014). *Downgrading Rights: The Cost of Austerity in Greece*. Available at: www.fidh.org.

Joint Parallel Report submitted by FIDH (International Federation for Human Rights), the Hellenic League for Human Rights and the Global Initiative for Economic, Social and Cultural Rights (GI-ESCR) on the occasion of the consideration of the Second Periodic Report for Greece during the Committee's 56th Session. August 2015. Available at: www.fidh.org.

Balakrishnan, R. & Heintz, J. (2010). *Making the International Monetary Fund Accountable to Human Rights*. Huffington Post. Available at: www.etoconsortium.org.

52 UN CESCR. *Public Debt, Austerity Measures and the International Covenant on Economic, Social and Cultural Rights*. (E/C.12/2016/1). June 24, 2016. Pp. 3-4. Available at: www.ohchr.org.

Chapter 3:

Transnational Corporations

Introduction



Due to their transnational character, complex corporate and contractual structures, and their immense economic and political leverage, transnational corporations (TNCs) have great potential to harm human rights, often with total impunity. Examples of corporate human rights abuses include:

- › The destruction of the eco-system and natural resources that communities depend on for a livelihood (see **Chapter 5 and 6**);
- › The oppression of workers, including through modern forms of slavery and forced labour, low wages or non-payment of wages, insecure and unsafe work conditions, discrimination against women;
- › Attacks and criminalization of human rights defenders and trade unionists, including through private armed forces, psychological harassment, denial of due process of law;
- › Interference with public policy making, corruption, and tax evasion, all of which have an effect on States' capacity to take measures to realize human rights.

States have an obligation to protect human rights from potential negative impacts resulting from corporate activities. Moreover, they must not collude with harmful activities of TNCs and other business enterprises. As TNCs operate across borders – either as a single firm or as a group of firms – their regulation requires the involvement of various States. Domestic remedies, even if successful, would be insufficient in cases where the domestic firm's harmful activities are actually carried out on behalf of or under the direction of foreign companies. One challenge for the State of the persons and communities affected, the so-called '**host State**', in punishing a harmful firm or securing remedies for victims stems from the difficulties to investigate cross-border crimes, to persecute company officials abroad, and to implement judgments. An additional difficulty concerns the seizure of assets (in the implementation of judgments), as a firm may have its assets abroad – or quickly transfer them abroad. The seizure of assets is almost impossible without international cooperation. Such cooperation is currently lacking or insufficient. Finally, one of the main difficulties in securing remedies for affected persons and communities and holding TNCs accountable stems from the collusion between some States and TNCs headquartered or registered under their jurisdiction. States of origin of TNCs, so-called '**home States**', can exercise political and commercial pressure in order to avoid judicial procedures against 'their' companies (see **Case Study 3.2**).

Human rights are the yardstick for the quality – if not legitimacy – of domestic and international law. States have to regulate, monitor, investigate and, if necessary, sanction companies and managers, in order to comply with their obligation to protect human rights. When they fail to do so, they violate the human rights of the persons and communities

who have been harmed by the companies' conduct. Unfortunately, this is happening at an alarming scale. Only a few countries, such as the UK, France, and the Netherlands, have national corporate criminal laws in place to deal with corporate human rights abuses, in particular where those affected live in other countries (see **Case Study 3.3**). International corporate criminal law is still underdeveloped. The regulation of TNCs is an issue that requires mandatory international cooperation amongst States, which can be established through treaties and agreements that create the needed criminal, administrative and civil law, as well as mechanisms for enforcement.

What are States' ETOs in relation to the Regulation of TNCs?

The Maastricht Principles summarize the international law standards developed so far (at the time of their adoption) with respect to States' protect obligations in the context of business operations. **Maastricht Principle 24** recalls that:

*All States must take necessary measures to ensure that non-State actors **which they are in a position to regulate**, as set out in Principle 25, such as private individuals and organisations, and transnational corporations and other business enterprises, do not nullify or impair the enjoyment of economic, social and cultural rights [emphasis added].*

All States carry obligations to protect human rights in their country and abroad. The Maastricht Principles distinguish between situations in which States have to regulate companies, and those in which they don't. Even in the latter case, States have an obligation to use their influence to protect human rights to the extent possible, for instance, through diplomacy and public procurement (e.g., by not purchasing goods or services from a company that is involved in human rights abuses) (**ETOP 26**).

Maastricht Principle 25 outlines the situations in which a State has obligations to regulate corporations:

- 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) *[...] 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 [...];*
- e) *[the company's conduct] constitutes a violation of a peremptory norm of international law.⁵³ Where such violation also constitutes a crime under international law, States must exercise universal jurisdiction over those bearing responsibility [...].*

The different provisions require some explanation:

Nationality is important for questions of jurisdiction as it provides a basis for regulation. As opposed to individuals, companies do not carry passports. For individuals

⁵³ See *Supra* note 11 for further explanation of peremptory norms.

to hold a passport and therefore nationality of a State, a special relationship to the respective State is usually required. For companies, this special relationship is defined under **Maastricht Principle 25c**, for example, if the company has substantial business activities in that country. If a company ‘carries the nationality’ of a State, it is assumed that this State is able to regulate the company and has to do so. This entails the possibility to strongly intervene against the company, for example by seizure of business assets or even deregistration.

The notion of the home State of a company is often equated with its nationality, that is, with where it “has its centre of activity, is registered or domiciled, or has its main place of business or substantial business activities” (**ETOP 25c**). As becomes clear, a company can have *several home States*. Another important aspect highlighted by ETOP 25c is that regulatory obligations apply not only for the incriminated company’s home State but also for the home State of its “parent or controlling company”.

Regulation is also obligatory for States that have a ‘reasonable link’ to the incriminated company, as outlined under **Maastricht Principle 25d**. There is a reasonable link between a State and a company if, for example:

- › The company has assets in the country that can be seized to implement a judgment of a court.
- › There is evidence or there are eyewitnesses in the country.
- › Accused company officials are present in the country.
- › The company carried out part of the incriminated operations in that country.

Finally, all States, no matter how distantly related to the case, are under an obligation to regulate a company in cases in which international crimes or violations of peremptory norms are concerned, as outlined in **Maastricht Principle 25e**. These include war crimes, crimes against humanity, genocide, torture, and forced disappearances. In such cases, regulation would involve bringing the company and/or its officials before its courts, or handing the case over to another country or international court.

Unfortunately, home States sometimes not only fail to take action against corporate human rights abuses, but even collude with TNCs and other business enterprises and facilitate their offenses. In doing so, they not only fail in their protect obligations but also in their obligations to *respect* human rights abroad.

The Maastricht Principles prohibit *direct interference* by States that nullifies or impairs the enjoyment of ESC rights outside their territories (**ETOP 20**). A concrete example of direct interference would be if a State through its development cooperation or as investor promotes public-private partnership projects or private sector investments abroad that result in human rights impairments (see **Chapter 6** and **Case Study 4.1**).⁵⁴

States may also *indirectly interfere* with the enjoyment of human rights in another country by colluding with companies. Indirect interference refers to situations in which a State impairs the ability of another State to meet its ESC rights obligations, or if it assists, directs, or coerces that State in breaching its human rights obligations (**ETOP 21**). For example if the home State of a transnational mining company exercises undue influence

⁵⁴ See for instance: FIAN International (September 2012). *The Human Rights Impacts of Tree Plantations in Niassa Province, Mozambique*. Heidelberg. Available at: www.fian.org.

in another State's domestic legislative process for the drafting of mining regulations to facilitate the investments of its mining company.⁵⁵ In this case, the home State is exercising pressure on the host State not to take protective measures, thereby breaching its human rights obligations.

Often, when dealing with TNCs, various home States are involved and effective regulation requires cooperation among the various home States and the host State.

Maastricht Principle 27 recalls States' extraterritorial obligation to:

[...] cooperate to ensure that non-State actors do not impair the enjoyment of the ESCR of any persons. This obligation includes measures to prevent human rights abuses by non-State actors, to hold them to account for any such abuses, and to ensure an effective remedy for those affected.

Examples of such cooperation include:

- › Cooperation between home and host States in adopting regulations under their civil, administrative and criminal laws to regulate the activities of TNCs and other business enterprises operating abroad.
- › Both home and host States establish mechanisms to monitor the activities of TNCs and other business enterprises.
- › Complaint mechanisms are made available for affected individuals and communities in the home States of TNCs and other business enterprises, without requiring the exhaustion of remedies in the host State.

The current lack of cooperation to this effect presents a major obstacle in ensuring effective regulation and accountability of companies. The intergovernmental initiative of the UN Human Rights Council (HRC) to adopt a legally binding instrument on TNCs and other business enterprises with respect to human rights is a first and long overdue step to set up such cooperation (see **Case Study 3.1**). States' refusal to engage in such initiatives and to cooperate to this effect is contrary to their extraterritorial obligations to cooperate to protect human rights, as spelled out in **Maastricht Principle 27**.

Box 3.1: CESCR General Comment No. 24 on State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities

In June 2017, the CESCR released a general comment which elaborates on the human rights obligations States hold under the International Covenant on Economic, Social and Cultural Rights (ICESCR) with regard to the business sector, including transnational corporations. A comprehensive part of the general comment is dedicated to States' extraterritorial obligations in this context. The general comment is very clear on the fact that States hold ETOs with regard to business entities over which they may exercise control, including "corporations that are domiciled in their territory and/or jurisdiction: this includes corporations incorporated under their laws, or which have their statutory seat, central administration or principal place of business on their national territory" (para. 31).

⁵⁵ For a concrete example of indirect interference see: Working Group on Mining and Human Rights in Latin America (2014). *The impact of Canadian Mining in Latin America and Canada's Responsibility: Executive Summary of the Report submitted to the Inter-American Commission on Human Rights*. Available at: www.dplf.org

The general comment furthermore recalls States ETOs in the context of trade and investment agreements (para. 29) and deals with the issue of abusive tax practices and financial secrecy policies. States must avoid lowering the rates of corporate taxes which “ultimately undermines the ability of all States to mobilize resources domestically to realize Covenant rights” (para. 37).

Finally, States must tackle the procedural and practical barriers which individuals’ and communities face when accessing remedies in cases involving transnational corporations and therefore various jurisdictions (para. 44). To this effect, the general comment recommends that “the extent to which an effective remedy is available and realistic in the alternative jurisdiction should be an overriding consideration in judicial decisions relying on *forum non conveniens* considerations” (para. 44).

KEY REFERENCES:

Amnesty International (2014). *Injustice Incorporated: Corporate Abuses and the Human Right to Remedy*. London: Amnesty International Publications. Available at: www.amnesty.org.

ESCR-net (August 2014). *Global Economy, Global Rights: A practitioners’ guide for interpreting human rights obligations in the global economy*. Available at: www.escr-net.org.

Gwynne Skinner, Robert McCorquodale, Olivier De Schutter (2013). *The Third Pillar: Access to Judicial Remedies for Human Rights Violations by Transnational Business*. Available at: www.corporatejustice.org.

IACHR. *Indigenous Peoples, Afro-Descendent Communities, and Natural Resources: Human Rights Protection in the Context of Extraction, Exploitation, and Development Activities*. OEA/Ser.L/V/II. Doc. 47/15. December 2015. Available at: www.oas.org.

International Commission of Jurists (2015). *State Obligations Regarding the Impact of the Business Sector on Children’s rights: A practical guide for Non-Governmental Organisations on how to use the United Nations Committee on the Rights of the Child’s General Comment no. 16*. Geneva: Child Rights International Network (CRIN) and International Commission of Jurists (ICJ). Available at: www.icj.org.

UN CESCR. *General comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities*. E/C.12/GC/24. 10 August 2017. Available at: www.ohchr.org.

UN CESCR. *Statement on the obligations of States parties regarding the corporate sector and economic, social and cultural rights*. E/C.12/2011/1. 12 July 2011. Available at: www.ohchr.org.

Case Study 3.1:

Towards a Treaty on Transnational Corporations and Human Rights⁵⁶



Corporate globalization based on communications and transportation technology, innovation, integrated chains of production, and delocalized decision-making is challenging international human rights law's doctrinal focus on the State as holder of the monopoly of power in society. Consequently, the structures of governance established to control the State and hold it accountable to citizens have been shown to be ill-equipped to deal with threats to human rights arising not from the State but from business activity.

All too often business corporations have been responsible for serious human rights abuses, such as environmental damage and denial to people of their means of subsistence, mistreatment of workers, and violent attacks against community leaders. All too often, the growing list of offenses committed by corporations, especially where transnational corporations are involved, remains in impunity, in large measure because of the governance gaps inherent in existing legal structures of human rights accountability and the lack of implementation of extraterritorial human rights obligations.

In the TNC context, governance gaps arise when a State enables the creation of a corporation under its national legislation, but fails to control the corporation when it engages in transnational activity or fails to provide an effective remedy to victims when it impairs human rights. This gap is aggravated when the host State, especially where plagued by weak institutions and corruption, is either unwilling or unable to secure protection to people under its jurisdiction. The result is human rights violations and abuses, massive and systematic environmental destruction, and ultimately corporate impunity.

In 2013, given the gaps and imbalances that undermine human rights accountability of businesses, Ecuador and South Africa made a proposal to the Human Rights Council on the need to elaborate a binding legal instrument on transnational corporations and human rights. They argued that voluntary approaches, such as the UN Guiding Principles on Business and Human Rights, adopted by the Council in 2011, had their limitations and that a binding instrument was needed to overcome these. A heated debate ensued at the Council, gathering great interest from many groups in civil society that had been demanding the elaboration of binding international standards on corporate accountability for decades.

After much discussion, in June 2014 the Council voted and adopted resolution 26/9 that established an open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights (OEIGWG) with the mandate "to elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises."⁵⁷ The resolution specified that, in its first two sessions, the working group would conduct constructive deliberations on the content, scope, nature and form of the future international instrument, and that it would commence negotiations in its third session.

⁵⁶ Prepared by Marcos A. Orellana, Director of the Environment and Human Rights Division at Human Rights Watch.

⁵⁷ HRC Resolution 26/9. *Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights*. A/HRC/RES/26/9. 14 July 2014. Available at: www.ihrb.org.

The first session of the working group took place in Geneva in July 2015.⁵⁸ During the entire week of the session, experts were invited to address the working group in various panels that led to a substantive interactive dialogue. ETOs figured prominently in the presentations and discussions. Speakers and commentators noted that with the advent of economic globalization, the need for international cooperation, including the effective articulation and application of ETOs, is more pressing than ever. They further underscored that ETOs are a central tool in rebalancing the misaligned structures of the current international world order that are leading to corporate crime and impunity. They also observed that a global partnership for the protection of human rights from corporate activity based on ETOs is a key building block for the binding instrument on transnational corporations and human rights.

During the second session of the working group,⁵⁹ which took place from 24 – 28 October 2016, ETOs remained a prominent topic of discussion with two panel discussions dedicated to this topic. The session also demonstrated how the inclusion of ETOs in the prospective treaty is one of the strongest rallying calls of civil society.

FURTHER INFORMATION:

International Commission of Jurists (October 2016). *Proposals for Elements of a Legally Binding Instrument on Transnational Corporations and Other Business Enterprises*. Geneva: International Commission for Jurists. Available at: www.icj.org.

Mohamadieh, K. (October 2016). *Approaching States' Obligations Under a Prospective Legally Binding Instrument on TNCs and Other Business Enterprises In Regard to Human Rights*. Geneva: South Centre Policy Briefs. Available at: www.southcentre.int.

OHCHR. "United Nations Human Rights Council: Open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights". Available at: www.ohchr.org.

Treaty Alliance resource site: www.treatymovement.com/resources/.

58 For further details, see: *Report on the first session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights, with the mandate of elaborating an international legally binding instrument*. A/HRC/31/50. 5 February 2016. Available at: www.un.org.

59 For more information on the second session, see: OHCHR. "United Nations Human Rights Council: Second session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights". Available at: www.ohchr.org.

Case Study 3.2: Prompting the ETOs Debate in the Inter-American Human Rights System⁶⁰



In October 2013, a number of Latin American civil society organizations (CSOs) participated in a hearing before the Inter-American Commission on Human Rights (IACHR) entitled “The impact of natural resource extraction in Latin America and the responsibility of host States and corporations’ home States.”⁶¹ In April 2014, after three years of research, a coalition comprised of CSOs based in Chile, Colombia, Honduras, Mexico, Peru, and the United States published a related report on the impact of Canadian mining companies in Latin America and Canada’s responsibility.⁶² The report examines 22 mining projects carried out in nine countries in the region and identifies a pattern of human rights violations and its underlying causes - notably in Canada, the home-State of the companies involved in the abuses.

The report was officially presented to members of the IACHR in April 2014 and prompted the IACHR after its 150th session to raise awareness as to “emerging issues such as corporate responsibility as regards the impact of extractive industries on the observance of human rights, especially the impact on certain groups such as Afro-descendants and indigenous peoples.”⁶³

Eighth months later, 29 Canadian CSOs under the umbrella of the Canadian Network on Corporate Accountability (NCA) participated in a thematic hearing at the IACHR with the presence of a delegation representing the Canadian government.⁶⁴ During the hearing, the petitioners urged Canada to develop and implement a binding corporate accountability framework to ensure Canadian companies and State actors — including embassies and government-controlled agencies that provide financial support to mining companies — remain accountable and respectful of human rights abroad. The petitioners reiterated the argument based on ETOs addressed in the report on the impact of Canadian mining in Latin America, asserting that Canada not only fails to prevent and remedy corporate abuses abroad, but also provides political, legal and financial support to mining companies involved in serious human rights violations in Latin America. Finally, they recommended the creation of objective, impartial, and effective measures to monitor and investigate allegations of human rights abuses committed by Canadian mining companies, and to include international human rights standards in the regulation of the public and private credit and investment agencies that finance extractive activities.⁶⁵

After concluding its 153rd session, in November 2014, the IACHR called upon States to take “measures to prevent the multiple human rights violations that can result from

60 Prepared by Daniel Cerqueira, Senior Program Officer at Due Process of Law Foundation.

61 Participants in the hearing included Colectivo de Abogados José Alvear Restrepo (CAJAR), Fundación para el Debido Proceso Legal (DPLF), Centro Hondureño de Promoción y Desarrollo Comunitario (CEHPRODEC), Red Agua, Desarrollo y Democracia (REDAD), Asociación Marianista de Acción Social (AMAS). For information on the hearing see: www.dplf.org.

62 Working Group on Mining and Human Rights in Latin America (2014). *The impact of Canadian Mining in Latin America and Canada’s Responsibility: Executive Summary of the Report submitted to the Inter-American Commission on Human Rights*. Available at: www.dplf.org.

63 *IACHR Wraps Up its 150th Session*. Media statement, Washington D.C., 4 April 2014. Available at: www.oas.org.

64 Images of the hearing are available at: www.youtube.com.

65 For a more comprehensive explanation of the hearings and its impact in Canada see, Shin Imai & Natalie Bolton. “The Canadian Government Does Little to Curb Problems with Canadians Mining Companies in Latin America”. *Aportes DPLF*. 20 (August 2015): 24-26. Available at: www.dplf.org.

the implementation of development projects, both in countries in which the projects are located as well as in the corporations' home countries, such as Canada."⁶⁶

During its 154th session, in March 2015, ETOs were again addressed at a hearing on "Corporations, Human Rights, and Prior Consultation in the Americas".⁶⁷ One of the issues raised was the extraterritorial responsibility of States, and in particular, Canada's responsibility for the financial support provided to mining companies involved in human rights abuses in the region. At the end of the session, the IACHR emphasised that "it is essential that any development project is carried out in keeping with the human rights standards of the inter-American system".⁶⁸

Constant conversations with members of the IACHR, the Inter-American Court of Human Rights, and staff members of their Executive Secretariat have also allowed members of the ETO Consortium to prompt the incorporation of ETOs into the agenda of the Inter-American Human Rights System (IAHRS) bodies. Their participation in sessions of the two UN HRC Working Groups whose mandates are related to transnational corporations and human rights was also useful for sharing updated information with several IAHRS stakeholders.

After more than three years of advocacy aimed at placing ETOs on the agenda of the IAHRS, the most concrete result came on April 6, 2016, when the IACHR published the report "Indigenous Peoples, Afro-Descendent Communities, and Natural Resources: Human Rights Protection in the Context of Extraction, Exploitation, and Development Activities".⁶⁹ One of the report's chapters addresses the obligation of States – both the corporations' home States and the host States in which the extractive projects are located – to bring their domestic laws and public policy into line with the objective of preventing, mitigating and providing redress for human rights violations.

For the first time, the IACHR developed specific standards on the duties of the home States of extractive companies related to human rights abuses committed abroad. The IACHR's report concludes with a list of recommendations for the home States of extractive companies to monitor, control, and supervise the activities that such companies carry out within the jurisdiction of other countries.⁷⁰

The ETOs debate has also been prompted in the IAHRS by Colombia's request for an Advisory Opinion by the Inter-American Court of Human Rights with respect to the interpretations of Art. 1(1) (Obligation to Respect Rights), Art. 4(1) (Right to Life), Art. 5(1) (Right to Humane Treatment/Personal Integrity), and 4(1) and 5(1) of the American Convention on Human Rights (also known as Pact of San Jose), which clearly places the issue of States' ETOs on the Court's table.⁷¹

66 *IACHR Wraps Up its 153rd Session*. Media statement, Washington D.C., 7 November 2014. Available at: www.oas.org.

67 Images of the hearing are available at: www.youtube.com.

68 *IACHR Wraps Up its 154th Session*. Media statement, Washington D.C., 27 March 2015. Available at: www.oas.org

69 IACHR. *Indigenous Peoples, Afro-Descendent Communities, and Natural Resources: Human Rights Protection in the Context of Extraction, Exploitation, and Development Activities*. OEA/Ser.L/V/II. Doc. 47/15. December 2015. Available at: www.oas.org.

70 *Ibid.*, p. 179. For a more detailed assessment of the IACHR's report see, Cerqueira D. & Blanco, C. (May 2016). *IACHR Takes Important Step in the Debate on Extraterritorial Responsibility and States' Obligations regarding Extractive Companies*. Available at: www.dplfblog.com.

71 Colombia's request for an Advisory Opinion by the Inter-American Court of Human Rights Court is available at: www.corteidh.or.cr.

Case Study 3.3: Campaigns for Due Diligence Laws in Home States⁷²



The recognition and implementation of States' extraterritorial obligations in the area of business and human rights is one of Amnesty International's key objectives in this field of work. This objective is advanced through research and campaigning around specific cases of corporate human rights abuse and through involvement in key national, regional and international standard setting processes. This work has helped advance the normative framework in relation to extraterritorial obligations or contributed to the development of home State regulatory measures with extraterritorial effect.

Amnesty's calls for corporate accountability in cases of human rights abuses by multinational corporations are directed not only to the host State, but also to the multinational company's home State. Documenting human rights abuses committed by these companies provides proof to home States of the negative human rights effects of non-regulation, which is inconsistent with their international human rights obligations.

In 2010, Amnesty International launched the report "India: Don't mine us out of existence: Bauxite mine and refinery devastate lives in India."⁷³ The report documents how plans by a joint venture led by UK-based Vedanta Resources Plc to mine bauxite and expand a refinery in a tribal area of Orissa, India, threatened the human rights of local communities, including the Dongria Kondh Indigenous community. Both the State and companies acted in contravention with applicable regulatory frameworks and advanced their plans without conducting adequate human rights impact assessments, consulting the communities and seeking the free, prior and informed consent of the indigenous community. Plans to expand the refinery also moved ahead despite the fact that ongoing violations to people's human rights to water and health associated with the refinery remained unaddressed.

Amnesty's campaigning in this case focused on raising awareness in the UK of the situation on the ground in India, and on highlighting the UK's regulatory failures. In August 2011, Amnesty submitted a briefing to the UN Committee on the Elimination of Racial Discrimination (CERD), citing these failures and raising concerns about the UK's policy with respect to the human rights impact of UK corporations in other countries.⁷⁴ In response, CERD recommended that the UK "take appropriate legislative and administrative measures to ensure that acts of transnational corporations registered in the State party comply with the provisions of the Convention".⁷⁵ Due to work by many civil society organisations, UN treaty bodies are now responsive to civil society calls for States to be held accountable for their extraterritorial failures and to develop norms in this area.

Over the last few years Amnesty has also focused on home state legislative reforms, such as the imposition of legal duties on parent companies to ensure human rights are respected in the context of their global operations, including those of their subsidiaries.

⁷² Prepared by Gabriela Quijano, Legal Advisor at Amnesty International.

⁷³ Amnesty International (2010). *India: Don't mine us out of existence: Bauxite mine and refinery devastate lives in India*. London: Amnesty International Publications. Available at: www.amnesty.org.

⁷⁴ Amnesty International (2011). *United Kingdom: Briefing to the UN Committee on the Elimination of Racial Discrimination*. London: Amnesty International Publications. Available at: www.ohchr.org.

⁷⁵ CERD. *Concluding observations of the Committee on the Elimination of Racial Discrimination: United Kingdom of Great Britain and Northern Ireland*. CERD/C/GBR/CO/18-20. 14 September 2011. Para 29. Available at: www.ohchr.org.

Amnesty's national sections have been involved in strong national campaigns to place parent companies under an express legal duty of care toward individuals and communities affected by their global operations. Remarkable recent achievements in this respect have come from France and Switzerland. In February 2017, the French National Assembly adopted a bill imposing environmental and human rights due diligence obligations on large French companies with regard to the activities of their subsidiaries and subcontractors. In Switzerland, citizens will be called to vote soon on the "Responsible Business Initiative" which legally obliges Swiss companies to carry out mandatory human rights and environmental due diligence including for their activities abroad.⁷⁶ The high level of support achieved within these two parliaments show that the concept of parent company liability is gaining increasing support from national decision-makers and politicians.

Regional and international standard-setting processes can also help advance and strengthen the international normative framework on business and human rights, including on extraterritorial obligations. Because of their political and normative value, Amnesty has prioritised intergovernmental processes. From 2012 to 2014 Amnesty contributed to the EU's elaboration of a directive on non-financial reporting requiring certain large EU companies to report publicly on the human rights, environmental and social impacts of their global operations as well as on their due diligence procedures for identifying, preventing, mitigating and addressing those impacts.⁷⁷ Although weaker than hoped for, the directive still represents a significant achievement in efforts to strengthen state acceptance and implementation of their extraterritorial obligations.⁷⁸ Implementation through member State national legislation will be key to ensuring the regulation is credible and robust.

Although most are still reluctant to adopt legally binding measures, home States can no longer remain indifferent to civil society calls for action to hold companies accountable for their human rights impacts abroad, especially when confronted with hard evidence of abuse. States are beginning to recognise the negative repercussions that lack of action at home has on human rights in other countries and crucially, some are beginning to take action.

76 For more information on the Responsible Business Initiative visit: www.konzern-initiative.ch.

77 Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups. Available at: www.eur-lex.europa.eu.

78 For an analysis of the Directive visit: www.amnesty.org.

Chapter 4: Development Cooperation

Introduction



Development cooperation is one form of cooperation among States. While its intention is to make a positive contribution to development and, ideally, such would imply the furthering of human rights, the impact of development policies and projects on human rights can be both positive and negative. In part, this has to do with the different understandings as to what ‘development’ means, what the priorities and means of achieving it are, and what accountability mechanisms should be attached to it. Development cooperation objectives, moreover, often tend to be closely intertwined with and at times subordinate to economic and other foreign policy interests, rather than having human rights as their primary objective. The human rights orientation and commitment of the beneficiary country also plays – without doubt – a crucial role in determining the human rights outcomes of development cooperation.

Examples of negative impacts of development cooperation on human rights include:

- › Large-scale infrastructure, conservation, or similar projects that cause displacements of local communities (see **Case Study 2.1**);
- › Public-private partnerships that foster the privatization of public goods and services (see **Case Study 4.1**);
- › Ill-designed land titling projects that weaken rather than strengthen the effective control and autonomy of marginalized groups over their territories/land;⁷⁹ and
- › Humanitarian aid that distorts local markets and causes dependencies on imported products.

Over the past decade, there have been increased efforts by UN agencies and bilateral donors to align their development cooperation to human rights.⁸⁰ At the core of the so-called ‘human rights-based approach to development’ (HRBA) are the deliberate contribution of policies and programmes to the realization of human rights, the application of human rights principles (e.g., participation and accountability) to programme design, implementation, and monitoring, and a focus on strengthening the capacities of duty-bearers to comply with their obligations and of rights-holders to claim their rights. Several governments have adopted policies on HRBAs to guide their

79 See, for example, the case of the Germany’s support to the Cambodian land sector programme. Lüke, M. (2013). *Human Rights Assessment of the German-Cambodian Land Rights Program (LRP)*. Berlin: German Institute for Human Rights, available at: www.institut-fuer-menschenrechte.de. See also: FIAN Germany (2011). *Germany’s Human Rights Obligations in Development Cooperation: Access to Land and Natural Resources and Germany’s support of the Land Sector in Cambodia*, available at: www.ohchr.org.

80 See for example: United Nations Development Group (2003). *UN Statement of Common Understanding on Human Rights-Based Approaches to Development Cooperation and Programming*. Available at: www.hrbaportal.org.

development cooperation work. Nevertheless, significant challenges remain with regard to implementing these, in particular when it comes to prioritising funds, ensuring true participation of beneficiaries, and accountability. In response to concerns about human rights violations in the context of development cooperation, some governments have taken initial steps to foster accountability through complaint mechanisms (see **Case Study 4.2**).

In contrast to – and potentially off-setting – positive moves to align development cooperation to human rights is the current trend to involve the private sector as a key ‘stakeholder’ or ‘partner’ in development projects. Whereas cooperation with the private sector is not automatically negative, it can become highly problematic when adequate safeguards against conflicts of interest are not in place and private sector actors are able to use their participation and/or funding to unduly influence the design of public policies and programmes. With States reducing public funds dedicated to bilateral and multilateral development cooperation and thereby increasingly relying on the private sector to step in, there is a huge risk of policies and programmes becoming geared towards private sector interests (see **Case Study 4.3**). As a result, attention and funds may be diverted from measures that address the structural causes, and regulatory measures (that would affect companies) avoided. Partnerships with the private sector may also contribute to a ‘technicalization’ of solutions (e.g., nutrition pills) and the privatization of essential goods and services (see **Case Study 4.1**). They may also undermine efforts to improve accountability in development contexts.⁸¹

What are States’ ETOs in the Context of Development Cooperation?

There are two principle aspects when discussing States’ ETOs in the context of development cooperation. One is for development cooperation *not to cause any harm* to human rights in the ‘recipient’ country. The other is for development cooperation to make a *positive contribution* to the realization of human rights. Related to the latter is the question whether States have obligations to provide (and seek) development assistance, as part of their broader obligation to cooperate towards achieving the universal realization of human rights.⁸²

ETOS TO AVOID HARM IN DEVELOPMENT COOPERATION

International law, as summarized in the Maastricht Principles, is very clear on the obligations States have to ensure that their policies and practices do not contribute to harm in other countries (**ETOPs 13, 20, 21**). This also applies to policies and practices in the area of development cooperation.

81 For a compilation of case studies on the human rights outcomes and risks of public private partnerships and corporate influence across different development fields, see: Adams, B. *et al.* (2017). *Spotlight on Sustainable Development 2017: Reclaiming policies for the public. Privatization, partnerships, corporate capture and their impact on sustainability and inequality - assessments and alternatives*. Available at: www.2030spotlight.org.

82 The obligation of States to cooperate internationally towards the universal realisation of human rights is enshrined in the UN Charter, the UDHR and the ICESCR, among others.

States must ensure that the technical and financial support they provide to another country in the context of development cooperation does not cause or contribute to violations of human rights in that country. **Maastricht Principle 21** on *indirect interference* highlights that a State can breach its ETOs, where it assists, directs or otherwise influences another State to breach its human rights obligations. Whereas the primary responsibility for avoiding negative impacts resulting from development policies, programmes and projects lies with the State in which these are carried out, other States or IGOs supporting these equally carry responsibility. They must take steps to ensure that their support does not contribute to policies or practices that impair, or risk impairing, human rights (e.g., by excluding poor and marginalized groups from access to basic services).

The impact of development programmes and projects on human rights may not always be clear from the outset. **Maastricht Principle 13** emphasises that a State is liable for human rights impairments in another country whenever these are a “foreseeable result of its conduct”. The Commentary to the Maastricht Principles explains that a risk can be considered foreseeable not only where a State is aware of it, but also where it *should have been aware of it*, but failed to seek relevant information.⁸³ In this sense, States must take proactive steps to identify and evaluate the potential risks of development projects (**ETOP 14**). This must be done prior to and throughout implementation, and allow for public participation. The results of such assessments must be made public and must “inform the measures that States must adopt to prevent violations or ensure their cessation as well as to ensure effective remedies” (**ETOP 14**) (see **Case Study 1.3**).

Maastricht Principle 13 also notes that “uncertainty about potential impacts does not constitute justification for such conduct”. Thus, even when there is no full certainty about the potential risk of a development project, States’ must adopt a *precautionary approach* where serious or irreversible damage is at stake.⁸⁴ This could be for example, by carrying out additional studies or consultations, putting into place effective preventive measures, or abstaining from implementing the project.

Maastricht Principle 17 highlights that when States negotiate international agreements, including in the field of development cooperation, they must ensure that these agreements are compatible with their human rights obligations. This also applies to multilateral agreements adopted in the context of international organisations and conferences. When engaging in intergovernmental organisations (IGOs), including UN bodies and development banks such as the World Bank, States remain fully responsible for their actions and omissions, and must use their influence within the respective organisation to ensure that the organisation’s policies and practices in the context of development cooperation do not interfere with the enjoyment of human rights (**ETOP 15**). The obligations of Member States complement the direct human rights obligations IGOs have under international law (see **Chapter 2**).

When private sector actors are involved through public-private partnership (PPP) or so-called ‘multi-stakeholder’ initiatives, States not only continue to be accountable for their own conduct within such partnerships, but in addition carry responsibility to ensure that the private sector actors do not infringe human rights (**ETOP 25**) (see **Chapter 3**). In addition to regulating and holding companies accountable for human rights abuses carried out in the framework of public-private partnerships, States must also put into place robust safeguards against conflicts of interest and ensure the collaboration does not interfere with their capacity to implement measures required for the realization of ESC rights.

83 *Supra* note 4. Commentary to Principle 13, para. 3-6.

84 *Supra* note 4. Commentary to Principle 13, para. 7-9.

To ensure that development cooperation, whether bilateral or multilateral, does not interfere with the enjoyment of human rights, it is fundamental that effective mechanisms be in place that allow individuals and groups to raise complaints and hold donor States accountable for violations that occur in the framework of development projects. **Maastricht Principles 36 to 40** outline States' respective duties under international law to establish such accountability mechanisms and cooperate with other States concerned in the provision of effective remedies to those affected (see **Case Study 4.2**).

POSITIVE OBLIGATIONS TO CONTRIBUTE TO THE FULFILMENT OF HUMAN RIGHTS THROUGH DEVELOPMENT COOPERATION

As described above, States have obligations under international law to take concrete steps to ensure that their development cooperation does not harm or create obstacles to the realization of human rights. Are there, however, also positive duties for States to, on the one hand, engage in development cooperation and, on the other hand, ensure that such makes a *positive* contribution to the realization of human rights?

Maastricht Principle 29 reiterates States' obligation to

[...] take deliberate, concrete and targeted steps, separately, and jointly through international cooperation, to create an international enabling environment conducive to the universal fulfilment of economic, social and cultural rights, including in matters relating to [...] development cooperation.

States should hence make a deliberate effort to ensure not only that their policies and support in the field of development cooperation are not harmful, but that they are actually *conducive* to the universal fulfilment of human rights. Guaranteeing adequate international financing for development, in line with the principles and priorities outlined in Maastricht Principle 32 (described below), is one critical element of such an enabling environment (see **Case Study 4.3**).

Maastricht Principle 32 provides guidance on the principles and priorities that States should adhere to in their development cooperation, and in international cooperation more broadly. As many States are already engaging in development cooperation, the guidance provided as to how such cooperation should be carried out is vital. According to **ETOP 32** States must:

- a) *prioritize the realisation of the rights of disadvantaged, marginalized and vulnerable groups;*
- b) *prioritize core obligations to realize minimum essential levels of economic, social and cultural rights, and move as expeditiously and effectively as possible towards the full realization of economic, social and cultural rights;*
- c) *observe international human rights standards, including the right to self-determination and the right to participate in decision-making, as well as the principles of non-discrimination and equality, including gender equality, transparency, and accountability; and*
- d) *avoid any retrogressive measures⁸⁵ [...].*

⁸⁵ Retrogressive measures are measures that diminish existing enjoyment of rights. For example, the privatization of water services where such creates barriers for some population groups to accessing water in sufficient quantities.

The Maastricht Principles also stipulate that States, as part of their broader obligation to cooperate, have obligations to *provide international assistance*, individually and jointly, towards fulfilling ESC rights in other countries, when they are in a position to do so (ETOP 33). The extent to which a State can be expected to contribute to the fulfilment of ESC rights in other countries is commensurate with that State's economic and technical capacities, as well as its influence in international decision-making processes (ETOP 31). Similarly, States that are not able to realize ESC rights within their territory, have obligations to *seek international assistance* from other States towards this purpose (ETOP 34). Both the States that provide and those that receive international assistance must ensure that the assistance provided is in line with the principles and priorities described in **Maastricht Principle 32** and contributes to the realization of ESC rights.

Box 4.1: Pronouncements by UN Treaty Bodies on States' ETOs in Development Cooperation

The Committee on Economic, Social and Cultural Rights (CESCR) has on several occasions reiterated the extraterritorial obligations States have when engaging in international cooperation, and has provided guidance as to how these should be implemented. For instance, in its 2016 concluding observations to the United Kingdom, the Committee called upon the UK to ensure human rights compliance in its international development cooperation by:

- (a) *Undertaking a systematic and independent human rights impact assessment prior to decision-making on development cooperation projects;*
- (b) *Establishing an effective monitoring mechanism to regularly assess the human rights impact of its policies and projects in the receiving countries and to take remedial measures when required;*
- (c) *Ensuring that there is an accessible complaint mechanism for violations of economic, social and cultural rights in the receiving countries committed in the framework of development cooperation projects [emphasis added].⁸⁶*

To sum up, international law places duties on States to ensure their development cooperation does not cause harm to ESC rights in other countries and to provide international assistance, in line with certain principles and priorities, towards the fulfilment of human rights in other countries, when they are in a position to do so.

KEY REFERENCES:

Centre for Economic and Social Rights and Third World Network (2015). *Universal Rights, Differentiated Responsibilities: Safeguarding human rights beyond borders to achieve the Sustainable Development Goals*. Available at: www.cesr.org.

Khalfan, A. (2012). "Development Cooperation and Extraterritorial Obligations". In *The Right to Water, Theory, Practice and Prospects*, edited by Malcolm Langford and Anna Russell. Cambridge University Press.

⁸⁶ CESCR. *Concluding observations on the sixth periodic report of the United Kingdom of Great Britain and Northern Ireland*. E/C.12/GBR/CO/6. 14 July 2016, para 15. Available at: www.ohchr.org.

Right to Education Project *et al.* (2016). *The UK's support of the growth of private education through its development aid: Questioning its responsibilities as regards its human rights extraterritorial obligations*. Available at: www.right-to-education.org.

Case Study 4.1: Responding to UK and World Bank Support for the Privatisation of Education⁸⁷



Private actors are playing an increasing role in education in a number of countries worldwide and in particular in developing countries. The growth of private schools, including the emergence and rapid expansion of so-called 'low-fee' private schools that target relatively poor populations, has led to a *de facto* privatisation of education systems in these countries over the past 15 years. Particularly striking is that new multinational commercial chains of low-fee schools have started to emerge and receive public support, raising crucial human rights questions.

Research conducted by the Global Initiative for Economic, Social and Cultural Rights (GI-ESCR), the Right to Education Project (RTE), and other organisations demonstrates that privatisation in education often has negative impacts on the right to education.⁸⁸ It creates and further entrenches inequalities to the detriment of the most marginalised groups and leads to socio-economic segregation while not delivering on quality education.

UN bodies have issued several statements on the matter⁸⁹ and a constructive dialogue has been initiated with States to improve regulation of private actors and focus government efforts on improving public education. However, slowing this progress, international actors, particularly the UK development agency (DFID) and the World Bank, have been putting pressure on or circumventing national governments to support the expansion of private schools.⁹⁰

To address the problem, RTE, GI-ESCR and partners conducted an analysis of the ETOs the UK has with regard to funding private education in developing countries. This analysis was presented to the Committee on the Rights of the Child (CRC) and the CESCR, which reviewed the UK in May and June 2016.⁹¹ It was complemented by research in several countries where the UK is funding private schools (Ghana, Kenya, Uganda, and Pakistan) and by UN treaty bodies' statements.⁹²

87 Prepared by Sylvain Aubry, Research and Legal Advisor at Global Initiative for Economic, Social and Cultural Rights.

88 For more information, visit: www.globalinitiative-escr.org.

89 For an overview, see: GI-ESCR. *Human rights bodies statements on private education September 2014 – March 2016*. Synthesis paper, version 5, March 2016. Available at: www.globalinitiative-escr.org.

90 For more information, see: "Just" \$6 a month? *The World Bank will not end poverty by promoting fee-charging, for-profit schools in Kenya and Uganda*. Response to President Jim Kim's speech from concerned communities and organisations in Kenya and Uganda. Available at: www.globalinitiative-escr.org.

91 Right to Education Project *et al.* (2016). *The UK's support of the growth of private education through its development aid: Questioning its responsibilities as regards its human rights extraterritorial obligations*. Available at: www.globalinitiative-escr.org.

92 Of particular relevance were concerns raised by the CRC about "low quality of education and rapid increase of private and informal schools, including those funded by foreign development aid" [emphasis added] in a recent country review of Kenya. CRC. *Concluding observations on the combined third to fifth periodic reports of Kenya*. CRC/C/KEN/CO/3-5. 2 February 2016, para. 57(d). Available at: www.ohchr.org.

The reports focused on UK development aid - leaving aside the complex question of the regulation of UK-based private school companies and UK participation in international organisations. Drawing on the Maastricht Principles, the reports found violations of:

- › the obligation to respect, as UK funding to private schools is impairing the realisation of the right to education in other countries (ETOP 13), as well as impairing the capacity of other States to comply with their obligations (ETOP 21);
- › the obligation to fulfil, as UK development aid did not prioritise the rights of marginalised groups (ETOP 32); and
- › the general obligation to conduct and use the results of impact assessments (ETOP 14), as the UK did not conduct an *ex-ante* assessment, and did not use the results of an *ex-post* assessment it carried out.

The process of researching and writing the report brought many partners on board, including non-human rights organisations that may not have been used to work on ETOs. Following its review, the CRC published very progressive concluding observations addressing all concerns raised in the report:

*The Committee recommends that the State party ensure that its international development cooperation supports the recipient States in guaranteeing the right to free compulsory primary education for all, by prioritizing free and quality primary education in public schools, refraining from funding for-profit private schools, and facilitating registration and regulation of private schools.*⁹³

The CESCR made similar findings and highlighted in particular the need for prior human rights impact assessments, effective monitoring mechanisms, and accessible complaint mechanisms in the context of development cooperation (see **Box 5.1**).

The civil society coalition welcomed the Committees' findings and conducted joint media actions to highlight the illegality of DFID funding.⁹⁴ These were picked up by mainstream media,⁹⁵ resulting in increased pressure on DFID to reform its funding strategy, while also discouraging other donors to adopt the same approach. A similar strategy is now being developed to address the influence of international organisations, in particular the World Bank, and to use ETOs to develop a positive dialogue with States. Research has been conducted in Haiti, where the World Bank and the Global Partnership for Education (GPE), have funded a very controversial project to support private schools.⁹⁶

GI-ESCR submitted a report to the CESCR on France's responsibility in the project.⁹⁷ This was not because France has acted wrong in a particular way, but rather because it has not used its influence as a member of the GPE and the World Bank to stop the project (required by **Maastricht Principle 26**). The aim is to highlight that although France has taken a progressive position on the right to education at the Human Rights Council, it

93 CRC. *Concluding observations on the fifth periodic report of the United Kingdom of Great Britain and Northern Ireland*. CRC/C/GBR/CO/5. 3 June 2016, paras. 16-17. Available at: www.ohchr.org.

94 See for example: *UK could be harming children's rights abroad – and the Government fails to comment*. Geneva, 24 May 2016. Available at: www.globalinitiative-escr.org.

95 See for example: *The Guardian*. *UN criticises UK for spending aid money on for-profit private schools*. 14 June 2016. Available at: www.theguardian.com.

96 For more information, see: *Haïti: enseignement privatisé, droit à l'éducation bafoué*. 7 April 2016. Available at: www.globalinitiative-escr.org.

97 GI-ESCR and Sciences Po. *Misusing influence: France's failure to prevent international organisations' support to privatisation and violations of the right to education in Haiti*. May 2016. Available at: www.globalinitiative-escr.org.

does not meet its ETOs in this field. On the basis of the reports submitted, the CESCR issued concluding observations on France in June 2016 that include, for the first time, a mention of its responsibilities in international organisations.⁹⁸ One outcome of this work has been to open a positive dialogue in France, leading the State to take a more active role on the matter, and allowing unprecedented mobilisation on the issue across the francophone space.⁹⁹

Case Study 4.2: Accountability Mechanisms in Development Cooperation with a Focus on the German Experience¹⁰⁰



Development cooperation is intended to and often does further equitable access to rights and resources in the partner countries engaged. Sometimes, however, projects of partner countries which are supported by international donors also cause harm to people – for example, through environmental pollution, forced evictions, or inhumane working conditions in infrastructure projects. This is also true for projects supported by German development cooperation.¹⁰¹

Project-affected people might then be expected to turn to the judiciary or other avenues of redress in their countries, given that it is their own State that is first and foremost responsible for guaranteeing human rights in its territory. Sometimes, however, domestic mechanisms are not effective. This is not to be used as an excuse by international donors not to provide an additional avenue for redress: Whereas international donors should not be blamed for the actions of their partners, they are responsible for assessing the risks of their own involvement and should provide mechanisms of their own through which people can seek redress.

In **Principles 36-40**, the Maastricht Principles address accountability of States acting extraterritorially. The Principles and the accompanying Commentary elaborate on the obligation to provide an effective remedy in cases of extraterritorial harm by a State or transnational company. They also provide general guidelines for joint action in situations where two actors are jointly (even if to varying degrees) responsible (**ETOP 37a**). This will usually be the case in development cooperation, where both the country implementing a development programme and the one supporting it through advisors or credits/grants share responsibility.

Accountability mechanisms – often interchangeably referred to as complaint or grievance mechanisms – in development cooperation are “non-judicial procedures that provide a formalized means through which individuals or groups can raise concerns

98 CESCR. *Concluding observations on the fourth periodic report of France*. E/C.12/FRA/CO/4. 13 July 2016, paras. 7, 8, 11. Available at: www.ohchr.org.

99 See for example: *La société civile francophone se mobilise contre la marchandisation de l'éducation dans le monde*. 12 March 2016. Available at: www.globalinitiative-escr.org.

100 Prepared by Andrea Kämpf, Senior Researcher and Policy Adviser, German Institute for Human Rights (GIHR). All views expressed here are my own and do not necessarily reflect the position of the GIHR.

101 See for example: Amnesty International (2015). *Driven out for Development: Forced Evictions in Mombasa, Kenya*. Available at: www.amnesty.org.

about and seek remedy from the impact a project/investment has on them.”¹⁰² In 1993, the Inspection Panel of the World Bank was the first such mechanism created in the realm of development cooperation, following an investigation into the Narmada dam project in India which evidenced serious environmental and social harm. Other multilateral development banks followed suit. In doing so, they closed an accountability gap: immunity from legal proceedings that is usually granted to multilateral development banks by their respective founding members.¹⁰³ The banks’ mechanisms only examine whether they have followed their own standards of conduct, which are usually called environmental and social safeguards. Hence, these mechanisms do not substitute or interfere with the jurisdiction of the countries in which the projects are implemented.

Bilateral donors are also increasingly creating accountability mechanisms. In Germany, the umbrella organisation for human rights NGOs (Forum Menschenrechte) and the German Institute for Human Rights (GIHR) have been calling on the development ministry (BMZ) and implementing agencies to establish such a mechanism.¹⁰⁴ In its 2011 human rights strategy, the BMZ announced that it was considering the feasibility of establishing a human rights complaint mechanism. In 2014, the German and Dutch private sector investment banks DEG and FMO established a joint complaint mechanism, which saw its first case in 2015.¹⁰⁵ The German implementing agencies for technical and financial cooperation, GIZ and KfW, also introduced complaint procedures, which they are in the process of developing further.¹⁰⁶ The reasons for introducing these mechanisms vary. Aside from reacting to complaints from people negatively affected by development projects, they have often been motivated by a desire to join the Global Environmental Facility (GEF), the standards of which require implementing partners to establish accountability mechanisms.

The mechanisms of the different institutions vary in their structure, functions, and procedures. There are basically two kinds of procedures: One is a *problem-solving procedure* with a mediation-like character, for example, the Problem Solving Process of the Asian Development Bank (ADB). The second is a *compliance review procedure*, which examines measures for compliance with internal standards; examples are the Inspection Panel of the World Bank or the Compliance Review Process of the ADB. The more recent accountability mechanisms – such as the one provided by the ADB¹⁰⁷ or the one recently introduced for the United Nations Development Programme (UNDP)¹⁰⁸ – provide plaintiffs with the choice of both avenues. This development reflects the experience that problem-

102 *Ensuring a Robust Accountability Framework at the AIIB*. Joint CSO letter to the president of the Asian Infrastructure Investment Bank (23 October 2015). Available at: www.ciel.org.

103 The shareholders, usually States. The European Court of Human Rights ruled in *Waite and Kennedy v. Germany* (www.echr.coe.int) that its Member States are obliged to furnish international organisations with alternative means of redress if they grant them immunity.

104 Forum Menschenrechte (2012). *Proposal for a human rights complaint mechanism for German development cooperation*. Available at: www.forum-menschenrechte.de. See also: GIHR (2015). *Human Rights Require Accountability. Why German development cooperation needs a human rights complaints mechanism*. Available at: www.institut-fuer-menschenrechte.de.

105 For an overview, see: Accountability Counsel (2015). *The Accountability Resource Guide: Tools for Redressing Human Rights & Environmental Abuses in International Finance and Development*. 8th Edition. Available at: www.accountabilitycounsel.org. For information on the DEG/FMO mechanism, visit: www.deginvest.de.

106 See *GIZ Progress Report on Sustainability 2015*, pp. 21-22 (www.giz.de). See also the *online complaint form* (www.kfw-entwicklungsbank.de) of the KfW Development Bank.

107 For more information, visit: www.adb.org.

108 For more information, visit: www.undp.org.

solving mechanisms tend to be taken seriously only when it is clear to the parties – in particular to the stronger side – that an independent compliance review will follow if they fail to agree. The two procedures should be institutionally, procedurally, financially, and politically separate and also independent of the respective operative departments.

Principle 31 of the UN Guiding Principles on Business and Human Rights¹⁰⁹ specifies eight criteria for the effectiveness of non-judicial grievance-mechanisms: Legitimacy, Accessibility, Predictability, Transparency, Equitability, Rights-compatibility, Continuous Learning, Dialogue and Engagement. A recent assessment of grievance mechanisms by CSOs and human rights institutes that draws on these criteria identified major shortcomings in accessibility in terms of information, physical access and transparent communication, follow-up, compensation and external oversight.¹¹⁰ CSOs have also frequently pointed out that States, as shareholders of development banks, should lift the immunity granted to development banks in order to enable judicial proceedings in national and international courts.

Case Study 4.3: The Governance of Financing for Development¹¹¹



The area of development financing addresses all sources of financing, internal and external, that are available to developing countries to invest in their sustainable economic growth and the raising of living standards. The holistic global process of **Financing for Development (FfD)** has been institutionalized within the United Nations since 2002. This process includes all Member States of the UN, plus a number of important international organisations such as the International Monetary Fund, the World Bank, and the United Nations Development Programme. There have now been three international conferences, with the last one held in Addis Ababa in July 2015.

The establishment of the FfD process has been a significant step towards more democratic and just global economic governance. The FfD process seeks to raise overall levels of financing available to developing countries and to coordinate the diverse streams of financing to produce the most efficient outcomes.

Human rights have, however, yet to make an impact on the FfD process, which proceeds almost entirely along rationales of mainstream economics and political interest. Although human rights are incorporated to a limited extent in some national development cooperation programmes, within the overall FfD process the legal obligations of States in this area, both within their own borders and extraterritorially, have not been properly addressed.

The policy positions taken by national governments and international institutions within this process have extensive and deep effects on the human rights of people worldwide, well beyond the territorial boundaries and subject matter jurisdictions of individual nations and institutions.

109 Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises (2011). *Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework*. Available at: www.ohchr.org.

110 Daniel, C. et al. (2016). *Glass Half Full? The State of Accountability in Development Finance*. Amsterdam: SOMO, available at: www.grievancemechanisms.org.

111 Prepared by Joshua Curtis, Postdoctoral Research Associate, School of Law and Social Justice, University of Liverpool.

Ensuring extraterritorial respect for human rights in all of the policies and proposals of States and institutions in this process will have the following effects:

- › setting limits to the power plays and self-interest of dominant national and institutional actors,
- › informing choices regarding just and efficient economic policies,
- › designing financing instruments to include human rights safeguards against possible risks, and
- › structuring the transparency and fairness of the negotiating framework.

In this context, ETOs apply not just to Northern, OECD States, but very importantly to the significant and growing influence of upper-middle income developing countries.

One crucial issue within this process is the overall trend towards increased reliance on external private sources of financing from foreign investment and foreign private loans. There is now a move from OECD States to divert official development financing into programmes that specifically benefit foreign private investors, to induce these investors to invest more money in developing countries. Much of this will occur through public-private partnerships (PPPs). As a result, public money from Northern States, which had previously been devoted to specific projects with concrete benefits for people in developing countries, and thus had some accountability under a human rights framework, will now go to benefit multinationals that are not subject to any substantive accountability framework.

This diversion of public funds for the primary benefit of Northern-State corporations investing in the developing world violates Northern States' ETOs because no frameworks of human rights accountability have been put into place to ensure:

- › that the process of PPPs does not harm human rights directly,
- › that there are identifiable benefits in terms of increased human welfare and progressive realisation of socio-economic rights as a result of this use of funds, and
- › that any concrete benefits that do accrue as a result of this strategy are not outweighed by the loss of more direct benefits resulting from the diversion of these public funds to multinational corporations.

The World Bank has initiated some approaches to better regulation of PPPs, including disclosure requirements, bidding, and the standardisation of PPP agreements. Under a human rights framework however, these measures are inadequate.

The European Network on Debt and Development has formulated a Responsible Finance Charter¹¹², which provides a template for addressing PPPs that would help satisfy States' ETOs in this area. The Charter covers development effectiveness and protection of human rights and the environment. The principles of this Charter should be incorporated into all PPP contracts. States should regularly review the implementation of PPPs financed by their taxpayers, ensuring the presence of concrete benefits that outweigh other uses of those funds, and ensuring that the process of PPPs does not undermine the progressive realization of rights. They should also implement the Principles for Responsible Contracts¹¹³ between States and investors as laid out by the UN Special Representative of

112 Available at: www.eurodad.org.

113 Available at: www.ohchr.org.

the Secretary-General on the issue of human rights and transnational corporations and other business enterprises. This would be the bare minimum required for powerful States to observe their ETOs in this specific context.

FURTHER INFORMATION:

Centre for Concern: www.coc.org.

Centre for Economic and Social Rights: www.cesr.org.

Eurodad (2011). *Responsible Finance Charter*, available at: www.eurodad.org.

RightingFinance: www.rightingfinance.org.

Ruggie, J. *Principles for responsible contracts: integrating the management of human rights risks into State-invest or contract negotiations: guidance for negotiators*. A/HRC/17/31/Add.3, 25 May 2011.

Available at: www.ohchr.org.

Chapter 5: Environmental Destruction and Climate Change¹¹⁴

Introduction



The recognition and application of ETOs is essential for preventing and remedying transboundary and global environmental destruction. Inspired by comments made by Sharan Burrows, General Secretary of the International Trade Union Confederation, Kumi Naidoo, a human rights and environmental activist, once said, “there are no human rights on a dead planet”.¹¹⁵ Environment and human rights are closely interrelated because environmental harm, including climate change, is impacting the lives, health and livelihood of people today.

- › Climatic phenomena such as rising sea-levels, increasing temperatures and severe weather events (e.g. typhoons, storms, droughts and cyclones) cause flooding, population displacement, and destruction of cultivable and habitable land.¹¹⁶
- › Effects of climate change on ecosystems and natural resources “intensify competition” for natural resources among various sectors such as agriculture, ecosystems, settlements, industry, and energy production, thereby affecting regional water, energy, and food security.¹¹⁷
- › Particularly affected by the impacts of climate change are poor and marginalized rural communities, in particular women and children, and indigenous peoples, whose lives and culture are “inextricably tied to nature”, as well as populations who live in coastal and low-lying islands states (e.g., Pacific island states) and lack the economic resources to adapt to severe changes (see **Case Study 5.1**).¹¹⁸

According to the Fifth Assessment Report by the Intergovernmental Panel on Climate Change (IPCC)¹¹⁹, climate change is happening and the risks are alarming. It is unequivocal that the climate system is warming due to human influence. The level of greenhouse gas (GHG) emissions have never been this high in at least the last 800,000 years. GHG emissions largely result from the burning of fossil fuels and industrial processes. Continued GHG emissions increase the risk of dangerous and irreversible

114 Prepared by Kristin Casper, Litigation Counsel for the Climate Justice and Liability Project, Greenpeace Canada, and Zelda DT Soriano, Legal & Political Advisor, Greenpeace Southeast Asia.

115 Kumi Naidoo. *There are No Human Rights on a Dead Planet*. Blogpost, 16 April 2014. Available at: www.greenpeace.org.

116 CIEL (2011). *Climate Change & Human Rights: A Primer*. p. 2, available at: www.ciel.org.

117 UNEP and Sabin Center for Climate Change Law (2015). *Climate Change and Human Rights*. p. 3, available at: www.columbiaclimatelaw.com.

118 CIEL (2011). *Supra* note 116. p. 1.

119 The IPCC is the most authoritative source of information on climate change, and its 195 member states have to agree on the reports. For more information, visit: www.ipcc.ch.

impacts for people and the planet. We are already witnessing the impacts of climate change in every country and on the oceans.¹²⁰

What are States' ETOs with regard to Environmental Destruction and Climate Change? ¹²¹

For the people and the communities on the frontline of environmental destruction, it is well understood that damage to land, water, and air harms people and negatively impacts an array of basic human rights, such as the rights to life, housing, food, land, water, sanitation, and to a healthy environment.¹²² The 2011 Office of the High Commissioner on Human Rights (OHCHR) report on human rights and the environment states: "One country's pollution can become another country's environmental and human rights problem".¹²³ There are rampant examples of egregious practices by businesses, such as mining companies, domiciled in one country abusing the rights of people living in another country.¹²⁴ For lawyers and campaigners, ETOs are an essential tool for advocating for solutions to environmental destruction that is impairing human rights.¹²⁵

States not only have human rights obligations with respect to protecting their own populations from the impacts of environmental destruction, they also have obligations towards persons outside of their territories, under certain situations.¹²⁶ While all of the Maastricht Principles are relevant to varying degrees to climate change, there are **four cornerstone obligations** that are particularly useful in the context of climate change.

1. The *obligation to avoid causing harm* (ETOP 13) confirms that a State "must desist from acts or omissions that create a real risk of nullifying or impairing the enjoyment" of ESC rights within and beyond the State's territory.¹²⁷
2. The *obligation to regulate* (ETOP 24) confirms that States must take necessary measures to ensure that non-State actors that they are in a position to regulate do not nullify or impair the enjoyment of ESC rights, independently of where the harm takes place.¹²⁸
3. The *general obligation to provide an effective remedy* (ETOP 37) requires that "prompt, accessible and effective" mechanisms to hold States and non-State actors

120 For more details, please see IPCC (2014): *Climate Change 2014: Synthesis Report*. pp. 2-8, available at: www.ipcc.ch

121 Ashfaq Khalfan, Law and Policy Programme Director for Amnesty International, made a significant contribution to this section.

122 ETO Consortium Focal Group 5 (2014). *ETOs, Eco-destruction and Climate Change*. p. 6, available at: www.fian.org.

123 OHCHR. *Analytical Study on the Relationship between Human Rights and the Environment*. A/HRC/19/34. 16 December 2011. Para. 65, available at: www.srenvironment.org.

124 See for example: HRC. *Concluding observations on the sixth periodic report of Canada*. CCPR/C/CAN/CO/6. 13 August 2015. Para. 6, available at: www.refworld.org.

125 ETO Consortium Focal Group 5. *Supra* note 122. p. 6.

126 See the handbook's introduction for more information on the universal realisation of human rights. There is growing awareness in the human rights and environmental communities that State recognition and adherence to ETOs - owing to the universal, interdependent and indivisible nature of human rights - is critical for finding global, national, and local solutions to environmental destruction and climate change, which threaten the rights of individuals and vulnerable groups.

127 De Schutter, O. *et al.* "Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights". *Human Rights Quarterly* 1084 (2012): pp. 1112-1115.

128 *Ibid.* pp. 1134-1137.

accountable for human rights violations and abuses are in place, regardless of where the harmful conduct or harm occurred.¹²⁹

4. The general obligation of all States to “take action, separately, and jointly through international cooperation, to respect the economic, social and cultural rights of persons within their territories and extraterritorially” (ETOP 19) is essential for the full realization of human rights.¹³⁰

These cornerstone principles, taken together, indicate that States have an obligation to mitigate and adapt to climate change to the greatest extent of their ability and ensure that climate change actions, policies and programmes do not result in human rights violations.

ETOs arise from two bases as described in **Principle 8** of the Maastricht Principles: (a) duties that arise from the impact of a State’s conduct that affects rights outside its territory; and (b) duties that arise out of obligations of international cooperation set out in international treaties.¹³¹ Both require States to take reasonable and practical actions on climate change, e.g., *individual steps by each State* to reduce national emissions, through regulatory and other measures, and *international cooperation* to coordinate and distribute the burden of doing so. The duties that arise from the impact of a State’s conduct on rights outside its territory may be particularly important at the national level when new large-scale GHG polluting projects, such as coal mining for export, are under consideration (see **Box 5.1**). The duties that arise from the obligations of international cooperation are particularly important when nations negotiate and agree on climate policies.

Box 5.1: UN Bodies Emphasise Individual and Collective Human Rights Duties in Climate Change

In its 2017 review of Australia, the CESCR recommended the State party to “revise its climate change and energy policies” and “take immediate measures aimed at reversing the current trend of increasing absolute emissions of greenhouse gases, and pursue alternative and renewable energy production.” The Committee also encouraged Australia “to review its position in support of coal mines and coal export.” This last point is particularly important because it implies that the greenhouse gas emissions embedded in coal that is exported and burned outside of Australia are also relevant to the country’s obligations under the ICESCR, as they apply extraterritorially.¹³²

The duties that arise out of obligations of international cooperation have equally received significant attention by UN human rights and environmental bodies recently. In a report on the relationship between climate change and human rights (2009), the OHCHR concluded that “[g]lobal warming can only be dealt with through cooperation by all members of the international community.”¹³³ The Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy, and sustainable environment, in a recent report to the

129 *Ibid.* pp. 1160-1164.

130 *Ibid.* pp. 1126-1128.

131 *Ibid.* pp. 1101-1104.

132 See: CESCR. *Concluding observations on the fifth periodic report of Australia*. E/C.12/AUS/CO/5 29 May – 23 June 2017. paras. 11-12, available at: <http://globalinitiative-escri.org>.

133 *Report of the Office of the United Nations High Commissioner for Human Rights on the relationship between climate change and human rights*. A/HRC/10/61. 15 January 2009. para. 99.

UN Human Rights Council, suggested that it is more appropriate to treat climate change “as a global problem that requires a global response,” in accordance with “the duty of international cooperation.”¹³⁴

A 2015 UNEP report, published in cooperation with the Sabin Center for Climate Change Law, on human rights and climate change analysed both international cooperation obligations and obligations to address transboundary harm.¹³⁵

The importance of both types of obligations is demonstrated in an analytical study by the OHCHR on climate change and the right to health. The study explains that in the context of climate change and the right to health, States must “protect and fulfil the rights of all persons”¹³⁶ and act “individually and collectively.”¹³⁷ Furthermore, the study finds that “[t]he obligations of States in the context of climate change and other environmental harm extend to all rights holders and to harm that occurs both inside and beyond boundaries.”¹³⁸ There is often an overlap between ETOs arising under Principle 8 (a) and Principle 8 (b), with legal consequences being similar.¹³⁹ In taking steps to urgently reduce GHGs, States must take account of the extent of the harm non-State actors within their territory cause and/or have caused as a result of the carbon footprint of activities and plans and must implement their obligations, whether or not other States do so to the same extent.¹⁴⁰

Case Study 5.1:

Human Rights and Climate Change Investigation – The Philippines



The Philippines, an archipelago of more than 7,000 islands, is one of the most vulnerable countries in the world to climate change.¹⁴¹ Elma Reyes is a community member from Alabat Island. She is part of the group of 18 individuals and 14 civil society organisations (e.g., Greenpeace Southeast Asia Philippines) that filed a human rights and climate change petition with the Commission on Human Rights of the Philippines (Commission) on September 22, 2015. During the Paris climate negotiations, the Commission announced that an investigation would be launched on December 10, 2015.¹⁴² Following the launch of the investigation, the Commission requested the companies to respond to the petition by the end of September 2016. Despite fossil fuel opposition communicated in responses, the investigation is now moving forward and has become a national inquiry,

134 See report submitted to the HRC on 1 February 2016 (A/HRC/31/52), available at: www.un.org.

135 See: *Climate Change and Human Rights*, pp. 24-25, available at: www.columbiaclimatelaw.com.

136 OHCHR. *Analytical study on the relationship between climate change and the human right of everyone to the enjoyment of the highest attainable standard of physical and mental health*. A/HRC/32/23. 6 May 2016. para. 32, available at: www.ohchr.org.

137 *Ibid.* para. 34.

138 *Ibid.* para. 38.

139 De Schutter *et al.* *Supra* note 127. pp. 1101-1104.

140 In its 2016 study on the relationship between climate change and the right to health, the OHCHR states that “States should be accountable to rights holders for their contributions to climate change, including for failure to adequately regulate the emissions of businesses under their jurisdiction.” *Supra* note 136. para 38, available at: www.ohchr.org.

141 See Germanwatch. *Climate Risk Index 2017*. p. 5, available at: www.germanwatch.org.

142 Greenpeace Southeast Asia-Philippines. Philippines launches world’s first national human rights investigation into 50 big polluters. Press Release, 4 December 2015, available at: www.greenpeace.org.

which carries significant weight since such procedures are only rarely used for matters of paramount importance to the country.¹⁴³

Elma and the group are calling for investor-owned fossil fuel and cement producers (*Carbon Majors*) to be held accountable for fueling the catastrophic climate change and ocean acidification resulting in human rights impairments. As a start, the group demanded an investigation into the responsibility of the now 46 *Carbon Majors* for climate impacts that endanger people's lives and livelihoods, as well as those of future generations. The Petitioners argue that the *Carbon Major* companies should be held accountable for the human rights impacts of climate change and ocean acidification because the companies have contributed a large share of GHGs and have failed to curb emissions despite internal knowledge of the threats posed by climate change and possessing the capacity and resources to mitigate climate risks. In addition, the Petitioners believe that some of the companies have been or are currently involved in activities aimed at undermining climate science and policy action.¹⁴⁴ The Petitioners also argue that the companies are failing to respect the rights of Filipino people and communities based on the norms and standards concerning the responsibility of corporate actors, as articulated in the UN Guiding Principles on Business and Human Rights.¹⁴⁵

The individuals and NGOs also invoke the ETOs of the States where the *Carbon Majors* are incorporated ('home States') to protect the human rights of Filipinos against harm by third parties. The Petitioners argue that steps must be taken both by the States where the companies are incorporated, such as Australia, Canada, and the United States, and by the State where the harm is occurring, the Philippines, to ensure that they refrain from the activities that are interfering with the rights of Filipinos. The States in which the *Carbon Majors* are domiciled need to adequately regulate, whereas the Philippines needs to provide access to prompt, accessible and effective remedies for individuals suffering human rights harm and to monitor, assess, and notify the *Carbon Majors* and their States of domicile about imminent or on-going human rights impacts, as well as take further action as deemed necessary.¹⁴⁶

The proceeding presents an opportunity for the home States to effectively regulate the *Carbon Majors* and cooperate with the Philippines, and specifically with the Commission. They should take deliberate, concrete and targeted steps to cooperate with the Commission. This could take the form of information-sharing about domestic laws and legal processes, facilitation of correspondence and exchange of information with and from fossil fuel companies and/or communicating with counterpart Philippine authorities to assist in the investigation. In addition, home States should examine how the *Carbon Majors* are regulated and determine the necessary measures, such as human rights impact assessments and reporting on climate risks, to ensure that companies do not nullify or impair the rights of local communities, indigenous peoples, and others living abroad by further contributing to climate change. This may require determining to what extent fossil

143 Greenpeace Southeast Asia-Philippines. Petitioners' consolidated reply to the respondent Carbon Majors in the National Public Inquiry being conducted by Commission on Human Rights of the Philippines. Press Release, 14 February 2017, available at: www.greenpeace.org.

144 Greenpeace Southeast Asia et al. *Petition to the Commission on Human Rights of the Philippines Requesting for Investigation of the Responsibility of the Carbon Majors for Human Rights Violations or Threats of Violations Resulting from the Impacts of Climate Change*. 22 September 2015. pp. 30-46, available at: www.greenpeace.org.

145 *Ibid.*

146 *Ibid.* p. 28.

fuel companies are contributing to climate change and taking legislative action to reduce/eliminate this contribution.

The Commission's national inquiry could ultimately lead to a resolution with a finding that the *Carbon Majors* are responsible for the impacts associated with climate change, including extreme weather events, and the associated human rights harm. It presents a platform for States to meet their obligation to create an international environment that is conducive to the realization of human rights through international cooperation, as set out in **Maastricht Principles 20-22**. For Elma, and others highly vulnerable to the impacts of climate change, ETOs serve as an important legal lever to achieve accountability and to protect their lives and livelihood from the climate crisis.

Chapter 6: Land and Natural Resource Grabbing¹⁴⁷

Introduction



Access to, use of, and control over land and related natural resources are necessary conditions for the realisation of human rights for the people and communities living off these resources. This includes the right to food and nutrition, the right to water and sanitation, the right to health, the right to housing, the right to work, the right not to be deprived of one's means of subsistence, and the right to take part in cultural life. The rights of women and indigenous peoples are also closely linked to secure, stable and equitable access to land and related resources.

The scale, depth and pace of the current wave of land and resource grabbing pose major threats for the present and future enjoyment of human rights worldwide. If not reversed, the current developments will deprive a significant part of the world's rural population of their access to and control over natural resources and will destroy the peasantry, fishing, pastoralist and forest dweller communities that still are the backbone of local food producing systems. They are also deepening existing patterns of discrimination and structural violence against women and indigenous peoples. The increased interest in land as an economic asset by corporations, funds, local elites and governments denies land and land-related resources for local communities, destroys livelihoods, disrupts communities, and reduces the political space for peasant-oriented agricultural policies and self-determined development. It also distorts markets towards increasingly concentrated agribusiness interests and global trade rather than towards sustainable peasant, smallholder production for local and national markets. These processes accelerate eco-system destruction and the climate crisis because of the depletion of natural resources that they promote (e.g., industrial agricultural production, large-scale extractivism).

When approaching the issue, it is important to underline that:

- › The current wave of land dispossession and privatization of nature as well as the mechanisms, immediate outcomes, and broader, long-term implications attached to it concern not only land (agricultural lands, forests, rangelands, coastal lands, etc.) but also related natural resources: underground materials, water, as well as small-scale fisheries ('ocean grabbing'¹⁴⁸).

¹⁴⁷ Prepared by Philip Seufert, Programme Officer on Access and Control over Natural Resources, FIAN International.

¹⁴⁸ "The term 'ocean grabbing' aims to cast new light on important processes and dynamics that are negatively affecting the people and communities whose way of life, cultural identity and livelihoods depend on their involvement in small-scale fishing and closely related activities." Transnational Institute (TNI), Masifundise Development Trust, Afrika Kontakt and World Forum of Fisher Peoples (2014). *The Global Ocean Grab: A Primer*, available at: www.tni.org.

- › Beyond the issues of access to and control over land, the resulting changes in the use of these resources towards a production model based on high external inputs and commercial (incl. GMO) seeds, with important implications for human rights, are key: This applies even where there are no forced evictions and independently of whether they imply (legal or illegal) large-scale land deals or not.¹⁴⁹
- › The current wave of natural resource grabs is not limited to rural areas, but also concerns peri-urban and urban areas, particularly affecting popular neighbourhoods, informal urban settlements and slums.

THE EXTRATERRITORIAL DIMENSIONS OF LAND AND NATURAL RESOURCE GRABBING

The application of ETOs in the context of land and natural resource grabbing is part of a broader effort to enforce human rights-based land and food governance frameworks that prioritise marginalised rural groups, especially small-scale food producers, by protecting, improving and, where necessary, restoring their access to, use of and control over land and related natural resources. The relevance of ETOs for struggles around land and natural resource grabbing arises from the use of human rights law instruments as complementary tools that can add legal weight to the claims made by people and communities. The Maastricht Principles summarize and clarify the human rights obligations States have under international human rights law in relation to people living in other countries. They hence provide a tool for extending advocacy efforts beyond the domestic State to foreign States involved in violations related to land and natural resource grabbing.

Land and natural resource grabbing involves many different actors such as local elites, companies (from local to transnational corporations), individual investors, governments, local authorities, (development) banks, international institutions, development agencies, etc. Although there are always local or national entities involved, international actors play an important role in many land grabbing cases. A web of global actors behind most large-scale agricultural projects and land deals include banks and companies that are funding the projects, and the companies that are buying the produce.

At first sight, however, many of these actors remain invisible because they are often not directly involved in the operations on the ground. Above all, financial actors such as banks, pension funds, hedge funds or investment firms are often not very visible, as they may be financing land grabs indirectly (e.g. when banks provide credits to companies involved in land deals, or when hedge funds and private equity firms buy stakes in overseas companies that control land).

The example of the complex structure of one of the biggest palm oil players in Africa, Feronia, illustrates the multiple and interconnected actors, relations and processes that are involved in the design, financing and implementation of agribusiness investments (see **Case Study 6.1**). What looks like a corporate entity at first is, in reality, a complex investment web, in which attributing responsibilities for human rights violations

¹⁴⁹ As the implementation of projects linked to land deals that were made since 2008 is advancing, there are more and more cases where the actual land grab/dispossession has already occurred, but where communities face the longer-term impacts, such as lack of jobs or bad working conditions, pollution of land and water, increased living costs, transformation of the local economy, disintegration of the social fabric of communities and resulting conflicts, and emigration (especially of young people). While some of these cases may not look like “land cases” at first sight, they actually are.

and abuses to each of the actors involved becomes a substantial challenge (see also **Chapter 3**).¹⁵⁰ This is a deliberate strategy of ‘distancing of accountability’,¹⁵¹ used by those involved in promoting and facilitating land and natural resource grabbing.

In order for the communities and people affected by land and natural resource grabs to assert their rights, it is thus important to try to understand the investment web behind a land grab as much as possible. Identifying some of the most important actors can open additional avenues for advocacy and allows identification of the most strategic and promising entry points for effectively claiming and asserting people’s human rights.

For advocacy based on ETOs it is important to understand the multiple avenues through which foreign States are connected to land and natural resource grabs. Important linkages include:

- › Foreign States as ‘home States’ of private companies (including financial entities) involved in land grabbing (see **Chapter 3**).
- › Direct involvement (e.g. land deals by public institutions or sovereign wealth funds).
- › Involvement via participation in or support to public-private partnerships (PPPs).
- › Promotion or facilitation of land grabbing through domestic and foreign policies. For example, development policies that support large-scale commercial agriculture, or trade policies that provide incentives for large-scale production of certain cash crops (see **Chapters 1 and 4**).
- › Foreign States’ participation in international organisations, including financial institutions such as the World Bank, whose lending practices are contributing to land grabbing and land conflicts (see **Chapter 2**).

Box 6.1: The Role of the State in Land and Natural Resource Grabs

The state plays a key role in land and resource grabbing. First, a significant part of current land and natural resource grabs are occurring on lands that are formally owned by the state. Often State authorities use public interest arguments to justify the dispossession of communities that occupy and use the land and related resources. Consequently, many States today are facilitating further privatization, commoditization and (re-) concentration of land. One way they do this is by creating a narrative about why land deals that benefit investors are necessary. The appropriation of land and natural resources is further facilitated by foreign States’ policies for alleged environmental ends (e.g., carbon offsetting or environmental conservation initiatives).

While States play an important role in the current wave of land grabbing by facilitating land deals and other forms of dispossession, they are necessarily also part of the solution. Only the State has the authority to mobilize public resources to protect people’s access to land (e.g., by regulating companies and investors), to overcome resistance to redistributing large private landholdings, and to enforce compliance from social forces in society.

150 Borrás Jr., S. et al. (2016). *Land Grabbing and Human Rights: The Involvement of European Corporate and Financial Entities in Land Grabbing outside the European Union*. Study commissioned by the Subcommittee on Human Rights of the European Parliament, available at: www.europarl.europa.eu.

151 Clapp, J. “Financialization, distance and global food politics”. *Journal of Peasant Studies* 41(5) (2014): 797-814.

It is important to note that although the human rights framework attributes a key role to the State, it does not attribute more power to the State. Rather, it limits State power in that it considers people not as subjects but as rights-holders, and the State as guarantor of rights ('duty-bearer') and not as absolute sovereign. The human rights framework also emphasizes the fundamental difference between States and companies by clarifying that States have the mandate to serve the public interest, whereas corporations pursue private economic interests. This differs fundamentally from many regulatory approaches that implicitly transfer State prerogatives and duties to companies and private investors, implying (implicitly or explicitly) that they will self-regulate. This does not mean one should rely solely on the State to advance and protect the land rights of people (taking into account the contested and contradictory nature of State power), but rather one should pursue an interactive State-society framework.

What are States' ETOs in relation to Land and Natural Resource Grabbing?

States' main ETOs in the context of land and natural resource grabbing can be summarized as follows:

1. Obligation to avoid causing harm in other countries: States must take measures to prevent their domestic and foreign policies and actions from contributing to land grabbing and interfering with people's human rights. This refers both to activities that *directly* impair the rights of people abroad and those that interfere *indirectly* (e.g., by decreasing another state's ability to comply with its human rights obligations). Human rights impact assessments (HRIAs) and monitoring of the extraterritorial impacts of policies, laws, and practices are important steps for avoiding harm.

Most relevant Maastricht Principles:

- ETOP 13: Obligation to avoid causing harm
- ETOP 14: Impact assessment and prevention
- ETOP 20: Direct interference
- ETOP 21: Indirect interference

2. Regulation of transnational corporations: States that are in a position to regulate a corporation, or a private investor, are required to adopt and enforce measures to protect human rights. This obligation applies when a corporation has its center of activity, is registered or domiciled, or has its main place of business or substantial business activities, in the State concerned. Effective regulation of the extraterritorial activities of companies, and international cooperation to this effect, is crucial for addressing land grabbing. States should moreover use their influence, for example through their public procurement system, to protect human rights abroad (see **Chapter 3**).

Most relevant Maastricht Principles:

- ETOP 24: Obligation to regulate
- ETOP 25: Bases for protection
- ETOP 26: Position to influence
- ETOP 27: Obligation to cooperate

3. Accountability and access to remedies: Experience has shown that moral-duty-based and non-judicial grievance mechanisms are insufficient for addressing corporate human rights abuses, and that companies often use them strategically to prevent victims from taking legal action. State-based judicial remedies are therefore crucial. The human rights obligations of States require them to ensure victims of human rights violations and abuses, whether by State actors or companies, have access to effective judicial and non-judicial remedies. They must cooperate to this effect with other States concerned.

Most relevant Maastricht Principles:

ETOP 37: General obligation to provide effective remedies

ETOP 38: Effective remedies and reparation

4. Obligations in the context of international organisations: States continue to be bound by their international human rights obligations when they act through or transfer competencies to international organisations. They must use their influence within these organisations to ensure that they act in compliance with and do not harm human rights (see **Chapter 2**).

Most relevant Maastricht Principles:

ETOP 15: Obligations of States as members of international organisations

Case Study 6.1:

Distancing Accountability through Investment Webs: The Example of Feronia Inc.



Feronia Inc. is a Canadian company registered on the Toronto stock exchange. Feronia claims to legally control some 117,897 hectares of land in the Democratic Republic of Congo (DRC) through its two subsidiary companies, the Congolese Feronia Plantations et Huileries du Congo (PHC) and Feronia PEK sprl (107,897 and 10,000 hectares respectively).¹⁵² Feronia JCA Limited, which is in turn registered in the Cayman Islands, intermediately controls these two subsidiaries, to 76% and 80%.¹⁵³ As of March 2015, Feronia Inc.'s largest shareholders were the African Agriculture Fund (AAF, 32.44 %) and CDC Group Plc. (27.43 %). AAF is a Mauritius-based private equity fund financed by bilateral and multilateral African development finance institutions.¹⁵⁴ Its Technical Assistance Facility (TAF) is funded primarily by the European Commission (EC) and managed by the International Fund for Agricultural Development (IFAD). The TAF is co-sponsored by the Italian Development Corporation, United Nations Industrial Development Organisation (UNIDO), and the Alliance for a Green Revolution in Africa (AGRA).¹⁵⁵ CDC is the UK's Development Finance Institution, owned by the UK Government. In total, institutional investors control 77.7 % of Feronia.¹⁵⁶

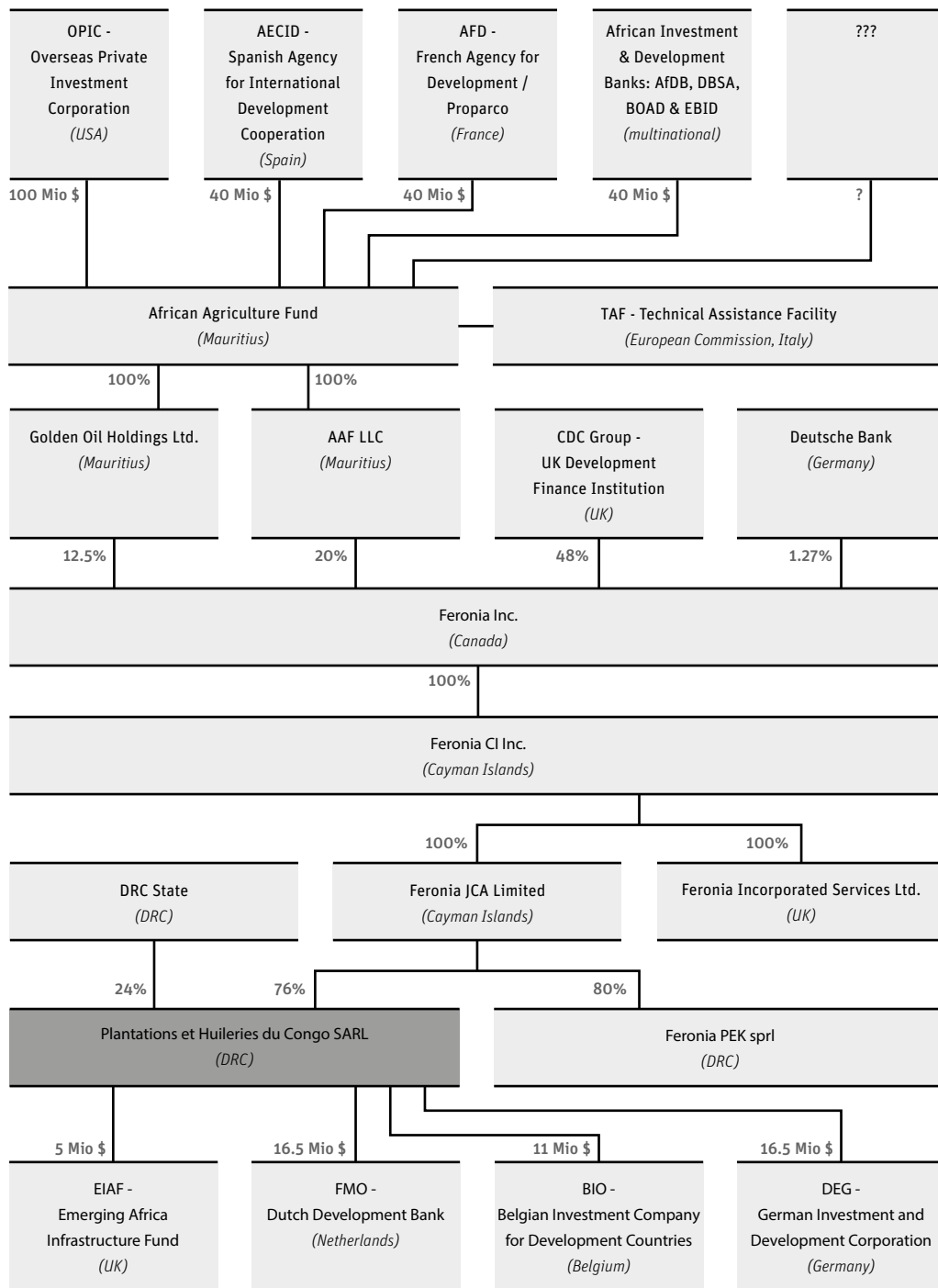
152 Feronia. "Our Plantations". Visit: www.feronia.com/pages/view/plantations. The legitimacy of those land claims are contested by local communities, as well as Congolese and international NGOs.

153 RIAO-RDC/GRAIN (2015). *Agro-Colonialism in the Congo. European and US Development Finance is Bankrolling a New Round of Colonialism in the DRC*, www.grain.org.

154 Including: USA (OPIC), France (AFD/ FISEA), Spain (AECID), and African development banks (AfDB, DBSA, BOAD and EBID). *Ibid.* p. 3.

155 Feronia. "Introducing the Technical Assistance Facility of the AAF". Available at: www.aaftaf.org.

156 Feronia. *Feronia Secures \$49M Term Facility for Palm Oil Operations*. Press Release, 22 December 2015, available at: www.feronia.com.



Source: *Borras Jr., S. et al. 2016*¹⁵⁷

157 “The following aspects must be considered: (1) The data are taken from different sources from different years. The figure might thus not reflect the exact situation as of today. However, this does not impede the purpose of the figure, which is to exemplify the complex investment webs surrounding land grabs. (2) CDC shares are summarized from shares and “benders”, an instrument that can convert loans to shares. (3) Feronia’s website mentions that due to negative perceptions, the Feronia entity in the Cayman Islands entered into voluntary liquidation. During an informational meeting with Belgian NGOs, Feronia and BIO mentioned that Feronia would now register in Belgium.” *Borras Jr., S. et al. Supra* note 150. pp. 21.

Although a corporate entity at first sight, this complex structure poses questions in terms of human rights compliance of the States mentioned. This creates a peculiar situation in which one of the biggest palm oil players in Africa is owned and mainly controlled by Development Finance Institutions linked to eleven different countries (USA, Canada, Germany, Spain, France, Belgium, The Netherlands, Cayman Islands, Mauritius, UK, DR Congo).¹⁵⁸ This complex ‘multilayeredness’ can be seen as a possible characteristic of land grabs. As a result, attributing responsibilities for human rights violations to each of the States involved becomes a substantial challenge for those in charge of determining accountability and providing remedies (including parliamentary, quasi-judicial and judicial mechanisms). It also hampers the advocacy work of grass roots communities and CSOs seeking justice.

ETOs can be a useful instrument for breaking this strategy of distancing accountability and provide an entry point for advocacy work targeting the home States of the investors involved. An ETO strategy for this case can build on the following elements:

- › The implication of several Development Finance Institutions (DFIs) in the case implies the respective States’ obligations to respect human rights. These obligations require States to ensure public scrutiny of land deals through independent HRIAs (prior to and after an investment has been made), and to withdraw from deals where substantial human rights risks or violations have been identified. They must also effectively monitor the activities of DFIs, for instance, by establishing parliamentary commissions that have access to DFI’s business records.
- › States and DFIs also must establish accessible complaint mechanisms for victims of human rights abuses (see **Case Study 4.2**).
- › There is also a particular obligation for Canada, as the home State of Feronia Inc., to put into place effective regulations that prevent the company (and its subsidiaries) from impairing human rights in other countries. This obligation also applies to other States which are in a position to regulate corporations involved in Feronia’s operations.

Given the substantial barriers faced by communities and support groups in having the rights of affected people respected and restored due to the difficult political context in DRC, international advocacy in the home States of the involved companies and investors has become a key component of the advocacy related to this case.

¹⁵⁸ Multilateral banks and the financiers of the Technical Assistance Facility of the AAF (especially EC and Italy) are excluded from this list.

Outlook:

The Way Forward with Human Rights Beyond Borders

The handbook has provided an introduction to the obligations States have beyond their national borders and how these relate to different policy fields and sites of social struggle. It has highlighted the relevant Maastricht Principles that can be used to strengthen the documentation, analysis and advocacy around extraterritorial violations of human rights. Moreover, possible avenues for denouncing violations at the domestic, regional and international levels have been outlined.

The Maastricht Principles present a complementary tool for holding States accountable to their human rights obligations by moving from an exclusive focus on the States where affected groups live to one that also examines the responsibility of other States. This by no means implies releasing the national State from its responsibility to respect, protect and fulfil human rights, but rather opens up further avenues for accountability that reflect today's reality in which decisions taken by one State impact on other States and the enjoyment of human rights in those countries.

There continues to be considerable insecurity about and even resistance by some States against their extraterritorial obligations. After all, who likes to take on what looks like additional obligations? It may well be asked why States took up territorial human rights obligations in the first place. They did so because the population in their territory demanded it, and because it is part and parcel of a modern State's legitimacy. The times of looking at States in isolation are, however, gone.

When human rights made their entry into international law in the context of the UN Charter, they did so for political reasons. International cooperation among States was of central importance from the beginning. The political and historic reasons for the importance of human rights beyond borders have grown since then. International cooperation needs a political and legal base: human rights.

With time, the extraterritorial obligations of States in specific situations will become further clarified. An international law of cooperation will emerge to address pressing global issues of the present and future: climate, resources, pollution, peace, global social sharing, and the regulation of business and finance. There are some positive steps in this direction, for example, the current Human Rights Council process towards an international treaty on the regulation of transnational business. Such processes provide important spaces for the further development and agreement on the content of States' ETOs with regard to specific policy fields, and the development of respective safeguards.

Consistent engagement with UN and regional human rights bodies as well as strategic litigation and the use of quasi-judicial mechanisms at the domestic level are equally important to further concretize States' obligations beyond borders and hold them accountable for breaches. Significant advancements have been made in past years. These go hand in hand with efforts to engage with government bodies, including parliamentarians

and judges, to advance the application of ETOs in policy and practice, and to strengthen domestic mechanisms of scrutiny and accountability.

Essential in all of this is the work around concrete cases of extraterritorial human rights violations. Actions to promote human rights beyond borders must be rooted in and support the struggles of communities for their rights. Only when ETOs become a concrete tool in the hands of people to claim and advance their rights, the necessary public pressure will be created for States to adhere to them. We hope that this handbook can make a contribution to this.

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