

# The Extraterritorial Scope of the International Covenant on Economic, Social and Cultural Rights in the Work of the United Nations Committee on Economic, Social and Cultural Rights

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## Abstract

Over the years, the United Nations Committee on Economic, Social and Cultural Rights has indicated that the International Covenant on Economic, Social and Cultural Rights (ICESCR) may have an effect beyond the borders of States Parties, meaning that states may be bound by their obligations under the treaty when acting extraterritorially. The present contribution aims at researching the use of the notion of the extraterritorial scope of the ICESCR in the documents adopted by the Committee, such as General Comments, Statements and Concluding Observations. The article concludes that, although the Committee did introduce some basic notions, it has never clarified at length, in-depth and systematically the notion of the extraterritorial scope of State Parties' obligations from a conceptual perspective. There is therefore a need for the Committee to further develop the notion of the international scope and application of the ICESCR, for example, by holding a day of general discussion and adopting a key document on this topic which should contain concrete guidance to States Parties. The present article provides examples of questions and issues that are relevant in order to gain a more coherent understanding of the extraterritorial scope of the ICESCR from a legal point of view.

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**Keywords:** economic, social and cultural rights – extraterritorial jurisdiction – international cooperation and assistance – International Covenant on Economic, Social and Cultural Rights – United Nations Committee on Economic, Social and Cultural Rights

## 1 Introduction

Realisation of economic, social and cultural rights ('esc rights') essentially has a territorial scope: it normally takes place on the territory of states. On 1 October 2010, 160 states had ratified or acceded to the International Covenant on Economic, Social and Cultural Rights (ICESCR),<sup>1</sup> which is the main universal treaty protecting these rights. A State Party is under an obligation to take all appropriate measures to progressively realise the esc rights listed in the treaty (Article 2(1)). However, states do not exist in isolation. As members of the community of states they are dependent on international cooperation to cope with problems that go beyond national borders. The need for international cooperation as a key principle of present-day life comes very much to the fore in the era of globalisation in which we live. The process of globalisation is crucial for a proper understanding of the international dimensions of the realisation of esc rights. Globalisation as an economic and social phenomenon is characterised by an increase in international transactions between a growing number of actors, such as companies, individuals (patterns of worldwide migration), international governmental organisations, non-governmental organisations (NGOs) and states. Also, the nature of involvement of actors in this process is changing: we witness an increase in the role and responsibilities of private actors in economic life; a diminishing role of the state (with trends towards privatisation); and a stronger involvement of international governmental organisations and international market forces in the economic and financial policies of states (with financial and economic austerity and adjustment programmes propagated by the International Monetary Fund (IMF) and the World Bank).<sup>2</sup> The process of economic globalisation has also led to an unequal distribution of the positive effects of globalisation between people living in the North and those in the South.<sup>3</sup> In other words, the realisation of esc rights increasingly has international dimensions.<sup>4</sup>

Furthermore, since the end of the Second World War the nature of international law has changed dramatically. Not only did a law of cooperation between

1 1966, 993 UNTS 3.

2 See The World Commission on the Social Dimension of Globalization, *A Fair Globalization: Creating Opportunities for All* (Geneva: ILO, April 2004), available at: <http://www.ilo.org/public/english/wcsdg/docs/report.pdf> [last accessed 22 November 2010].

3 Sen, 'Ten Theses on Globalization', *Los Angeles Times*, 17 July 2001.

4 See, for example, Kinley, *Civilising Globalisation – Human Rights and the Global Economy* (Cambridge: Cambridge University Press, 2009).

states develop next to the law of co-existence,<sup>5</sup> but also the more recent process of globalisation led to a trend towards a wider interpretation of traditionally territorial related concepts, such as jurisdiction and national sovereignty in matters of human rights.<sup>6</sup> What then is the relationship between developments towards globalisation and the universal protection of esc rights? The UN Committee on Economic, Social and Cultural Rights ('the Committee') has noted that in itself globalisation as a social phenomenon is not incompatible with the idea of social, economic and cultural rights. However, 'taken together . . . and if not complemented by appropriate additional policies, globalisation risks downgrading the central place accorded to human rights by the Charter of the United Nations and the International Bill of Human Rights in particular'.<sup>7</sup> In other words, the changed (and changing) nature and pattern of economic and financial transactions worldwide may jeopardise the enjoyment of esc rights in many countries. The challenge then is to make the ICESCR fit the era of globalisation: to reach beyond traditional concepts of state sovereignty in order to provide for international solidarity and achieve global justice. At the time the treaty was drafted, only states were the principal actors on the international plane. The role of the state as the principal actor responsible and accountable for the realisation of these rights is still paramount, but other actors (such as international organisations and companies) may also have an impact on the actual enjoyment or lack of enjoyment of these rights. The question then is how the state, as a State Party to the ICESCR, can be held responsible for the conduct of these non-state actors who often act extraterritorially, or whose conduct has extraterritorial effects. For example, if the World Bank intends to financially support the construction of a dam in a developing country, and if as a consequence of this project indigenous people face eviction from their land and homes, does a Western donor state have an obligation under human rights law to oppose approval of this project by the competent body of the World Bank? Also, the state itself is an actor that increasingly acts outside its own territory. Such conduct may have human rights effects in another country. Does the state have human rights obligations due to an extraterritorial application of the ICESCR? What does international human rights law have to say about this?

The present contribution aims at researching the use of the notion of the extraterritorial scope of the ICESCR in the work of the Committee. Over the

- 5 For an early description of this development, see Friedmann, 'The Changing Structure of International Law' (1969) 127-II *Recueil des Cours de l'Académie de Droit International de la Haye* 91.
- 6 Coomans and Kamminga (eds), *Extraterritorial Application of Human Rights Treaties* (Antwerp: Intersentia, 2004); and Skogly, *Beyond National Borders: States' Human Rights Obligations in International Cooperation* (Antwerp: Intersentia, 2006).
- 7 Statement adopted by the Committee on Economic, Social and Cultural Rights at its eighteenth session on globalisation and its impact on the enjoyment of economic, social and cultural rights, 15 May 1998, E/C.12/1998/26, at para 515(3).

years, the Committee has indicated that the ICESCR may have an effect beyond the borders of States Parties, meaning that states may be bound by their obligations under the treaty when acting extraterritorially. This idea has been developed cautiously, but progressively in the General Comments, the Statements and Concluding Observations adopted by the Committee. The present contribution will study how the Committee has used this notion in its work. It will also analyse the terminology applied by the Committee to label the extraterritorial reach of the ICESCR. It will distinguish between different dimensions of the extraterritorial application of the ICESCR (for example, in a situation of occupation) and actors (states, transnational corporations, international organisations, states as members of international organisations) that are relevant in this context. The method used for researching this subject is a content analysis of the texts adopted by the Committee in the framework of the State reporting procedure. These include General Comments, Statements and Concluding Observations and other relevant ICESCR related documents.

It should be pointed out that, generally speaking, the reporting procedure is not a very appropriate mechanism for discussing concrete cases of extraterritorial state conduct, because it normally deals with the general situation of esc rights in a State Party. Also State Reports do not contain information on this issue; it may be assumed that states are not very willing to provide information on extraterritorial activities which may give rise to criticism from a human rights perspective. It should be noted, however, that the Guidelines on Reporting do not invite states to submit information on this. The new, revised Guidelines adopted by the Committee in November 2008, are quite poor on the extraterritorial dimensions of State Parties' actions.<sup>8</sup> Also, the lists of issues drafted by the Committee in preparation of the oral examination of State Reports are quite minimal on this aspect. As a consequence, it is difficult for the Committee to make specific recommendations in the Concluding Observations. One suggestion to improve this would be to have more alternative information on extraterritorial state conduct available from NGOs, to be submitted as parallel reports to the Committee. So far, there are only a few examples of such NGO reports.<sup>9</sup>

8 Guidelines on Treaty-Specific Documents to be submitted by States Parties under Articles 16 and 17 ICESCR, 24 March 2009, E/C.12/2008/2.

9 See Windfuhr, *Compliance of Germany with its International Obligations under the ICESCR – Special Focus: The Right to Adequate Food* (Heidelberg/Bonn/Stuttgart: FIAN, EED and Brot für die Welt, 2001); Hausmann Künemann, *Germany's Extraterritorial Human Rights Obligations – Introduction and Six Case Studies* (Heidelberg/Bonn/Stuttgart : FIAN, EED and Brot für die Welt, 2006); and Hausmann, *Germany's Extraterritorial Human Rights Obligations in Multilateral Development Banks – Introduction and Case Study of Three Projects in Chad, Ghana and Pakistan* (Heidelberg/Bonn/Stuttgart FIAN, EED and Brot für die Welt, 2006); and Coalition of Belgian Civil Society for Economic, Social and Cultural Rights, *Joint Parallel Report - Compliance of Belgium with its Obligations under the International Covenant on Economic, Social and Cultural Rights, Part II*, 24 July 2007, E/C.12/BEL/NGO/3. See also FIDH

## 2 Extraterritorial Scope of Human Rights Treaties: General Observations

As a general rule, states have obligations towards individuals who are on the territory or within their jurisdiction. This is a key clause of leading treaties on civil and political rights.<sup>10</sup> The extraterritorial scope of obligations is an exception to that general rule and has been recognized and interpreted by a number of human rights supervisory bodies.<sup>11</sup> The extraterritorial scope of a human rights treaty would apply in cases where people residing in another country are within the jurisdiction of a foreign state as a result of such a state's extraterritorial acts or omissions. This would be the case when a foreign state exercises effective control over a person or over territory in another state, for example, when a person is arrested by foreign troops or part of the territory of a state has been occupied by another state.<sup>12</sup> Article 2(1) of the ICESCR does not have a jurisdiction clause. What does this omission mean for the protection of esc rights in an extraterritorial context?<sup>13</sup> Would it mean that there is a protection gap in situations where the extraterritorial conduct of one state affects the esc rights of people living in another state, because these persons are not within the jurisdiction of the foreign state? It is important in this respect to distinguish between the concept of jurisdiction and the notion of state responsibility. Jurisdiction is about entitlements to act (is it

and Kenyan Human Rights Commission, *Economic Development or Human Rights – Assessing the Impact of Kenya's Trade and Investment Policies and Agreements on Human Rights* (Paris/Nairobi, 2008), available at: <http://www.fidh.org> [last accessed 22 November 2010].

- 10 Compare Article 1, Convention for the Protection of Human Rights and Fundamental Freedoms 1950, ETS 5, 213 UNTS 221; Article 2(1) International Covenant on Civil and Political Rights 1966, 999 UNTS 171; and Article 1, American Convention on Human Rights 1969, 1144 UNTS 123.
- 11 The European Court of Human Rights, the Human Rights Committee, the Inter-American Commission on Human Rights and the Committee against Torture.
- 12 For an extensive discussion of the case law of international human rights supervisory bodies, see Gondek, *The Reach of Human Rights in a Globalising World: Extraterritorial Application of Human Rights Treaties* (Antwerp: Intersentia, 2009).
- 13 It is interesting to note that the Optional Protocol to the ICESCR, adopted on 10 December 2008, which provides for a complaints procedure, does include the term 'jurisdiction' in Article 2 on who has the right to submit a communication. The relevant part of that provision reads: 'Communications may be submitted by or on behalf of individuals or groups of individuals, under the jurisdiction of a State Party, claiming to be victims of a violation of any of the economic, social and cultural rights set forth in the Covenant by that State Party.' See Optional Protocol to the ICESCR, GA/Res. 63/117, 10 December 2008, A/RES/63/117. It has been argued by some that there was no reason to include a jurisdictional limitation clause in the Protocol because the ICESCR does not use that term. However, that would be a deviation from the wording of other international complaints procedures and completely unacceptable for states, because it would be open to anyone to lodge a complaint against any State Party to the Protocol, no matter whether such a person is within the jurisdiction of that State: see Inter-American Institute of Human Rights and International Commission of Jurists, *Commentary on the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights* (Costa Rica/Geneva: Inter-American Institute for Human Rights/Sida, 2010) at 51–2.

lawful for a state to act outside its borders?), while state responsibility is about obligations incurred when a state does or does not act (the legal consequences of extraterritorial conduct).<sup>14</sup> In the era of globalization international intercourse between states has increased tremendously, such as in the areas of trade, development, investments and military cooperation. The overarching notion underlying such activities is the principle of international cooperation. Normally speaking, states have a right to engage in such bilateral or international activities (jurisdictional dimension), as long as they comply with general rules of international law, for example the non-use of force and respect for human rights. The state responsibility dimension comes into play when the actions or omissions of a state beyond its national border are contrary to its obligations under human rights treaties, that is where they negatively affect/harm the esc rights of persons residing in another country.<sup>15</sup> Another complicating factor with respect to the use of the jurisdiction concept in the area of esc rights is that it is quite hard to think of cases or situations, with the exception of a situation of occupation, in which a state exercises effective control over persons or territory abroad. For example, if a donor state is engaged in a development cooperation project, such a state is not the only duty bearer. Usually, the national state is engaged as well, and there may be NGOs involved in carrying out the project. There are thus multiple duty holders and consequently shared responsibilities. In addition, the actions of the donor state may certainly have an impact on the esc rights of people affected by the project, but it would depend on the facts whether such an impact can be qualified as exercising effective control over people or territory abroad. In addition, the effect on the esc rights of the local residents should be defined more precisely in terms of harm incurred and violations of rights.

The moral reasons for extraterritorial human rights obligations would include the idea that states cannot do abroad what they are prohibited from doing at home, namely doing harm and/or violating rights of individuals. This applies especially to negative obligations, meaning abstaining from conduct which would violate rights of individuals through direct action by a foreign state. Extraterritorial positive obligations to contribute directly and financially to the realisation of esc rights may be justified by the argument that there is a moral duty to alleviate human suffering and eliminate worldwide poverty.<sup>16</sup> Skogly and Gibney have argued that 'the moral – but also legal – basis for these (extraterritorial) obligations is really very simple: it is a matter of taking

14 Higgins, *Problems & Process – International Law and How We Use It* (Oxford: Clarendon Press, 1994) at 146; and Gondek, *supra* n 12 at 56 and 168.

15 Gondek, *supra* n 12 at 324.

16 For a discussion of different arguments, see Pogge, 'Severe Poverty as a Human Rights Violation', in Pogge (ed), *Freedom from Poverty as a Human Right* (Oxford: Oxford University Press and UNESCO, 2007) 11.

responsibility for one's own actions or omissions'.<sup>17</sup> This seems to be a convincing justification from the moral perspective, but from a legal point of view it is not. What does 'taking responsibility' exactly mean from the legal perspective, and who is responsible for what? Some of these questions will be discussed hereafter.

### 3 The Approach of the Committee

#### A. The ICESCR and its International Dimension

Article 2(1) of the ICESCR refers to the obligation of every State Party

to take steps, individually *and through international assistance and cooperation*, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognised in the present Covenant by all appropriate means . . . (emphasis added)

The ICESCR does not mention territory or jurisdiction as delimiting criteria for the scope and application of the treaty.<sup>18</sup> Instead, it refers to the international or transnational dimensions of the realisation of esc rights. Therefore it is suggested that a certain extraterritorial (in the sense of international) scope was intended by the drafters and is part of the treaty.<sup>19</sup> This is also clear from the Preamble of the Covenant which contains a reference to 'the obligation of States under the Charter of the United Nations to promote universal respect for, and observance of, human rights and freedoms'. There was consequently no need to limit explicitly the protection of esc rights to those people resident in the territory of a State Party only.

A few other Articles of the Covenant also have an explicit international dimension. For example, Article 11(2) provides that State Parties shall take measures through international cooperation that are necessary to improve methods of food production, conservation and distribution of food. In addition,

17 Skogly and Gibney, 'Economic Rights and Extraterritorial Obligations', in Hertel and Minkler (eds), *Economic Rights – Conceptual, Measurement and Policy Issues* (Cambridge: Cambridge University Press, 2007) 267 at 268.

18 Compare Article 2(1) ICCPR which provides: 'Each State Party to the present Covenant undertakes to respect and to ensure to all individuals *within its territory and subject to its jurisdiction* the rights recognized in the present Covenant . . .' (emphasis added). On the scope of this provision, see McGoldrick, 'Extraterritorial Application of the International Covenant on Civil and Political Rights', in Coomans and Kamminga, *supra* n 6 at 41.

19 See Craven, *The International Covenant on Economic, Social and Cultural Rights – A Perspective on its Development* (Oxford: Clarendon Press, 1995) at 144. Craven quotes Cassin, who, at the time of drafting the ICESCR, argued that 'by providing for recourse to international cooperation instead of allowing the enjoyment of rights to be put off, [the reference to international cooperation] filled the gap between what States could in fact do and the steps they would have to take to meet their obligations under the Covenant', 21 May 1951, E/CN.4/SR.216, at 6.

State Parties shall take measures in order to ensure an equitable distribution of world food supplies in relation to need, thereby taking into account the problems of food-importing and food-exporting countries. Articles 22 and 23 emphasise the important role of various forms of international action and cooperation for the achievement of esc rights. However, there is no clear understanding yet of the extraterritorial reach of the ICESCR. There is no case law that could shed light on this question, because the new complaints procedure under the Covenant has not yet entered into force.

The Committee began to develop its views on the extraterritorial reach of the ICESCR in a number of General Comments that were adopted in the early 1990s.<sup>20</sup> These Comments mainly dealt with the nature of States Parties' obligations resulting from the key provision of the Covenant, which is Article 2(1). A number of Statements on topical issues also contain references to the notion of the international reach of the Covenant, such as the one on poverty and economic, social and cultural rights.<sup>21</sup> A number of General Comments on substantive rights deal with the obligation of a State Party to regulate and monitor the activities of transnational corporations based in that country who, through their activities in other countries, may affect the rights of the local residents.<sup>22</sup> In General Comments and Concluding Observations, the Committee also calls upon States to take into account their obligations resulting from the ICESCR as members of intergovernmental organisations, such as the IMF and the World Bank. In addition, the Committee deals with the international scope of the Covenant in its Concluding Observations when it calls upon states to allocate 0.7% of their Gross National Product (GNP) to development cooperation. Finally, the Committee occasionally discusses the extraterritorial application of the Covenant in the framework of a situation of occupation of foreign territory by a State Party. A case in point is the occupation of the Palestinian Territories by Israel. These aspects will be discussed in detail below.

### ***B. The Legal Basis for the Extraterritorial Scope of the ICESCR***

In General Comment No 3 on the nature of State Parties' obligations, adopted in December 1990, the Committee for the first time dealt with the international reach of the Covenant. It referred to the obligation of states included in Article 2(1) 'to take steps, individually and through international assistance and cooperation, especially economic and technical' aimed at the full

20 For example, General Comment No 3: The nature of States parties obligations (art. 2, para 1), 14 December 1990, E/1991/23; 1(1) IHRR 6 (1999).

21 Statement on Globalisation, *supra* n 7; Statement on Poverty and the International Covenant on Economic, Social and Cultural Rights, 10 May 2001, E/C.12/2001/10; and Statement on the World Food Crisis, 19 May 2008, E/C.12/2008/1.

22 For example, General Comment No 14: The right to highest attainable standard of health (art. 12), 4 July 2000, E/C.12/2000/4; 8 IHRR 1 (2001).



realisation of economic, social and cultural rights. It is helpful to quote here the relevant parts of this General Comment:

13. The Committee notes that the phrase to the maximum of its available resources' was intended by the drafters of the Covenant to refer to both the resources existing within a State and those available from the international community through international cooperation and assistance. Moreover, the essential role of such cooperation in facilitating the full realization of the relevant rights is further underlined by the specific provisions contained in articles 11, 15, 22 and 23. With respect to article 22 the Committee has already drawn attention, in General Comment 2 (1990), to some of the opportunities and responsibilities that exist in relation to international cooperation. Article 23 also specifically identifies "the furnishing of technical assistance" as well as other activities, as being among the means of "international action for the achievement of the rights recognized . . .".

14. The Committee wishes to emphasize that in accordance with Articles 55 and 56 of the Charter of the United Nations, with well-established principles of international law, and with the provisions of the Covenant itself, international cooperation for development and thus for the realization of economic, social and cultural rights is an obligation of all States. It is particularly incumbent upon those States which are in a position to assist others in this regard. The Committee notes in particular the importance of the Declaration on the Right to Development adopted by the General Assembly in its resolution 41/128 of 4 December 1986 and the need for States parties to take full account of all of the principles recognized therein. It emphasizes that, in the absence of an active programme of international assistance and cooperation on the part of all those States that are in a position to undertake one, the full realization of economic, social and cultural rights will remain an unfulfilled aspiration in many countries. In this respect, the Committee also recalls the terms of its General Comment 2 (1990).<sup>23</sup>

The focus of the Committee in these paragraphs is on the obligation of international cooperation which is a duty for states under general international law. Cooperation and assistance should be aimed at contributing to the realisation of economic, social and cultural rights in other countries. One may assume that cooperation and assistance entail positive measures requiring the allocation of resources. Note that the Committee does not distinguish between cooperation and assistance. One would argue that cooperation is the wider term

23 ICESCR, General Comment No 3: *supra* n 20. For a more recent example, see General Comment No 21: The right of everyone to take part in cultural life (art. 15, para 1(a)), 21 December 2009, E/C.12/GC/21; 17 IHRR 608 (2010), at para 58.

meaning a relationship providing for mutual advantages for the participating states, while providing assistance is a unilateral act requiring efforts from one state to the benefit of another state.<sup>24</sup> The latter is often in a dependent and weak position. One could agree with Skogly who has argued that ‘international assistance and cooperation’ in the meaning of the ICESCR goes beyond providing official development assistance and would include a wide area of subjects on which states cooperate and assist each other.<sup>25</sup>

## 4 Dimensions of the Extraterritorial Scope of the ICESCR

### A. Sanctions

Multilateral sanctions, adopted by the United Nations Security Council under Chapter VII of the Charter of the United Nations (‘the Charter’),<sup>26</sup> give rise to a special type of international coercive measure that may have serious human rights effects in the target state. Usually, the purpose of such sanctions is to force the government of the target State to change its conduct, or to punish the government for its conduct that is in contravention of international law. Often UN sanctions are a countermeasure against human rights abuses by a regime, while at the same time sanctions may have a negative effect on the human rights of the population, but these effects are intended or taken for granted. The fact that sanctions may have a negative effect is part of the concept; however, it is important to look at the acceptability of their effects from a human rights perspective. In a way sanctions are indiscriminate, because the sanctioning states have, or body has, no control over the target state. In a study for the UN Sub-Commission on the Promotion and Protection of Human Rights, Mr Bossuyt has pointed out, for example, that the UN sanctions against Iraq have had deleterious effects on the living conditions of the Iraqi people. Bossuyt was of the view that ‘the sanctions regime against Iraq has as its clear purpose the deliberate infliction on the Iraqi people of conditions of life . . . calculated to bring about its physical destruction in whole or in part’.<sup>27</sup> This very critical study concludes that ‘sanctions regimes that clearly violate international law, especially human rights and humanitarian law, need not be respected. This is especially true when the imposers are clearly on notice

24 Craven, *supra* n 19 at 147.

25 Skogly, *supra* n 6 at 98.

26 1945, UNTS 993.

27 Bossuyt, Working Paper for the Commission on Human Rights Sub-Commission on the Promotion and Protection of Human Rights, ‘The Adverse Consequences of Economic Sanctions on the Enjoyment of Human Rights’, 21 June 2000, E/CN.4/Sub.2/2000/33, at para 72.

of those violations and have undertaken no effective modification.’<sup>28</sup> Some authors have argued that as ‘a right of last resort’ states may reject Security Council sanctions and refuse to implement them if there is a strong case that the measures are illegal in the sense that they would violate international law.<sup>29</sup> On the other hand, one could argue that the initial violation of human rights by a regime is worse than the abuse through sanctions, and that consequently sanctions as a response are legitimate.

The negative impact of sanctions on the economic, social and cultural rights of the people living in the target state came very much to the fore when the humanitarian consequences of sanctions imposed by the UN Security Council on Iraq were disseminated widely in the world press. This case constituted an important reason for the Committee to devote a General Comment on the relationship between economic sanctions and respect for economic, social and cultural rights.<sup>30</sup> Sanctions imply a certain extraterritorial dimension of human rights treaties, because the states that impose sanctions, seen as acts that may have a human rights effect in the target state, are often bound themselves by human rights standards included in these treaties. The Committee believes that the provisions of the ICESCR ‘cannot be considered to be inoperative, or in any way inapplicable, solely because a decision has been taken that considerations of international peace and security warrant the imposition of sanctions.’<sup>31</sup> In addition, the Committee is of the view that the key provisions of the Charter dealing with human rights (Articles 1, 55 and 56) fully apply in cases of sanctions.<sup>32</sup> When imposing sanctions, the international community, whether it be an international or regional organisation, an individual state or a group of states, must do its utmost to guarantee the most essential elements of the economic, social and cultural rights of the people of the target state. This means that when designing sanctions, the human rights that may be affected must be fully taken into account. In this respect, the Committee is of the view that ‘when an external party takes upon itself even partial responsibility for the situation within a country (whether under Chapter VII of the Charter or otherwise), it also unavoidably assumes a responsibility to do all within its powers to protect the economic, social and cultural rights of the affected population.’<sup>33</sup> For example, in its General Comment on the right to the highest attainable standard of health, the Committee said that ‘States parties

28 Ibid. at para 109.

29 De Wet, ‘Human Rights Limitations to Economic Enforcement Measures Under Article 41 of the United Nations Charter and the Iraqi Sanctions Regime’ (2001) 14 *Leiden Journal of International Law* 277 at 280.

30 See General Comment No 8: The relationship between economic sanctions and respect for economic and social rights, 4 December 1997, E/C.12/1997/8; 5 IHRR 302 (1998).

31 Ibid. at para 7.

32 Ibid. at para 1. See also Craven, ‘Human Rights in the Realm of Order: Sanctions and Extraterritoriality’, in Coomans and Kamminga, *supra* n 6 at 233; and De Wet, *supra* n 29.

33 General Comment No 8, *supra* n 30 at para 13.

should refrain at all times from imposing embargoes or similar measures restricting the supply of another state with adequate medicines and medical equipment'.<sup>34</sup> This clear position by the Committee may be interpreted as an implicit recognition of extraterritorial human rights obligations in the area of esc rights. In addition to this, the human rights effects of the implementation of sanctions should be monitored. Finally, the entity that imposes the sanctions has an obligation to respond 'to any disproportionate suffering experienced by vulnerable groups within the targeted country'.<sup>35</sup> One could argue that the application of the principle of proportionality would imply that 'collateral damage' in the context of sanctions must be avoided, meaning that the UN Security Council would be barred from limiting the core content of esc rights, that is minimum essential levels of each of the rights which must be secured under all circumstances.<sup>36</sup> This requirement may also imply the choice for 'smart' sanctions specifically aimed at those whose behaviour the international community wants to change.<sup>37</sup> The Committee makes it clear that also the state which has been targeted by sanctions continues to have obligations to realise esc rights for its citizens.<sup>38</sup> These obligations do not wane because of the sanctions. The Committee recognises that sanctions may constitute a lawful response by the international community to unlawful acts of the government of the targeted state. However, 'the lawlessness of one kind should not be met by lawlessness of another kind which pays no heed to the fundamental rights that underlie and give legitimacy to any such collective action'.<sup>39</sup> This final sentence implies that the Committee is of the view that sanctions that violate the economic, social and cultural rights of the people living in the targeted state may lack legitimacy.

The Committee does not explicitly qualify sanctions imposed by the international community on a state as acts giving rise to the extraterritorial application of the ICESCR. However, it is obvious that this is actually what it is all about. The language used by the Committee in General Comment No 8 is overall mandatory: it uses strong wording, such as 'must' and 'obligation'. It also refers to the general obligations of Member States of the UN under the Charter. The Committee does not discuss the relationship between obligations resulting from the Charter and those emanating from other treaties as provided for in Article 103 of the Charter. The latter provision provides for a superior status for obligations resulting from the Charter over other sources of obligations. However, obligations resulting from the Charter include both decisions to implement sanctions of the Security Council (Article 48) and the obligation to

34 General Comment No 14, *supra* n 22 at para 41.

35 General Comment No 8, *supra* n 30 at para 14.

36 General Comment No 3, *supra* n 20 at para 10. On the application of the proportionality test to economic sanctions, see De Wet, *supra* n 29 at 293–6.

37 See General Comment No 8, *supra* n 30 at para 12.

38 *Ibid.* at para 10.

39 *Ibid.* at para 16.

respect and promote human rights (Articles 55 and 56). The Committee limits itself to stipulating that 'sanctions, whatever the circumstances, should always take full account of the provisions of the International Covenant on Economic, Social and Cultural Rights'.<sup>40</sup> It should be noticed, however, that the language used in this sentence is not very strong.

### B. Military Occupation

One type of situation where the extraterritorial application of the ICESCR has been discussed explicitly and at length by the Committee is that of military occupation. This entails a situation where one state occupies (parts of) the territory of another state with the former state having ratified the Covenant. The relevant question to be answered is whether the occupying state is under a legal obligation to observe the economic, social and cultural rights of the people that reside in the territory that is occupied. It is beyond question that international humanitarian law applies in such types of situations, in particular the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 1949.<sup>41</sup> This question has been dealt with extensively by the Committee when it discussed the State reports of Israel. Is Israel under a legal obligation to comply with its obligations under the ICESCR with respect to the Occupied Palestinian Territories (the West Bank and the Gaza Strip)?<sup>42</sup> In its first report, Israel failed to submit information on the realisation of the economic, social and cultural rights of the Palestinians who lived in the Occupied Territories.<sup>43</sup> The Government of Israel had only included information in the report on the enjoyment of these rights by Israeli settlers in the Occupied Territories. The Committee was of the view that 'the State's obligations under the Covenant apply to all territories and populations under its effective control'.<sup>44</sup> The Committee concluded that the measures taken by Israel in the Occupied Territories had resulted in widespread violations of the economic, social and cultural rights of the Palestinians as a consequence of, for example, closures.<sup>45</sup> Upon the request of the Committee, the Government of Israel submitted additional information on the realisation of economic, social

40 Ibid. at para 1.

41 12 August 1949, 75 UNTS 287.

42 See the report by Al-Haq, *The Applicability of Human Rights Law to Occupied Territories: The Case of the Occupied Palestinian Territories* (Ramallah: Al Haq, 2003); and Dennis, 'Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation' (2005) 99 *American Journal of International Law* 119.

43 Initial Report submitted by Israel under Articles 16 and 17 ICESCR, 28 November 1997, E/1990/5/Add.39.

44 Concluding Observations regarding Israel's Initial Report, 4 December 1998, E.C.12/1/Add.27, at para 8.

45 Ibid. at paras 17–22.

and cultural rights.<sup>46</sup> In that document, Israel clearly stated that it 'has consistently maintained that the Covenant does not apply to areas that are not subject to its sovereign territory and jurisdiction'.<sup>47</sup> The Government of Israel distinguished between international human rights law and international humanitarian law. In its view only the latter applies in the Occupied Palestinian Territories. In addition, the Israeli Government argued that powers and responsibilities in all civil spheres had been transferred to the Palestinian Council, including those relating to the realisation of economic, social and cultural rights. In its view, 'Israel cannot be internationally responsible for ensuring the rights under the ICESCR in these areas'.<sup>48</sup> However, Israel admits that some powers and responsibilities 'continue to be exercised by Israel in the West Bank and Gaza Strip', according to agreements reached with the Palestinians.<sup>49</sup> In its Concluding Observations on the additional report submitted by Israel, the Committee rejected the distinction made by Israel between human rights law and humanitarian law. It was of the view that even during armed conflict fundamental (economic, social and cultural) rights must be respected by the occupying power.<sup>50</sup>

In its second periodic report, Israel, again, failed to submit information on the living conditions of people, other than Israeli settlers, in the Occupied Territories.<sup>51</sup> During the oral examination of the report the Israeli delegation said that the reason for this omission was the fact that the ICESCR related to fields for which powers and responsibilities had been transferred from Israel to the Palestinian Authority in 1994. In addition, the government was of the view that the ICESCR was a specific, territorially bound treaty that did not apply to areas outside the national territory of a State Party. Israel did not exercise effective control over those territories.<sup>52</sup> In its Concluding Observations the Committee held the opposite view. It reaffirmed its previous position that 'the State party's obligations under the Covenant apply to all territories under its effective control'. In the view of the Committee this meant that Israel was called upon to give full effect to its ICESCR obligations in the Occupied Territories. In practice, this entails, as a matter of priority, an obligation to undertake to ensure safe passage at checkpoints for Palestinian medical staff and people seeking medical treatment, the unhampered flow of medical food-stuffs and supplies, free movement to places of employment, free access

46 Israel, Additional information submitted by State Parties to the Covenant following the consideration of their reports by the Committee on Economic and Social and Cultural Rights, 14 May 2001, E/1989/5/Add.14.

47 *Ibid.* at para 2.

48 *Ibid.* at para 3.

49 *Ibid.* at para 5.

50 Concluding Observations on the additional information submitted by Israel, 31 August 2001, E/C.12/1/Add.69, at para 12.

51 Second periodic report submitted by Israel under Articles 16 and 17 ICESCR, 16 October 2001, E/1990/6/Add.32.

52 Summary Record of the 18th Meeting, 4 June 2003, E/C.12/2003/SR.18, at paras 22–4.

to land and water resources and the safe conduct of students and teachers to and from schools. The Committee also strongly urged Israel to take immediate steps to ensure equitable access to and distribution of water to all populations living in the Occupied Territories, including the full and equal participation of all parties in the process of water management, extraction and distribution.<sup>53</sup>

From the above, it is clear that from the Committee's point of view what is decisive for the extraterritorial application of the ICESCR in a situation of military occupation is the exercise of effective control over foreign territory, and effective control over populations residing in a foreign territorial entity. The Committee does not explain what the criterion of 'exercise of effective control' exactly means. The Israeli/Palestinian case reaffirms that under military occupation the occupying power exercises such effective control. However, the Committee does not explain what type of obligations Israel has in the territories over which it exercises effective control. Is it only obligations to respect, meaning obligations not to interfere in the free enjoyment of rights and freedoms of the Palestinian people? Or do obligations also include more positive ones, such as obligations to protect and to fulfil? One gets the impression that the Committee mainly thinks of duties to respect, but positive duties may be included as well, such as the obligation to ensure equitable access to and distribution of water to all populations living in the Occupied Territories. However, a detailed and in-depth legal analysis by the Committee of the different types of ICESCR obligations lying upon a State Party when such a State occupies foreign territory is missing.

It is quite remarkable that the occupation of the Palestinian Territories is the only case of military occupation and the extraterritorial reach of the ICESCR discussed so far by the Committee. It has ignored the military occupation of parts of Iraq and Afghanistan by military forces of the United Kingdom and the effects this occupation may have on the enjoyment of esc rights, for example the right to have access to basic services, such as water, electricity, the right to adequate housing and the right to have access to health care facilities. During the 2009 examination of the UK State Report, the Committee did not

53 Concluding Observations on the second periodic report of Israel, 23 May 2003, E/C.12/1/Add. 90, at paras 31, 35, 40 and 41; The International Court of Justice, in its Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* ICJ Reports 2004 131 at paras 112 and 134, has said that the Palestinian territories have been subject to Israel's territorial jurisdiction as an occupying power. On this basis Israel is bound by the provisions of the ICESCR in these territories. In its most recent Concluding Observations on the examination of the Israeli periodic State Report under the ICCPR, the Human Rights Committee said that the provisions of that Covenant apply to the benefit of the population of the Occupied Territories, including the Gaza Strip, for all conduct by the Israeli authorities or agents in those territories affecting the enjoyment of rights enshrined in the ICCPR: see Concluding Observations of the Human Rights Committee regarding Israel, 29 July 2010, CCPR/C/ISR/CO/3, at para 5.

pay any attention to these country situations. This is in contrast to the approach of the Human Rights Committee (HRC) when it discussed the UK periodic ICCPR Report in 2008. The HRC called upon the State Party to ‘state clearly that the Covenant applies to all individuals who are subject to its jurisdiction or control’.<sup>54</sup> This includes persons kept in detention facilities in Iraq and Afghanistan. The Committee also ignored the situation of esc rights in the Northern part of Cyprus, an area occupied by Turkish forces, when it drew up its list of issues for the examination of the initial Turkish report on the implementation of the ICESCR.<sup>55</sup> The selective approach of the Committee in dealing with situations of occupation in which State Parties are involved seems to be rather unbalanced and biased against Israel.

### C. *International Assistance and Cooperation*

#### (i) Concept, Framework and Application

The notion of ‘international cooperation’ may be characterized as a general principle of international law. It is a cornerstone of international relations between states, such as in the economic and financial domain, in the area of peace and security and also human rights.<sup>56</sup> In Article 2(1) of the ICESCR the term ‘international assistance and cooperation’ is used. This provision stipulates that such assistance and cooperation should be especially ‘economic and technical’. Some guidance on the meaning and scope of this notion can be found in other provisions of the ICESCR, in particular Article 11(1) and (2) on international cooperation to achieve the right to be free from hunger, Article 15(4) on international cooperation and contacts in the field of science and culture, Article 22 on international measures to contribute to the effective implementation of the ICESCR and Article 23 on other forms of international action, including the furnishing of technical assistance. The Revised Guidelines for drawing up State Reports refer to the need that development cooperation in which states are engaged should be directed, as a matter of priority, towards the promotion of economic, social and cultural rights.<sup>57</sup> It thus seems that in the view of the Committee, development cooperation is part of

54 HRC, Concluding Observations regarding the United Kingdom of Great Britain and Northern Ireland, 18 July 2008, CCPR/C/GBR/CO/6, at para 14.

55 List of Issues on Turkey, 14 June 2010, E/C.12/TUR/Q/1.

56 See Article 1(3) Charter of the United Nations; and Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, 24 October 1970, GA Res 2625. See also Skogly, *supra* n 6 at 17–8; and Gondek, *supra* n 12 at 316–24.

57 Revised Guidelines regarding the form and contents of reports to be submitted by States parties under Articles 16 and 17 of the ICESCR, 17 June 1991, E/C.12/1991/1. In the latest, revised version of the Guidelines for Reporting, this reference to the priority orientation of international and technical assistance and cooperation has been deleted. The new text now reads: ‘Indicate the impact of international economic and technical assistance and cooperation,



'international assistance and cooperation'. The idea is that States that have the resources to engage in international cooperation and to assist, have a duty to do so. However, in the view of one Committee member, 'a distinction had to be made between international cooperation and assistance – which was a legal obligation under Article 2(1) of the ICESCR – and development cooperation'.<sup>58</sup> Notwithstanding the fact that international cooperation can be seen as a legal obligation under the Covenant, the Committee so far has not dealt with it in terms of violations, meaning that it has not identified a breach of the obligation to engage in international cooperation.<sup>59</sup> During the negotiations about an Optional Protocol to the ICESCR, providing for a complaints procedure, a number of Western States held the view that international cooperation and assistance may be an important moral obligation, but not a legal one. They emphasised the primary responsibility of the domestic state to realise esc rights. On the other hand, states from the South maintained that international cooperation and assistance does have the status of a legal obligation.<sup>60</sup> The idea that realisation of esc rights in a globalised world may be a matter of shared responsibilities between countries, or may also be seen from the perspective of extraterritorial obligations, was not recognized by states. The focus was, in contrast, on the notion of development cooperation only.<sup>61</sup>

### *Obligations of actors other than states*

An important dimension of international assistance and cooperation are the activities of bodies and organisations that are directly or indirectly related to the UN. These include the specialised agencies, such as the International Labour Organisation (ILO), the Food and Agricultural Organisation (FAO),

whether received or provided by the State party, on the full realization of each of the Covenant rights in the State party or, as the case may be, in other countries, especially developing countries'. See Guidelines on Treaty-Specific Documents, supra n 8 at para 9.

- 58 Committee Member Mr Eibe Riedel, Report of the Open-ended Working Group to consider options regarding the elaboration of an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights on its third session, 14 March 2006, E/CN.4/2006/47, at para 88.
- 59 Committee Member Mr Eibe Riedel, Report of the Open-ended Working Group to consider options regarding the elaboration of an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights on its second session, 10 February 2005, E/CN.4/2005/52, at para 63.
- 60 Commission on Human Rights, Report of the Open-ended Working Group to consider options regarding the elaboration of an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights on its third session, 14 March 2006, E/CN.4/2006/47, at paras 77–86. Western states opposing international cooperation as a legal obligation included Canada, Sweden, the United Kingdom, the Netherlands and Spain. States from the South favouring international cooperation as a legal obligation included Angola, Egypt, Ghana, Indonesia, Iran and Morocco.
- 61 Vandenbogaerde and Vandenhoele, 'The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights: An *Ex Ante* Assessment of its Effectiveness in Light of the Drafting Process' (2010) 10 *Human Rights Law Review* 207 at 232.

UNESCO, the World Health Organisation (WHO), the IMF and the World Bank. In its General Comment No 2, the Committee emphasised that the activities of these organisations in developing countries should be in accordance with human rights, both civil and political rights and economic, social and cultural rights.<sup>62</sup> For example, international measures initiated by international financial institutions aimed at dealing with the debt crisis in developing countries should take full account of the need to protect economic, social and cultural rights in those countries, which may call for debt relief programmes.<sup>63</sup> Also such organisations, while promoting measures of structural adjustment, should ensure that such measures do not compromise the enjoyment of the right to adequate housing.<sup>64</sup> The Committee also called upon relevant international organisations [UNESCO, ILO, the United Nations Children's Fund (UNICEF), the United Nations Development Programme (UNDP) and others] to assist states in working out and implementing a detailed plan of action for the progressive implementation of the right to compulsory and free primary education in accordance with Article 14.<sup>65</sup> More generally, the Committee called for a renewed commitment to respect economic, social and cultural rights by international organisations in their policies and programmes. For example, the World Trade Organization (WTO) should devise appropriate methods to facilitate more systematic consideration of the impact upon human rights of trade and investment policies.<sup>66</sup>

Starting with the General Comment on the right to education, the Committee included a new section on '*Obligations of Actors Other than States*' which mainly focuses on the role of UN specialized agencies, in particular the international financial institutions, and the WTO in contributing to the realization of the ICESCR rights.<sup>67</sup> The Committee does not explain what the legal basis for such obligations is. It only refers to Articles 22 and 23 of the ICESCR which may serve as a framework for the activities of these non-State actors, but not as their legal basis. For the UN specialized agencies one could argue that these organisations are subjects of international law and consequently bound by general rules and principles of international law. These include the

62 General Comment No 2: International technical assistance measures (art. 22), 2 February 1990, E/1990/23; 1(1) IHRR 3 (1995).

63 Ibid. at paras 6 and 9.

64 General Comment No 4: The right to adequate housing (art. 11(1)), 13 December 1991, E/1992/23; 1(1) IHRR 9 (1995), at para 19. See also General Comment No 7: The right to adequate housing (art. 11(1)): forced evictions, 20 May 1997, E/1998/22; 5 IHRR 1 (1998), at paras 18 and 19.

65 General Comment No 11: Plan of action for primary education (art. 14), 10 May 1999, E/C.12/1999/4; 6 IHRR 900 (1999), at para 11.

66 Statement on Globalization, supra n 7 at para 515(7).

67 See, for example, General Comment No 18: The right to work (art. 6), 24 November 2005, E/C.12/GC/18; 13 IHRR 625 (2006), at paras 52–4, focusing on the role of the ILO, private enterprises and trade unions. See also General Comment No 21, supra n 3 at para 76, focusing on the role of UNESCO, WIPO, ILO, FAO and WHO.

human rights provisions of the Charter (Articles 1, 55 and 56) and respect for human rights and fundamental freedoms as a general principle of international law.<sup>68</sup> The ICESCR can be seen as an authoritative interpretation of the human rights provisions of the Charter.<sup>69</sup> The WTO, however, is not a specialised agency of the UN. Consequently it is not bound by the human rights provisions of the Charter. WTO law on the one hand and international human rights law on the other hand have a different focus and aim. WTO law primarily aims at facilitating and promoting international trade, while the objective of human rights law is to protect the human rights of individuals on the basis of obligations taken up by states. These are thus separate bodies of law and the interests of players in both fields of law often diverge. However, the WTO does recognize that the process of trade liberalization should take into account non-trade issues, for instance in the field of agriculture.<sup>70</sup> These non-trade issues should include the protection of human rights concerns, such as the freedom from hunger, access to adequate food and the continuous improvement of living conditions laid down in Article 11 of the ICESCR. There is thus a need to find flexible ways that would contribute to striking a fair balance between the interests protected by international trade law and international human rights law.<sup>71</sup>

### *International Obligations*

In its General Comment on the right to adequate food, the Committee included a separate section on '*International Obligations*' for States Parties to the ICESCR.<sup>72</sup> This section dealt with obligations in the field of international co-operation and assistance aimed at the full realisation of the right to adequate food. The section distinguished between States Parties, states and international organisations and the UN and other international organisations. The section covers a number of issues relating to the international dimension and consequences of food policies. The relevant parts deserve to be quoted here at length.

36. In the spirit of article 56 of the Charter of the United Nations, the specific provisions contained in articles 11, 2.1, and 23 of the Covenant and the Rome Declaration of the World Food Summit, States parties should recognize the essential role of international cooperation and comply

68 Skogly, *supra* n 6 at 133.

69 See Darrow, *Between Light and Shadow: The World Bank, The International Monetary Fund and International Human Rights Law* (Oxford: Hart, 2003) at 126–9 and 136–7.

70 Article 20 WTO Agreement on Agriculture, available at: <http://www.wto.org/english/docs/e/legale/14-ag.pdf> [last accessed 22 November 2010].

71 See, for example, Mechlem, 'Harmonizing Trade in Agriculture and Human Rights: Options for the Integration of the Right to Food into the Agreement on Agriculture' (2006) 10 *Max Planck Yearbook of United Nations Law* 127.

72 General Comment No 12: The right to adequate food (art. 11), 12 May 1999, E/C.12/1999/5; 6 IHRR 902 (1999), at paras 36–41.

with their commitment to take joint and separate action to achieve the full realization of the right to adequate food. In implementing this commitment, States parties should take steps to respect the enjoyment of the right to food in other countries, to protect that right, to facilitate access to food and to provide the necessary aid when required. States parties should, in international agreements whenever relevant, ensure that the right to adequate food is given due attention and consider the development of further international legal instruments to that end.

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

38. States have a joint and individual responsibility, in accordance with the Charter of the United Nations, to cooperate in providing disaster relief and humanitarian assistance in times of emergency, including assistance to refugees and internally displaced persons. . . . Priority in food aid should be given to the most vulnerable populations.

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

. . .

41. The international financial institutions, notably the International Monetary Fund (IMF) and the World Bank, should pay greater attention to the protection of the right to food in their lending policies and credit agreements and in international measures to deal with the debt crisis. Care should be taken, in line with the Committee's General Comment No. 2, paragraph 9, in any structural adjustment programme to ensure that the right to food is protected.<sup>73</sup>

Paragraph 36 above identifies negative and positive international obligations emanating from the right to food. It also calls for the protection of the right to food in international agreements, for example, in the framework of the WTO. This paragraph briefly touches upon the typology of state obligations 'to respect, to protect, to fulfil (facilitate and provide)', used increasingly in the

73 Ibid. at paras 36, 37, 38, 39 and 41.

debate on esc rights, but lacks elaboration. Paragraph 37 is in line with General Comment No 8 on sanctions and the negative human rights obligations for states resulting from this position. Paragraph 38 provides for positive obligations for states to provide relief to victims of disasters. Paragraph 39 essentially contains a negative obligation that food aid and trade should respect the right to an adequate standard of living of the local recipients. Finally, paragraph 41 calls upon the UN financial institutions to guarantee that their policies and programmes do not violate the right to food. It is noteworthy in this respect to mention that the UN Special Rapporteur on the Right to Food is also of the view that the IMF, World Bank and WTO are bound by international law on the right to food.<sup>74</sup>

Although the Committee does not use the term extraterritorial application of the ICESCR, it is clear that this is essentially what is at stake. The Committee defines the extraterritorial conduct in terms of obligations and identifies a number of duty holders (states, international organisations). The legal basis for these obligations is to be found in the UN Charter and several provisions of the ICESCR. It has to be noted that the Committee uses recommendatory language ('should') to characterise what states and organisations are supposed to do. The Committee also refers to a 'commitment' in this respect in paragraph 36. This seems to be contrary to the nature of obligations as binding provisions.

This section on International Obligations served as a framework for subsequent General Comments adopted by the Committee. In the General Comment on the right to health, the Committee added that there is a collective responsibility for the international community to address the problem of diseases that are easily transmissible beyond borders and that developed states have a special responsibility and interest to assist poor states in this regard.<sup>75</sup> It is not clear what 'collective responsibility' would mean in this respect. Is it a responsibility within the framework of the WHO, or perhaps a joint responsibility of states to realise the Millennium Development Goals? Note that the Committee here uses the term 'responsibilities', not obligations or commitments. A new element that was included in the General Comment on the right to health relates to the qualification of the failure of a state to take into account its legal obligations regarding the right to health, when entering into bilateral or multilateral agreements with other states, international organisations and multinational corporations, as a violation of the obligation to respect.<sup>76</sup> In order to better structure and clarify the international obligations of states it would have been advisable if the Committee had distinguished between the various

74 Report of the Special Rapporteur on the Right to Food, Jean Ziegler, 16 March 2006, E/CN.4/2006/44, at para 41. See also, GA Res 60/165, The Right to Food, 16 December 2005, A/RES/60/165.

75 General Comment No 14, supra n 22 at para 40.

76 Ibid. at para 50.

types of obligations by applying and elaborating the typology to respect, to protect and to fulfil to an extraterritorial context.<sup>77</sup>

In the General Comment on the right to water the Committee stated that states should not deprive another state from guaranteeing the right to water to its residents, for example by diverting watercourses in a border area.<sup>78</sup> It also stressed that agreements on trade liberalization should not curtail or inhibit the capacity of a country to ensure the realisation of the right to water for its residents.<sup>79</sup> This would be the case when water services are privatised and foreign companies become players in the domestic market of developing countries which may lead to higher water fees for citizens. With respect to trade agreements this recommendation is relevant for all the trading partners, that is home countries of multinational companies and countries that host foreign companies. The latter countries have also been addressed by the Committee. In the Concluding Observations on the initial report of Kenya, the Committee recommended that the State Party undertake the measures necessary to assess the potential adverse impact of commitments under the future Economic Partnership Agreement with the European Union and the Investment Agreement for the Member States of the Common Market for Eastern and Southern Africa (COMESA) Common Investment Area, on the economic, social and cultural rights of Kenyans, and to ensure that ICESCR rights are not adversely affected.<sup>80</sup>

In addition, the focus of the Committee has been primarily on developed countries in the North. This is understandable taking into account their dominant role in international economic relations. However, it should be emphasised that increasingly other countries, such as China and Korea, engage in vast economic investments abroad. Developing countries often make special export processing zones available for such activities. Labour conditions in such areas often do not meet minimum international standards as laid down in international labour conventions of the ILO.<sup>81</sup> Referring to the recent practice of land grabbing by foreign companies in Madagascar, the Committee was concerned about the negative effects these practices might have on land rights of local people and on access to natural resources and the right to food.<sup>82</sup>

In an important Statement on Poverty, the Committee further explained some of the notions relating to the international dimension of the application

77 This has been done by the Special Rapporteur on the Right to Food in one of his reports, *supra* n 74 at paras 34–8.

78 General Comment No 15: The right to water (art. 11 and 12), 20 January 2003, E/C.12/2002/11; 10 IHRR 303 (2003), at para 31.

79 *Ibid.* at para 35.

80 Concluding Observations regarding Kenya, 1 December 2008, E/C.12/KEN/CO/1, at para 11.

81 *Ibid.* at paras 17 and 19.

82 Concluding Observations regarding Madagascar, 20 November 2009, E/C.12.MDG/CO/2, at para 12.

of the ICESCR.<sup>83</sup> Under the heading 'Core obligations: national and international responsibilities', the Committee reiterated a passage from General Comment No 14 on the right to health, saying that 'it is particularly incumbent on all those in a position to assist, to provide "international assistance and cooperation, especially economic and technical" to enable developing countries to fulfil their core obligations.'<sup>84</sup> Core obligations have been qualified as non-derogable by the Committee. Core obligations give rise to international responsibilities for developed states. It added that 'because poverty is a global phenomenon, core obligations have great relevance to some individuals and communities living in the richest States.'<sup>85</sup> First it should be noted that, in the view of the Committee, the fulfilment of core obligations in a country that has to cope with severe poverty does not give rise to obligations for developed states, but merely to responsibilities. The Committee may have been aware of this inconsistency, but was perhaps reluctant to impose hard obligations on rich states that cannot be based directly and unambiguously on Covenant provisions. However, the meaning of responsibilities is vague: is it possible to impose and enforce the fulfilment of responsibilities? In addition, the question may be raised how the Committee will assess whether a (rich) state and others are 'in a position to assist'. Will it look at the GDP of such states, their voting power in the IMF and World Bank and/or their Official Development Assistance (ODA)? Furthermore, the qualification of core obligations as non-derogable would greatly strengthen their legal character. It would mean that their legal nature goes much further than mere responsibilities and would apply under all circumstances. This is something to which developed states would object. It should be recalled that the principal obligations to guarantee human rights lie with the national states. International obligations by other states are of a complementary nature.<sup>86</sup> Finally, it is not clear what is meant by the clause that 'core obligations have great relevance to some individuals and communities living in the richest States'. Does the Committee have Bill Gates, George Soros and the business community in mind?

The notion of the extraterritorial scope of the ICESCR is implicit in another text adopted by the Committee. In a Statement on the World Food Crisis the Committee said: 'The current food crisis represents a failure to meet the obligations to ensure an equitable distribution of world food supplies in relation to need. The food crisis also reflects failure of national and international policies to ensure physical and economic access to food for all.'<sup>87</sup> The Statement did not indicate which actors had failed to comply with their obligations.

83 Statement on Poverty, *supra* n 21.

84 *Ibid.* at para 16.

85 *Ibid.* at paras 16 and 18.

86 See, for example, Report of the Special Rapporteur, *supra* n 74 at paras 18 and 33.

87 Statement on the World Food Crisis, *supra* n 21 at para 9.

However, it stated clearly that ‘donor countries should prioritize assistance to States most affected by the food crisis.’<sup>88</sup> One of the suggestions made by the Committee to tackle the structural causes of the food crisis is revising the global trade regime under the WTO to ensure that global agricultural trade rules promote, rather than undermine the right to adequate food.<sup>89</sup>

*States acting as members of international organisations*

The Committee also identified the role of *States acting as members of international organisations*. The idea is that States are bound by their obligations under the ICESCR when acting as members of decision-making bodies of international governmental organisations. This is a dimension of the obligation of a state to protect human rights. The idea first came up in the General Comment on the right to health where the Committee stated that ‘State Parties have an obligation to ensure that their actions as members of international organisations take due account of the right to health.’<sup>90</sup> For example, States should pay more attention to the protection of the right to health in influencing the lending policies and credit agreements of the IMF, World Bank and regional development banks. The language used by the Committee to qualify the nature of this obligation differs. Sometimes it is mandatory (‘have an obligation’),<sup>91</sup> in other General Comments it is recommendatory (‘should’).<sup>92</sup> The Committee also raised this issue in the Concluding Observations on States Parties’ reports. For example, in the Concluding Observations on Italy, the Committee encouraged the Government, ‘as a member of international organisations, in particular the IMF and the World Bank, to do all it can to ensure that the policies and decisions of those organisations are in conformity with the obligations of States parties to the Covenant, in particular the obligations contained in article 2, paragraph 1, concerning international assistance and cooperation.’<sup>93</sup> This issue is part of Concluding Observations adopted in the period 2000–2002. It is largely absent in Concluding Observations adopted

88 Ibid. at para 11.

89 Ibid. at para 13.

90 General Comment No 14, supra n 22 at para 39.

91 General Comment No 17: The right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he or she is the author (art. 15(1)(c)), 12 January 2006, E/C.12/GC/17; 17 IHRR 613 (2006), at para 56; and General Comment No 21, supra n 23 at para 75.

92 General Comment No 15, supra n 78 at para 36; and General Comment No 19: The right to social security (art. 9), 23 November 2007, E/C.12/GC/19; 15 IHRR 605 (2008), at para 58.

93 Concluding Observations regarding Italy’s Third Periodic Report on Implementation of the Covenant, 23 May 2000, E/C.12/1/Add.43, at para 20. See also, Concluding Observations regarding Germany’s Fourth Periodic Report on Implementation of the Covenant, 24 September 2001, E/C.12/1/Add.68, at para 31.



afterwards. However, the latest version of the Guidelines for Reporting explicitly asks states to provide information on:

mechanisms in place to ensure that a State party's obligations under the Covenant are fully taken into account in its actions as a member of international organisations and international financial institutions, as well as when negotiating and ratifying international agreements, in order to ensure that economic, social and cultural rights, particularly of the most disadvantaged and marginalized groups, are not undermined.<sup>94</sup>

One example is the recommendation to the Canadian Government that the primacy of esc rights be ensured in trade and investment agreements, and in particular in the adjudication of investor–state disputes under Chapter XI of the North-American Free Trade Agreement (NAFTA).<sup>95</sup> One may also think of the human rights effects of conditional lending policies of these agencies as part of Structural Adjustment Programmes or Poverty Reduction Strategy Papers.<sup>96</sup> Such loans may be dependent on the reorganisation and reallocation of government expenditure and budget of developing states, such as spending more resources on restructuring foreign debt. If such a reallocation leads to cuts in spending for social services, the enjoyment of the rights to health, housing and education of vulnerable groups in society may be at risk. An example may illustrate this. International human rights obligations of Germany as a member of the World Bank were raised by Food First International Action Network (FIAN), an NGO that aims to promote the right to feed oneself, in the context of a World Bank supported project for a pipeline in Chad and Cameroon. This project was approved by the World Bank in 2000. Communities of people living in areas of a section of the pipeline experienced negative effects of the project. People lost land and physical access to forest resources (plants and animals) and were affected by dust-related air pollution. The German Executive Director, as a member of the Board of Directors of the World Bank, voted in favour of approving the pipeline project. In FIAN's view, the primary responsibility for the negative human rights effects of the project lie with the Government of Chad (a State Party to the ICESCR) and the World Bank.<sup>97</sup> However, Germany is co-responsible, because it approved the project in the framework of the World Bank.<sup>98</sup> It may be argued, however, that there is a lack of legal authority for the proposition that states that voted in favour of so-called 'destructive acts' (in the sense of violating esc rights) may be held responsible for their voting behaviour. The arguments in support of this view

94 Guidelines on Treaty-Specific Documents, *supra* n 8 at para 3(c).

95 Concluding Observations regarding Canada's Fourth and Fifth Periodic Report on the Implementation of the Covenant, 22 May 2006, E/C.12/CAN/CO/5, at para 68.

96 See Darrow, *supra* n 69.

97 Hausmann, *supra* n 9 at 15.

98 *Ibid.* at 17.

are that the ICESCR does not have a jurisdiction clause and that states who voted in favour of a decision do not exercise control over the recipient state, nor over the international organisation. Actually, international organisations yield control to the states that contribute financially to the organisation, while at the same time states yield control to the organisation to execute its mandate. Therefore, in a way, there is a vacuum in the sphere of controlling the execution of the decisions of these organisations and a vacuum also in the sphere of accountability and responsibility.<sup>99</sup>

## (ii) Development Assistance

The Committee has not explained in detail whether wealthy states have an obligation under the ICESCR to assist poor states in achieving higher levels of development by providing development assistance. In its Statement on Poverty, mentioned earlier, it recommended that those states that are in a position to assist, should provide international assistance and cooperation to enable developing countries to fulfil their core obligations.<sup>100</sup> In its General Comment on the right to health the Committee held that 'depending on the availability of resources, states should facilitate access to essential health facilities, goods and services in other countries, wherever possible and provide the necessary aid when required.'<sup>101</sup> In its Concluding Observations the Committee has focused on one dimension of development assistance in particular and that is the commitment of states as members of the international community to allocate 0.7% of their GNP to ODA. This commitment was agreed upon by the states that participated in the International Conference on Financing for Development which took place in Monterrey (Mexico) in 2002.<sup>102</sup> This issue was raised in a considerable number of Concluding Observations on the State Reports of developed countries. The Committee expressed satisfaction when a State Party allocated more than 0.7% of its GNP to ODA.<sup>103</sup> With respect to other State Parties, the Committee encouraged the respective governments to raise the level of aid to developing countries to 0.7% of GNP.<sup>104</sup> With regard to other countries, the Committee expressed regret or concern if ODA was

99 See also Skogly, *supra* n 6 at 196.

100 Statement on Poverty, *supra* n 21 at para 16.

101 General Comment No 14, *supra* n 22 at para 39. See also, General Comment No 15, *supra* n 78 at para 34.

102 See the Concluding Document of this Conference, A/CONF.198/11, at para 42.

103 Concluding Observations regarding Luxembourg, 26 June 2003, E/C.12/1/Add.86, at para 6; Denmark, 14 December 2004, E/C.12/1/Add.102, at para 5; the Netherlands, 24 November 2006, E/C.12/NLD/CO/3, at para 9; and Sweden, 1 December 2008, E/C.12/SWE/CO/5, at para 11.

104 Concluding Observations regarding Ireland, 5 June 2002, E/C.12/1/Add.77, at para 38; Italy, 14 December 2004, E/C.12/1/Add.103, at para 34; Monaco, 13 June 2006, E/C.12/MCO/CO/1, at para 29; Finland, 16 January 2006, E/C.12/FIN/CO/5, at para 21; and Belgium, 4 January 2008, E/C.12/BEL/CO/3, at para 27.

below 0.7% of GNP.<sup>105</sup> Moreover, the Committee has occasionally asked a State Party to provide information on the ways its development cooperation and trade policies contribute to the realization of economic, social and cultural rights in developing countries.<sup>106</sup> This request was framed in rather general wording.

On the basis of the wording used both in the General Comments and the Concluding Observations it may be concluded that the Committee sees the 0.7% norm as a recommendation following from the broader UN framework and commitments and not as an obligation resulting directly from the ICESCR. However, it should also be noticed that, on the basis of Article 2(1), providing ODA is one of the steps developed states should take aimed at supporting the progressive realization of the rights in developing countries.<sup>107</sup> The responsibility of states to provide assistance to other states is probably stronger if it concerns an emergency situation or a disaster, such as a famine.<sup>108</sup> States should provide disaster relief and humanitarian assistance to the maximum of their capacities.<sup>109</sup> However, it cannot be concluded from the provisions of the ICESCR that states have a legal duty to assist.<sup>110</sup> Nevertheless, a strong moral duty does certainly exist. The present Special Rapporteur on the right to food is of the view that any regression in the level of ODA provided which cannot be justified should be treated as a violation of states' obligations under international law.<sup>111</sup>

The former Special Rapporteur on the Right to Food identified, on the one hand, an obligation for developing countries to actively seek international assistance and, on the other hand, an obligation for wealthier states to facilitate the fulfilment of the right to food. The latter obligation could be translated, for example, as actively striving for more equitable trade rules on food and agricultural issues, for instance, within the framework of the WTO.<sup>112</sup>

105 Concluding Observations regarding Germany, 24 September 2001, E/C.12/1/Add.68, at para 15; Spain, 7 June 2004, E/C.12/1/Add.99, at para 10; and France, 9 June 2008, E/C.12/FRA/CO/3, at para 12. Craven, *supra* n 19 at 150, is of the view that 'a State was not committed to its obligation to assist other States if the amount of aid it provided to other States declined over a number of years'.

106 List of Issues on Sweden, 13 December 2007, E/C.12/SWE/Q/5, at para 14.

107 In the same vein, see Sepúlveda, 'Obligations of "International Assistance and Cooperation" in an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights' (2006) 24 *Netherlands Quarterly of Human Rights* 271.

108 Report of the Special Rapporteur, *supra* n 74 at para 38.

109 General Comment No 12, *supra* n 72 at para 38; and General Comment No 14, *supra* n 22 at para 40. See also General Comment No 15, *supra* n 78 at para 34.

110 Sepúlveda argues that such a duty seems to arise in the context of disaster relief and humanitarian assistance, see Sepúlveda, *supra* n 107 at 288. Craven, *supra* n 19 at 149, holds that developed states are not required to meet the needs of poor states, 'but rather that they are under a duty to provide some form of assistance to the developing world', which is rather vague.

111 Human Rights Council, Report of the Special Rapporteur on the Right to Food, Olivier De Schutter, 11 February 2009, A/HRC/10/5, at para 9.

112 Report of the Special Rapporteur, *supra* n 74 at para 37.

One of the key issues of the discussion of development assistance from an extraterritorial human rights angle is its actual effect on human rights. This issue has, so far, been ignored by the Committee. Assume state A provides development assistance for the construction of a dam and a huge artificial lake in an area inhabited by an indigenous group. The aim of the plan is to produce environment friendly hydro energy for the benefit of the inhabitants of state B. However, the construction of this major infrastructural work would require the displacement of the local indigenous residents, thus jeopardizing their right to housing, food and an adequate standard of living. It goes without saying that the negative human rights effects could have been foreseen and thus avoided. A prior human rights impact assessment should have been carried out in order to avoid doing harm.<sup>113</sup> From the framework of the extraterritorial obligation to fulfil (facilitate development), the donor state must respect the rights of the indigenous people. The extraterritorial obligation of state A is complementary to the obligation of state B which has its own human rights obligations towards the members of the indigenous group. The extraterritorial conduct of state A should qualify as a violation of its obligation to respect the human rights of the local residents living in the area. The acts can be attributed directly to state A for which it can be held responsible.

A second example is of a more complex nature. There is an increasing practice among developed states of giving general budget support to countries in Africa as a form of development assistance. Assume, for example, that a number of Western countries provide budget support to the education sector in a selected number of African countries. Next these governments introduced free primary education (abolishment of school fees) for all children which is only possible with budget support from donor countries. This change of policy will lead to an enormous increase in the number of children attending primary schools. This is a positive development seen from the perspective of realising the right to education. However, the flip side of this development is quite negative: a high number of children per class, a high teacher/pupil ratio, a shortage of (qualified) teachers, lack of teaching materials and rising drop-out rates. This will probably result in a decline in the quality of education, which is of course a negative development from the perspective of the right to education. The question that may be raised is whether the Western donor states can be held accountable for this negative outcome. Decisions about budget allocations for the educational sector are evidently a domestic issue for the African states and the latter are no doubt the main duty bearers. However, one could argue that donor states also bear some secondary duties, because it could have been foreseen that the negative side-effects of abolishing school fees would occur. It is, probably, too far-fetched to qualify the extraterritorial conduct of the donor states as a breach of international human rights law. In

113 In the same vein, see Skogly, *supra* n 6 at 192–5.

such situations there are often multiple stake-holders, a chain of events, and shared and diffuse responsibilities, which all make attribution of responsibility quite difficult.

#### *D. Regulating Activities of Non-State Actors Abroad*

In a number of General Comments the Committee has dealt with the obligation of State Parties to prevent non-state actors (such as corporations) over which they exercise jurisdiction, from violating the social, economic and cultural rights of people living in another country. This issue has not yet been raised by the Committee in Concluding Observations. In the General Comment on the right to health, the Committee stated that:

To comply with their international obligations in relation to article 12, States parties have to respect the enjoyment of the right to health in other countries, and to prevent third parties from violating the right in other countries, if they are able to influence these third parties by way of legal or political means, in accordance with the Charter of the United Nations and applicable international law.<sup>114</sup>

The General Comment on the right to water uses more recommendatory language by stating that 'steps should be taken by States parties to prevent their own citizens and companies from violating the right to water of individuals and communities in other countries'.<sup>115</sup> The Committee for the first time uses the term 'extraterritorial' in the General Comment on the right to social security, saying that States Parties 'should extraterritorially protect the right to social security by preventing their own citizens and national entities from violating this right in other countries'.<sup>116</sup> In the view of the Committee, this preventive function requires regulating the responsibility of non-state actors,<sup>117</sup> but it is not clear what this actually entails. The conduct prescribed would be part of the extraterritorial obligation to protect.

One could pose the question whether there is an obligation to protect under current international human rights law. Different views have been expressed on this. The Committee, as mentioned above, and the UN Special Rapporteur on the Right to Food are of the view that such an obligation indeed exists.<sup>118</sup> The UN Special Representative of the Secretary-General on human rights and transnational corporations, John Ruggie, holds a different opinion. He argues

114 General Comment No 14, *supra* n 22 at para 39.

115 General Comment No 15, *supra* n 78 at para 33.

116 General Comment No 19, *supra* n 92 at para 54.

117 General Comment No 17, *supra* n 91 at para 55.

118 Report of the Special Rapporteur, *supra* n 74 at para 36.

that the extraterritorial dimension of the obligation to protect remains unsettled in international law. In his view, 'current guidance from international human rights bodies suggests that States are not required to regulate the extraterritorial activities of business incorporated in their jurisdiction, nor are they generally prohibited from doing so provided there is a recognised jurisdictional basis, and that an overall test of reasonableness is met.'<sup>119</sup> The notion of jurisdiction in this regard is to be understood as the situation where the actor or victim of a human rights violation is a national of the state in which the corporation acts, where the acts have substantial effects on the state or where specific crimes are involved.<sup>120</sup> Reasonableness would mean that the home state of the corporation should not intervene in the domestic affairs of other states.<sup>121</sup> In the case of a subsidiary of a transnational corporation established under the domestic law of the host state, interference by the home state of the mother company may breach the sovereign rights of the host state to deal with its own affairs domestically. In the literature there are also different views. For example, Skogly is of the view that there exists an extraterritorial obligation to protect in the sense of regulating the activities of a corporation abroad.<sup>122</sup> Sepúlveda argues that this preventive and protective function entails an obligation on states to discourage practices by non-state actors under their jurisdiction which (may) lead to violations of economic, social and cultural rights in other countries. It would also include an obligation to regulate the conduct of non-state actors, penalise offences and prosecute perpetrators.<sup>123</sup> De Schutter is more cautious, saying that in the current state of development of international law such an extraterritorial obligation to protect has not crystallized yet. In his view, there is no general obligation to exercise extraterritorial prescriptive and adjudicative jurisdiction in order to contribute to the protection and promotion of human rights abroad.<sup>124</sup> Joseph is probably right by noting that an extraterritorial obligation to protect is easier to maintain if a state actively facilitates or supports the activities of corporations abroad by providing export credits.<sup>125</sup> This would be an example of the condition suggested by the Committee that a state must be able to influence the

119 Human Rights Council, Report of the Special Representative of the Secretary-General on the issue human rights and transnational corporations and other business practices, John Ruggie, 22 April 2009, A/HRC/11/13, at para 15.

120 Report of the Special Representative of the Secretary-General on the issue human rights and transnational corporations and other business practices, John Ruggie, 7 April 2008, A/HRC/8/5, at para 19.

121 Ibid.

122 Skogly, *supra* n 6 at 69–70 and 191.

123 Sepúlveda, *supra* n 107 at 282.

124 De Schutter, *International Human Rights Law* (Cambridge: Cambridge University Press, 2010) at 162.

125 Joseph, 'Scope of Application', in Moeckli et al. (eds), *International Human Rights Law* (Oxford: Oxford University Press, 2010) 150 at 166.

conduct of a third party, for instance a corporation, by way of legal or political means.<sup>126</sup>

A different though related interesting question is: what would be the legal basis for an extraterritorial obligation to protect human rights abroad? It is a general principle of international law that a State may not permit the use of its territory in such a manner as to cause harm or injury to the territory of another state.<sup>127</sup> By analogy, this rule may be applied to the area of human rights law entailing that states have an obligation to protect human rights abroad against activities which have their origin in the home state of a transnational corporation. There is no explicit legal basis for the extraterritorial obligation to protect in the ICESCR. However, one could argue that the failure of a home state to prevent a transnational corporation from committing human rights abuses in another state would be contrary to the obligation of international cooperation as laid down in Article 2(1) of the ICESCR. If one takes the view that the rights included in the Universal Declaration of Human Rights have a minimum core which has the status of a customary norm and must thus be respected and protected under all circumstances, then one could argue that a home state has an obligation to protect if it fails to regulate a company's activities abroad.<sup>128</sup> An example would be if a foreign company forcefully evicts a local indigenous community from their ancestral land and homes in order to construct a mine. Implicit in this obligation is the idea that the right not to be evicted from one's home is an element of the right to adequate housing which is of a customary law nature. The fundamental underlying notion for such an obligation would be the idea of not doing harm and avoiding harm. Such an obligation should, on the basis of the principle of non-discrimination, apply domestically to the citizens of the home state, but also to those living in another country (the host state where the company operates) that should be protected from corporate conduct which negatively affects their human rights. All in all, I am inclined to conclude that there is no explicit extraterritorial obligation to protect laid down in international human rights law. However, there are strong arguments for an implicit legal basis for such obligations as explained above.

## 5. Assessing Compliance with Extraterritorial Obligations

So far, the Committee has not addressed the question whether States have complied with their extraterritorial obligations, neither in the General

126 General Comment No 14, supra n 22 at para 39.

127 *Trail Smelter Case (United States, Canada)* (1941) 3 Reports of International Arbitral Awards 1905-1982.

128 Skogly, supra n 6 at 111, 118 and 124.

Comments, nor in the Concluding Observations. Yet, this is an important issue. More specifically, the questions at stake here include: which criterion (and also language) should be used for assessing (including qualifying and labelling) whether states have observed their extraterritorial human rights obligations? In other words, what is the consequence of and legal qualification for a non-observance of extraterritorial obligations? Should these be qualified as an:

- Action or omission leading to a **violation** of rights; then there will be a victim requirement. Most probably there will be a violation if the victim is within the jurisdiction of the foreign state (cases of occupation; effective control over territory and/or persons).
- Action or omission resulting in **harm** or **damage** inflicted on individuals or groups. What is harm/damage? Does harm/damage automatically mean that there is a violation? Harm inflicted by whom? The state acting territorially or the state acting extraterritorially? This relates to questions of attribution of conduct and causation. Did the act of commission or omission indeed cause harm or damage?
- Action or omission having a **negative impact** on the enjoyment of esc rights in general (society as a whole) or of specific persons. What does negative impact mean? Does it mean unsatisfactory fulfilment short of a violation?
- Action or omission resulting in a **deprivation** of rights. What does this mean? Do retrogressive measures lead to a deprivation of rights? Does deprivation require deliberate conduct?

These questions are important, because not all extraterritorial wrongful conduct will result in a violation of rights. There may be different layers of 'wrongful conduct or omission'. Some clues for tentatively answering these questions can be found in the sections on violations that are part of most General Comments.<sup>129</sup> However, more specific guidelines can be found in the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights (Maastricht Guidelines) which served as a source of inspiration for the General Comments.<sup>130</sup> According to these Guidelines a violation of economic, social and cultural rights occurs when a state pursues, by action or omission, a policy or practice which deliberately contravenes or ignores obligations of the ICESCR, or fails to achieve the required standard of conduct or result.<sup>131</sup> In a situation of occupation, the state exercising effective control over the territory bears responsibility for violations of esc rights.<sup>132</sup> More generally, the Guidelines stipulate that violations are in principle imputable to the state

129 See for example General Comment No 15, supra n 78 at Part IV.

130 'The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights' (1998) 20 *Human Rights Quarterly* 691.

131 *Ibid.* at para 11.

132 *Ibid.* at para 17.



within whose jurisdiction they occur.<sup>133</sup> It can be inferred that these not only include the territorial state, but also the state that exercises home state jurisdiction over transnational corporations acting abroad. This would amount to a breach of the extraterritorial obligation to protect. This qualification becomes even more concrete if one looks at more specific examples included in the Maastricht Guidelines which may have an extraterritorial dimension, such as the active support for measures adopted by third parties that are inconsistent with esc rights and the failure to regulate activities of individuals or groups so as to prevent them from violating esc rights.<sup>134</sup> Furthermore, the Maastricht Guidelines stipulate that a failure by a state to take into account its international legal obligations in the area of esc rights when entering into bilateral or multilateral agreements with other states, international organisations or multilateral corporations should also be qualified as a violation of these rights.<sup>135</sup>

Another relevant aspect of assessing violations is the distinction between the inability of the foreign state to comply with its extraterritorial obligations versus the unwillingness to comply.<sup>136</sup> This distinction primarily applies to the domestic obligations of State Parties, but could, by analogy, also be applied to extraterritorial obligations. How should one assess inability and unwillingness in this regard? A general standard does not seem to be feasible, but inability might be the case when a state does not have the (financial) resources to contribute to realization of esc rights in another country. An example of unwillingness would be when a state imposes a food embargo on another state, thus endangering the economic and physical accessibility of basic food.<sup>137</sup> Another example would be the refusal by a Western state to comply with financial commitments made earlier to contribute financially to UN programmes for combating HIV/AIDS (UNAIDS). It is advisable that the Committee apply the Maastricht Guidelines to specific situations and questions with an extraterritorial dimension, both in its General Comments and Statements and in the framework of the state reporting procedure. The Committee should also clarify the different layers of wrongful extraterritorial conduct and omission and the resulting (legal) qualification.

## 6. Conclusion

The Committee should be commended for introducing the issue of the international dimension of the application of the ICESCR in its work. General

133 Ibid. at para 16.

134 Ibid. at paras 14(c) and 15(d).

135 Ibid. at para 15(j). See also General Comment No 15, supra n 78 at para 44.

136 Ibid. at para 13. See also, for example, General Comment No 14, supra n 22 at para 47.

137 See General Comment No 12, supra n 72 at para 37.

Comment No 3 on the nature of State Parties' obligations resulting from Article 2(1) provided a good starting point for its activities in the framework of the reporting procedure. It has identified negative and positive extraterritorial state conduct and obligations, meaning abstention and active involvement. These include respecting the economic, social and cultural rights of citizens of a state on which sanctions have been imposed, regulating the conduct of non-state actors—such as corporations—acting abroad and assisting developing countries that are in need. However, the Committee has never clarified at length, in-depth and systematically the notion of international obligations from a conceptual perspective.<sup>138</sup> For example, it did not develop the notion of violations of extraterritorial obligations in the field of economic, social and cultural rights. It did include a section on international obligations in the General Comments, but the theoretical legal basis underlying this notion is not clear and has not been elaborated. This situation has led to the use of different terms and language in the documents adopted by the Committee, such as strong and weak language on the nature of commitments of states. For example, it uses both the words 'should'/'responsibility' and 'have to'/'obligation' to qualify the nature of so-called 'obligations'. The reasons for using different terms have not been explained. In addition, recommendations to State Parties are often framed in a general wording and sometimes seem to indicate a rather cursory approach based on routine reiteration of language used in other documents. A good example is the reference to the 0.7% GNP target for ODA in the Concluding Observations on virtually all developed States Parties from the North. The only example of a strong, coherent, detailed and explicit position of the Committee on extraterritorial obligations is the case of Israel. However, this is due to the position of that State Party as the occupying power in the Palestinian Territories. The law that is applicable to a situation of occupation is more developed and better defined. The role of the 'effective control' criterion is crucial in such a context and has also been used by other human rights monitoring bodies. From the various documents adopted by the Committee which deal with the extraterritorial scope of the ICESCR one can draw the conclusion that obligations to respect seem to be clearer and more solid, while obligations to protect and fulfil in different types of situations (sanctions, occupation, trade, development cooperation, actions by international organisations) are still largely undefined and consequently weak.<sup>139</sup>

From the drafting process of the Optional Protocol to the ICESCR it has become clear that states, in particular Western states, were not willing to

138 Skogly (*supra* n 6 at 153) has come to a different conclusion on the basis of an analysis of a number of General Comments and Concluding Observations. She is of the view that 'the Committee has developed a consistent and quite comprehensive approach to the extraterritorial reach of the Covenant . . . .'

139 In the same vein, see Gondek, *supra* n 12 at 377–9.

approve of international cooperation and assistance as a legal concept, giving rise to extraterritorial human rights obligations. This means that in the view of (Western) states the idea that the realisation of human rights has an extraterritorial normative dimension is indeterminate at the least. The indeterminacy of a normative standard makes it not only easier to deny that a rule exists and to ignore what is expected from states, but also to justify non-compliance.<sup>140</sup> This relates to a crucial aspect of the international scope of the ICESCR, that is the broader meaning of the notion of international cooperation and assistance. This concept would require a much more in-depth analysis and discussion, including the idea of shared duties and responsibilities between states, causes and effects of extraterritorial conduct, the chain of events leading to negative effects of extraterritorial conduct on human rights, and the foreseeable and unforeseeable consequences of extraterritorial conduct. One of the reasons for the limited record of the Committee when it comes to interpreting these dimensions of the extraterritorial scope of the ICESCR is the nature of the reporting procedure. This is not a suitable mechanism to discuss in detail extraterritorial conduct and obligations, because it can only deal with general situations and notions of the realisation of esc rights in State Parties. There is therefore a need for the Committee to further develop the notion of the international scope and application of the ICESCR, for example by holding a Day of General Discussion, and adopting a key document on this topic which should contain concrete guidance for state practice. Such a document should also explain and specify in detail the legal basis for extraterritorial obligations resulting from the ICESCR and the nature of extraterritorial obligations by using the typology of obligations.

140 Franck, *The Power of Legitimacy Among Nations* (New York and Oxford: Oxford University Press, 1990) at 53–4.

