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# Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights

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**Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights**

On 28 September 2011, at a gathering convened by Maastricht University and the International Commission of Jurists, a group of experts in international law and human rights adopted the Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights.

The experts came from universities and organizations located in all regions of the world and included current and former members of international human rights treaty bodies, regional human rights bodies, and former and current Special Rapporteurs of the United Nations Human Rights Council.

Based on legal research conducted over a period of more than a decade, the undersigned experts adopted the following principles:

**Preamble**

*The human rights of individuals, groups and peoples are affected by and dependent on the extraterritorial acts and omissions of States. The advent of economic globalization in particular, has meant that States and other global actors exert considerable influence on the realization of economic, social and cultural rights across the world.*

*Despite decades of growing global wealth, poverty remains pervasive and socio-economic and gender inequalities endure across the world. Moreover, individuals and communities face the continuing deprivation and denial of access to essential lands, resources, goods and services by State and non-State actors alike.*

*Countless individuals are subsequently unable to enjoy their economic, social and cultural rights, including the rights to work and decent working conditions, social security and care, an adequate standard of living, food, housing, water, sanitation, health, education and participation in cultural life.*

*States have recognized that everyone is entitled to a social and international order in which human rights can be fully realized and have undertaken to pursue joint and separate action to achieve universal respect for, and observance of, human rights for all.*

*In the Vienna Declaration and Programme of Action, all States affirmed the importance of an international order based on the principles of equal rights and self-determination of peoples, peace, democracy, justice, equality, rule of law, pluralism, development, better standards of living and solidarity. In pursuit of these objectives, States reaffirmed in the Millennium Declaration their collective responsibility to uphold these principles at the global level.*

*States have repeatedly committed themselves to realizing the economic, social and cultural rights of everyone. This solemn commitment is captured in the Charter of the United Nations, and is found in the Universal Declaration on Human Rights and numerous international treaties, such as the International Covenant on Economic, Social and Cultural Rights, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination Against Women, the Convention on the Rights of the Child, the Convention on the Rights of Persons with Disabilities, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, as well as in the International Covenant on Civil and Political Rights and many regional human rights instruments.*

*These commitments include the obligation to realize progressively economic, social and cultural rights given the maximum resources available to States, when acting individually and through international assistance and cooperation, and to guarantee these rights without discrimination on the basis of race, colour, gender, sexual orientation and gender identity, language, religion, political or*

*other opinion, national or social origin, property, birth, disability or other prohibited grounds in international law.*

*Drawn from international law, these principles aim to clarify the content of extraterritorial State obligations to realize economic, social and cultural rights with a view to advancing and giving full effect to the object of the Charter of the United Nations and international human rights.*

*These Principles complement and build on the Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights (1986) and on the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights (1997).*

## I. General principles

1. All human beings everywhere are born free and equal in dignity and are entitled without discrimination to human rights and freedoms.

**Commentary**

(1) Principle 1 restates article 1 of the Universal Declaration of Human Rights, which affirms that "[a]ll human beings are born free and equal in dignity and rights."[1] The core precept that rights inhere in the human person has been universally and authoritatively reaffirmed in the Vienna Declaration and Programme of Action, endorsed by all States at the 1993 World Conference on Human Rights, which states that "Human rights and fundamental freedoms are the birthright of all human beings."[2]

(2) Article 2 of the Universal Declaration of Human Rights establishes that "[e]veryone is entitled to rights and freedoms … without distinction of any kind." The principle that rights are subject to enjoyment without discrimination or distinction is contained in article 7 of the Declaration itself, as well as in a number of the principal human rights treaties.[3]

2. States must at all times observe the principles of non-discrimination, equality, including gender equality, transparency and accountability.

**Commentary**

(1) Principle 2 reiterates a number of principles that run throughout the corpus of international human rights law and standards.

(2) The principle of *non-discrimination* under international human rights law relates both to the enjoyment of rights, as expressed in Principle 1, and as a self-standing principle.[4] Article 7 of the Universal Declaration of Human Rights recognizes both the principle of "equality before the law" and

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1 Universal Declaration of Human Rights, UN Doc. A/810, at 71.

2 Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights, Vienna, 14-25 June 1993, UN Doc. A/CONF.157/23, article 1.

3 International Convention on the Elimination of All Forms of Racial Discrimination, UN Doc. A/6014 (1966) (660 UNTS 195); International Covenant on Civil and Political Rights, UN Doc. A/6316 (1966) (999 UNTS 171), article 2(1); International Covenant on Economic, Social and Cultural Rights, UN Doc. A/6316 (1966) (993 UNTS 3), article 2(2); Convention on the Rights of the Child, UN Doc. A/44/49 (1989) (1577 UNTS 3), article 2 (1); International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, UN Doc. A/45/49 (1990) (2220 UNTS 3), article 1(1); Convention on the Rights of Persons with Disabilities, UN Doc. A/61/49 (2006) (2515 UNTS 3), article 5.

4 See, e.g., Universal Declaration of Human Rights, articles 2(1) and 7; International Covenant on Civil and Political Rights, article 26; Vienna Declaration and Programme of Action, articles 15, 18, 20, 21, 22 and 24; Durban Declaration of the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance (Durban Declaration), UN Doc. A/CONF.190/12, para.2; Human Rights Council Resolution of 15 June 2011 on Human Rights, sexual orientation and gender identity, A/HRC/17/L.9/Rev.1; Convention on the Elimination of Racial Discrimination (article 2(d)); Convention on the Elimination of Discrimination against Women, UN Doc. A/34/46 (1981) (1249 UNTS 13), article 2.

the right to "equal protection under the law". Article 3 of the International Covenant on Economic, Social and Cultural Rights and article 3 of the International Covenant on Civil and Political Rights obligate States "to ensure the equal rights of men and women to the enjoyment of all … rights" set forth in the respective Covenants. The Convention on the Elimination of All Forms of Racial Discrimination, in article 5, requires States to "guarantee the right of everyone, without distinction as to race, colour or national or ethnic origin, to equality before the law." The Convention on the Elimination of All Forms of Discrimination against Women, in article 2(a), requires that States "undertake … to embody the principle of the equality of men and women in their national constitutions or other appropriate legislation … and to ensure, through law and other appropriate means, the practical realizations of this principle."

(3) In human rights law, discrimination constitutes any distinction, exclusion, restriction or preference or other differential treatment that is based on any ground, such as race, colour, disability, sex, sexual orientation and gender identity, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms. It also includes any action or omission that, whether intended or not, disproportionately affects members of a particular group, in the absence of a reasonable and objective justification, thus constituting *de facto* discrimination. Furthermore, in order to eliminate *de facto* discrimination, States may be under an obligation to adopt special measures to attenuate or suppress conditions that perpetuate discrimination. In human rights law, such measures are legitimate to the extent that they represent reasonable, objective and proportionate means to redress *de facto* discrimination and are discontinued when substantive equality has been sustainably achieved.[5]

(4) The principle of *transparency* is of particular importance when States act extraterritorially, since the remoteness of the conduct from the territorial States and the confidentiality with which many international negotiations are conducted will sometimes obscure the conduct from public purview. Regional human rights bodies have affirmed the right of access to public information, for instance, in the context of negotiations conducted between a State and a foreign investor. The Inter-American Court of Human Rights noted that article 13 of the American Convention on Human Rights, which guarantees the right to freedom of thought and expression, "protects the right of the individual to receive such information and the positive obligation of the State to provide it, so that the individual may have access to such information or receive an answer that includes a justification when, for any reason permitted by the Convention, the State is allowed to restrict access to the information in a specific case".[6]

(5) The principle of transparency is reflected in, but is broader than, the right to access to information under international human rights law. Article 19 of the Universal Declaration of Human Rights establishes the right to receive and impart information regardless of frontiers. States are required to engage in international cooperation in the fulfilment of economic, social and cultural rights and the Vienna Declaration and Programme of Action has affirmed that governments and competent agencies and institutions, should engage in human rights cooperation based on transparency.[7] Transparency is also a recognized principle of trade and development, including international investment.[8]

(6) The principle of *accountability* has been recognized both at the universal[9] and regional[10] levels, within the context of the fight against impunity for gross violations of human rights law and

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5 Human Rights Committee, *General Comment No. 18: Non-discrimination*, UN Doc. HRI/GEN/1/Rev.7, May 12, 2004, at 146: Committee on Economic, Social and Cultural Rights, *General Comment No. 20: Non-Discrimination in Economic, Social and Cultural Rights (art. 2, para. 2)*, (Forty-second session, 2009), UN Doc. E/C.12/GC/20.

6 *Claude Reyes et al. v. Chile*, Inter-American Court of Human Rights judgment, September 19, 2006, para. 77.

7 Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights, Vienna, 14-25 June 1993, UN Doc. A/CONF.157/23, para. 74.

8 See UN International Conference on Trade and Development (UNCTAD), *Issues in International Investment Agreements, Transparency*, UNCTAD/ITE/IIT/2003/4.

9 Preamble to the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, UN Doc.

humanitarian law. Accountability may take a variety of forms, including criminal accountability or civil accountability before courts or other, quasi-judicial bodies. While the sanctions for violations of economic, social and cultural rights may be criminal, civil, administrative, or disciplinary, they must be sufficiently effective and dissuasive, and victims of violations must have access to effective remedies that have the power to grant a reparation for the violation committed and to order the cessation of the violation (see Section VI of the Principles on Accountability and Remedies).

3. All States have obligations to respect, protect and fulfil human rights, including civil, cultural, economic, political and social rights, both within their territories and extraterritorially.

**Commentary**

(1) Their obligation to comply with internationally recognized human rights imposes on States three levels of duties: to respect, protect and fulfil human rights.[11] Principle 3 must be read in the light of the Principles as a whole, in particular Principles 4 and 9 hereunder. It therefore should not be understood as implying that each State is responsible for ensuring the human rights of every person in the world. Rather, Principle 3 indicates that States may have extraterritorial obligations in relation to all human rights, in the circumstances and under the conditions that these Principles clarify. The scope of these extraterritorial obligations in relation to economic, social and cultural rights is defined in Sections III-VI of these Principles. As described in Principle 9 (a), extraterritorial obligations arise when a State exercises control, power or authority over people or situations located outside its sovereign territory, in a way that could have an impact on the enjoyment of human rights by those people or in such situations. These obligations apply in regard to all the human rights obligations binding that State. As described in Principle 9 (b), extraterritorial obligations also arise on the basis of obligations of international cooperation set out in international law.

(2) The extraterritorial duties that are imposed on States as part of their obligation to comply with human rights are implied both in instruments that are general in the range of rights they recognize, and in instruments relating to particular sets of human rights or particular groups of rights-holders.

(3) In article 56 of the Charter of the United Nations, "All Members pledge themselves to take joint and separate action in cooperation with the Organization..." to achieve purposes set out in article 55 of the Charter. Such purposes include: "... universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion."[12] The Universal Declaration of Human Rights, which provides an authoritative interpretation of the

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E/CN.4/2005/L.10/Add.11 (2005) ("...*Recognizing* that, in honouring the victims' right to benefit from remedies and reparation, the international community keeps faith with the plight of victims, survivors and future human generations and reaffirms the international legal principles of accountability, justice and the rule of law…").

10 See Guidelines of the Committee of Ministers of the Council of Europe on eradicating impunity for serious human rights violations, Adopted by the Committee of Ministers on 30 March 2011 at the 1110th meeting of the Ministers' Deputies. ("Considering that a lack of accountability encourages repetition of crimes, as perpetrators and others feel free to commit further offences without fear of punishment" (Preamble), the Committee of Ministers recommends that States "establish mechanisms to ensure the integrity and accountability of their agents. States should remove from office individuals who have been found, by a competent authority, to be responsible for serious human rights violations or for furthering or tolerating impunity, or adopt other appropriate disciplinary measures" (para. III(7)); and they emphasize the importance of public scrutiny of the investigation or its results to secure accountability (para. VI)).

11 See, e.g., Committee on Economic, Social and Cultural Rights, Report on the Twentieth and Twenty-first Sessions (1999), UN Doc. E/2000/22, E/C.12/1999/11, para. 53 and annex IX; Committee on Economic, Social and Cultural Rights, *General Comment No. 12: The Right to Adequate Food* (Art. 11), (Twentieth session, 1999), UN Doc. E/C.12/1999/5, paras. 14-20; Committee on Economic, Social and Cultural Rights, *General Comment No. 13: The Right to Education* (Art. 13), (Twenty-first session, 1999), UN Doc. E/C.12/1999/10, paras. 46-48; Office of the High Commissioner for Human Rights, 'Principles and Guidelines for a Human Rights Approach to Poverty Reduction Strategies' (2005), paras. 47-48; African Commission on Human and Peoples' Rights, *The Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v. Nigeria*, Communication No. 155/96 (2001) A.H.R.L.R. 60 (15th Annual Activity Report), paras. 44-48. See also Olivier De Schutter, *International Human Rights Law* (Cambridge University Press, 2010), pp. 242-253; Manfred Nowak, *UN Covenant on Civil and Political Rights -- CCPR Commentary* (N.P. Engel Verlag, Kehl am Rhein, 2nd ed. 2005), pp. 37-41.

12 Charter of the United Nations, June 26, 1945, 59 Stat. 1031, T.S. 993, 3 Bevans 1153, *entered into force* Oct. 24, 1945.

requirements of the United Nations Charter[13] but has also come to be recognized as expressing general principles of law as a source of international law,[14] set outs a duty of international cooperation in article 22. This provision states that everyone is entitled to realization, "... through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality." It therefore specifies that every individual is entitled to international cooperation for the realization of his or her universally recognized human rights.

(4) Article 28 of the Universal Declaration of Human Rights also stipulates that "Everyone is entitled to a social and international order in which the rights and freedoms in this Declaration can be fully realized". States thus have a duty to cooperate to establish such an international order. This has been reaffirmed in a number of international declarations in which States recognize the existence of extraterritorial obligations to respect human rights and pledge to ensure that their international policies are consistent with the realization of human rights. The 1986 Declaration on the Right to Development provides that States are required to create international conditions favourable to the realization of the right to development, have the duty to cooperate in order to achieve this right, and are required to act collectively to formulate development policies oriented to the fulfilment of this right.[15] Such commitments apply in relation to all human rights because the right to development entitles "... every human person and all peoples to participate in, contribute to and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be realized."[16] The Accra Agenda for Action, agreed at a 2008 Ministerial Conference organized by the Organisation for Economic Cooperation and Development, comprising over 100 countries, provides: "Developing countries and donors will ensure that their respective development policies and programmes are designed and implemented in ways consistent with their agreed international commitments on gender equality, human rights, disability and environmental sustainability."[17] In the Millennium Declaration the Heads of States and Governments recognized unanimously that: "... in addition to our separate responsibilities to our individual societies, we have a collective responsibility to uphold the principles of human dignity, equality and equity at the global level."[18] These declarations[19] are evidence of State practice in the application of human rights treaties, establishing the agreement of the parties regarding their interpretation.[20]

(5) Extraterritorial obligations of international cooperation are also contained in a wide range of more specialized human rights treaties. The Convention on the Rights of Persons with Disabilities, among the most recent of the core human rights treaties, recognizes the importance of international cooperation. It commits States parties to "... undertake appropriate and effective measures in this

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[13] See the Proclamation of Teheran, Final Act of the International Conference on Human Rights, Teheran, 22 April to 13 May 1968, UN Doc. A/CONF. 32/41 at 3 (1968), where it was stated unanimously that the Declaration "states a common understanding of the peoples of the world concerning the inalienable and inviolable rights of all members of the human family and constitutes an obligation for all members of the international community" (para. 2).

[14] International Court of Justice, *United States Diplomatic and Consular Staff in Tehran (United States v. Iran) (Merits)* (I.C.J. Reports 1980), at 42. See Horst Hannum, *The Status of the Universal Declaration of Human Rights in National and International Law*, 25 Georgia Journal of International and Comparative Law 287 (1995-1996), pp. 351-352; Thomas Buergenthal, *International Human Rights Law and Institutions: Accomplishments and Prospects*, 63 Washington Law Review 1 (1988), p. 9; Bruno Simma and Philip Alston, *The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles*, 12 Australian Yearbook of International Law 82 (1988-9), pp.100-102; Olivier De Schutter, 'The Status of Human Rights in International Law' in Catarina Krause and Martin Scheinin (eds), *International Protection of Human Rights: A Textbook* (Abo Akademi University Institute for Human Rights, Turku: Abo, 2009), pp. 39-60.

[15] Articles 3 and 4. The right to development has been repeatedly referred to in subsequent declarations adopted unanimously, for example the Millennium Declaration and the 1993 Vienna Declaration and Programme of Action of the 1993 World Conference on Human Rights. See further Margot E. Salomon, *Global Responsibility for Human Rights: World Poverty and the Development of International Law* (Oxford University Press, 2007).

[16] Article 1.

[17] Accra Agenda for Action, Third High Level Forum on Aid Effectiveness (2-4 September 2008), para 13 (c).

[18] United Nations Millennium Declaration, UN Doc. A/55/49 (2000), para. 2.

[19] See further A. Khalfan, 'Development Cooperation and Extraterritorial Obligations' in M. Langford and A. Russell (eds), *The Right to Water: Theory, Practice and Prospects* (Cambridge University Press, 2012).

[20] Vienna Convention on the Law of Treaties, 23 May 1969, entered into force 27 January 1980, 1155 UNTS 331, article 31 (3) (b).

regard...", and it lists illustrative measures to fulfil this commitment.[21] A duty to cooperate for the full realization of human rights is also included in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which requires States Parties to provide each other "... the greatest measure of assistance in connection with criminal proceedings ..." relating to torture including "... the supply of all evidence at their disposal necessary for the proceedings."[22] A comparable commitment is contained in the International Convention for the Protection of all Persons from Enforced Disappearance.[23] The first two Optional Protocols to the Convention on the Rights of the Child oblige States to cooperate to prevent and punish the sale of children, child prostitution, child pornography and the involvement of children in armed conflict. The two Protocols require States to assist victims and, if they are in a position to do so, to provide financial and technical assistance for these purposes.[24]

(6) The duty of international assistance and cooperation is given a particular emphasis in the International Covenant on Economic, Social and Cultural Rights. Article 2(1) of the Covenant provides that the States parties to the Covenant undertake to "take steps, individually *and through international assistance and co-operation*, especially economic and technical", to the maximum of their available resources, "with a view to achieving progressively the full realization of the rights" recognized in the Covenant. The notion of international co-operation also is mentioned in relation to the right to an adequate standard of living in article 11(1) of the Covenant, according to which "States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent". Under Part IV of the Covenant, which relates to the measures of implementation, two provisions relate to international assistance and co-operation. Article 22 states that the Economic and Social Council may bring to the attention of other UN bodies and agencies concerned with furnishing technical assistance any information arising out of the reports submitted by States under the Covenant which "may assist such bodies in deciding, each within its field of competence, on the advisability of international measures likely to contribute to the effective progressive implementation of the present Covenant". Article 23 specifies the different forms international action for the achievement of the rights recognized in the Covenant may take: such international action "includes such methods as the conclusion of conventions, the adoption of recommendations, the furnishing of technical assistance and the holding of regional meetings and technical meetings for the purpose of consultation and study organized in conjunction with the Governments concerned".

(7) Despite the fact that it is provided for in binding international instruments, disagreement persists as to the legally binding nature of the obligation of international cooperation as expressed in the International Covenant on Economic, Social and Cultural Rights. Neither the drafting history of the Covenant nor subsequent State practice provide a definitive answer. When negotiating what came to be article 2(1) of the International Covenant on Economic, Social and Cultural Rights, the drafters agreed that international cooperation and assistance was necessary in order to realize economic, social and cultural rights, but they disagreed as to whether it could be claimed as a right.[25] No vote was conducted to decide between these competing views and to reflect one of the contending views in the text. The issue was reopened in recent years, when the Optional Protocol to the Covenant was negotiated. During those negotiations, some industrialized countries accepted the moral responsibility of international cooperation, but argued that the Covenant does not impose legally binding obligations

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[21] Article 32.

[22] Article 9(1).

[23] Article 15 provides that "States Parties shall cooperate with each other and shall afford one another the greatest measure of mutual assistance with a view to assisting victims of enforced disappearance, and in searching for, locating and releasing disappeared persons and, in the event of death, in exhuming and identifying them and returning their remains."

[24] Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, UN Doc. A/54/49, vol. III (2000), article 10. Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, UN Doc. A/54/49, vol. III (2000), article 7.

[25] Philip Alston and Gerard Quinn, *The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights*, 9 Human Rights Quarterly 156 (1987), pp. 188-9.

in regard to economic, social and cultural rights internationally.[26] However, that interpretation is far from unanimous among States: although there are disagreements as to the scope of the duty and its precise implications, there is broad agreement that the Covenant imposes at least some extraterritorial obligations in the area of economic, social and cultural rights. This is reflected in international declarations adopted without a vote, such as the resolutions of the United Nations General Assembly on the right to food, which indicate that the right to adequate food requires "... the adoption of appropriate environmental and social policies, at both the national and international levels, oriented to the eradication of poverty and the fulfillment of human rights for all", and which provide that "... all States should make all efforts to ensure that their international policies of a political and economic nature, including international trade agreements, do not have a negative impact on the right to food in other countries."[27] Moreover, reaffirmations over many decades to cooperate internationally in advancing economic, social and cultural rights, including as expressed in Millenium Development Goal (MDG) 8 to develop partnerships for development to realize the MDGs, lend strength to the legal commitment to internationalize responsibility in this area.

(8) Article 2(1) of the Covenant specifically refers to an obligation to take steps, including through international assistance and cooperation, to realize economic, social and cultural rights. It therefore clearly affirms an obligation to engage in international cooperation, as recognized by the Committee on Economic, Social and Cultural Rights.[28] Similarly, the Convention on the Rights of the Child (CRC) requires states to take measures to implement the economic, social and cultural rights in the treaty "... to the maximum extent of their available resources and, where needed, within the framework of international cooperation."[29] Thus, as noted by the Committee on the Rights of the Child, "[w]hen States ratify the Convention, they take upon themselves obligations not only to implement it within their jurisdiction, but also to contribute, through international cooperation, to global implementation."[30]

(9) In addition to human rights instruments, the duty to support human rights beyond the State's national territory also finds support in general international law. Customary international law prohibits a State from allowing its territory to be used to cause damage on the territory of another State.[31] This results in a duty for the State to respect and protect human rights extraterritorially.[32] States also have territorial and extraterritorial obligations under international customary law to bring to an end violations of peremptory norms of international law (*jus cogens*). This includes an obligation to cooperate to bring to an end any serious breaches; an obligation to refrain from recognising as lawful any situation resulting from such breaches; and an obligation to refrain from providing aid or

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[26] See *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*, UN Doc. E/CN.4/2006/47 at paras. 78 and 82.

[27] For example, UNGA Resolution 64/159 (2009) (adopted without a vote), UN Doc. A/RES/64/159, paras. 32 and 20.

[28] See, e.g., Committee on Economic, Social and Cultural Rights, *General Comment No. 3: The Nature of States Parties' Obligations* (Fifth session, 1993), UN Doc. E/1991/23, para. 14. The commentary to Sections III-V of these Principles contains further references to the guidance provided by the Committee as regards the extraterritorial human rights obligations of States parties to the Covenant.

[29] Article 4. Articles 24 (4) and 28 (3) require states to promote and encourage international cooperation in regard to the right to health and to education, taking particular account of the needs of developing countries. See further, Wouter Vandenhole, *Economic, Social and Cultural Rights in the CRC: Is There a Legal Obligation to Cooperate Internationally for Development,* 17(1) International Journal of Children's Rights 23 (2009).

[30] Committee on the Rights of the Child, *General Comment No. 5: General Measures of Implementation for the Convention on the Rights of the Child*, (Thirty-fourth session, 2003), UN Doc. CRC/GC/2003/5, at para. 5.

[31] *Trail Smelter Case (United States v. Canada)*, 3 R.I.A.A. 1905 (1941); see also the dissenting opinion of Judge Weeramantry to the Advisory Opinion of the International Court of Justice on the *Legality of threat or use of nuclear weapons,* in which, referring to the principle that "damage must not be caused to other nations", Judge Weeramantry considered that the claim by New Zealand that nuclear tests should be prohibited where this could risk having an impact on that country's population, should be decided "in the context of [this] deeply entrenched principle, grounded in common sense, case law, international conventions, and customary international law".

[32] See also the commentary to Principle 24: Obligation to Regulate below.

assistance in maintaining such a situation.[33] Such peremptory norms are relevant to civil, cultural, economic, political and social rights, and include, *inter alia*, the right to self-determination and the prohibitions against genocide, crimes against humanity, war crimes, slavery, racial discrimination, extra-judicial executions, enforced disappearances and torture and other cruel, inhuman or degrading treatment or punishment. States also have obligations to collaborate in investigating crimes against international law and prosecuting the perpetrators. Such crimes can relate to violations of civil, cultural, political, economic or social rights.

4. Each State has the obligation to realize economic, social and cultural rights, for all persons within its territory, to the maximum of its ability. All States also have extraterritorial obligations to respect, protect and fulfil economic, social and cultural rights as set forth in the following Principles.

**Commentary**

(1) The first sentence of Principle 4 aims to clarify that the existence of extraterritorial obligations of other States to contribute to the realization of human rights on the territory of one State in no way detracts from the latter State's obligation to ensure economic, social and cultural rights within its territory to the maximum of its ability. A State may thus not refuse to discharge its territorial obligations by invoking the actions and omissions of other States, even though this may result, for example, in a lack of sufficient financial assistance. The Committee on Economic, Social and Cultural Rights has emphasised that "even where the available resources are demonstrably inadequate, the obligation remains for a State party to strive to ensure the widest possible enjoyment of the relevant rights under the prevailing circumstances."[34]

(2) Thus, even where a State is faced with conduct of other States that affects the realization of economic, social and cultural rights within its territory, for example if these other States permit environmental pollution or impose unfair conditions on trade, the State affected by such conduct is required to mitigate such interferences to the full extent that it is able to do so. The Committee on Economic, Social and Cultural Rights has stated for instance that the imposition of sanctions on one State "does not in any way nullify or diminish the relevant obligations of that State party."[35] Thus, a State against which sanctions are imposed must provide the greatest possible protection for the economic, social and cultural rights of each individual within its jurisdiction and take all possible measures to reduce to a minimum the negative impact upon the rights of vulnerable groups.[36] Such measures include entering into negotiations with other States and the international community, in order to improve the situation of human rights on its territory.

(3) Principle 4 refers to the "maximum of [each State's] ability" rather than using the expression "to the maximum of available resources", contained in article 2 (1) of the International Covenant on Economic, Social and Cultural Rights. This recognizes that a State is required today to use the full range of abilities, beyond resources narrowly defined, in order to comply with its obligations to realize economic, social and cultural rights. It also acknowledges that a State might be faced with barriers to the realization of economic, social and cultural rights other than lack of resources. For example, a State might be unable to realize rights within its territory due to military occupation or other forms of pressure exercised by other States.

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[33] See Commentary to Article 41 of the Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries adopted by the International Law Commission, Report of the International Law Commission on the Work of its 53rd session (23 April to 1 June and 2 July to 10 August 2001), UN Doc. A/56/10.

[34] Committee on Economic, Social and Cultural Rights, *General Comment No. 3: The Nature of States Parties' Obligations* (Fifth session, 1993), UN Doc. E/1991/23, at para. 11.

[35] Committee on Economic, Social and Cultural Rights, *General Comment No. 8: The relationship between economic sanctions and respect for economic, social and cultural rights* (Seventeenth session, 1997), UN Doc. E/C.12/1997/8, at para. 10.

[36] Ibid.

(4) The second sentence of Principle 4 indicates that States have extraterritorial obligations which exist alongside their territorial obligations. A State owes to each individual on its territory duties to respect, protect and fulfil human rights that correspond to the effective control a State exercises on its national territory. Extraterritorial obligations differ from territorial obligations, however, in that such obligations can be shared with other States. A State does not bear extraterritorial obligations to individually realize the economic, social and cultural rights of all people everywhere, but rather it is bound by obligations to people outside its borders under the conditions and in the circumstances set out in the Principles.

5. All human rights are universal, indivisible, interdependent, interrelated and of equal importance. The present Principles elaborate extraterritorial obligations in relation to economic, social and cultural rights, without excluding their applicability to other human rights, including civil and political rights.

**Commentary**

(1) The first sentence of Principle 5 re-affirms the principles set out in the 1993 Vienna Declaration and Programme of Action.[37] Extraterritorial obligations exist both as regards civil and political rights and as regards economic, social and cultural rights, and the character and scope of such obligations are broadly similar for both categories of rights. While these Principles are focused on economic, social and cultural rights, this should not be interpreted as implying that extraterritorial obligations are more important for any one set of human rights.

(2) Whether they arise in regard to civil and political rights or in regard to economic, social and cultural rights, the legal bases of extraterritorial obligations are broadly similar. However, extraterritorial obligations that arise on the basis of obligations of international cooperation are developed more extensively in relation to economic, social and cultural rights as a whole than in regard to civil and political rights taken together. Thus, the International Covenant on Civil and Political Rights does not refer to international cooperation. In addition, obligations of international cooperation in article 4 of the Convention on the Rights of the Child were limited to the economic, social and cultural rights stated in that convention, although the reason for that limitation was that the text referring to international cooperation was linked to the reference to availability of resources, and the drafters did not wish to make civil and political rights in the Convention on the Rights of the Child subject to the availability of resources.[38] On the other hand, when States have focused on the details of particular civil and political rights, such as freedom from torture, cruel, inhuman or degrading treatment and punishment, they have accepted clear obligations of international cooperation.[39] Although they apply only to economic, social and cultural rights, the present Principles are without prejudice of their applicability to civil and political rights.

6. Economic, social and cultural rights and the corresponding territorial and extraterritorial obligations are contained in the sources of international human rights law, including the Charter of the United Nations; the Universal Declaration of Human Rights; the International Covenant on Economic, Social and Cultural Rights; and other universal and regional instruments.

**Commentary**

(1) Economic, social and cultural rights and correlative State obligations are included in a wide range of instruments in addition to those listed in Principle 6. Some of the most important instruments include: the Convention on the Rights of the Child and the optional protocols thereto; the Convention on the Elimination of All Forms of Discrimination against Women; the International Convention on the Elimination of All Forms of Racial Discrimination; the International Convention on the Protection

[37] Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights, Vienna, 14-25 June 1993, UN Doc. A/CONF.157/23 (July 12, 1993), para. I. 5.
[38] S. Skogly, *Beyond National Borders: States' Human Rights Obligations in International Cooperation* (Intersentia, 2006), p. 103.
[39] See para. 5 of the commentary to Principle 3.

of the Rights of All Migrant Workers and Members of Their Families; the Convention on the Rights of Persons with Disabilities; and the conventions adopted in the framework of the International Labor Organization. The Declaration on the Rights of Indigenous Peoples proclaimed by General Assembly Resolution 61/295 on 13 September 2007 may also be the source of extraterritorial obligations, to the extent that it reflects customary international law.[40]

(2) Key regional instruments providing for economic, social and cultural rights include the African (Banjul) Charter of Human and Peoples' Rights; the African Charter on the Rights and Welfare of the Child; the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa; the American Declaration of the Rights and Duties of Man; the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights; the Inter-American Convention on The Elimination Of All Forms Of Discrimination Against Persons With Disabilities; the Arab Charter on Human Rights; the 1961 and 1996 (Revised) European Social Charter; and the first Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms.

7. Everyone has the right to informed participation in decisions which affect their human rights. States should consult with relevant national mechanisms, including parliaments, and civil society, in the design and implementation of policies and measures relevant to their obligations in relation to economic, social and cultural rights.

**Commentary**

(1) This Principle recalls that all people have the right to participate in and access information relating to the decision-making processes that affect their lives and well-being. Article 25 of the International Covenant on Civil and Political Rights recognizes the right and the opportunity of every citizen, without discrimination, to take part in the conduct of public affairs, directly or through freely chosen representatives; to vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors; and to have access, on general terms of equality, to public service in his country.[41] According to the Committee on Economic, Social and Cultural Rights: "The international human rights normative framework includes the right of those affected by key decisions to participate in the relevant decision-making processes. The right to participate is reflected in numerous international instruments, including the International Covenant on Economic, Social and Cultural Rights and the Declaration on the Right to Development … Although free and fair elections are a crucial component of the right to participate, they are not enough to ensure that those living in poverty enjoy the right to participate in key decisions affecting their lives."[42]

(2) Human rights standards require a high degree of participation, in particular, of communities, civil society, minorities, women, young people, indigenous peoples and other identified groups that in general are weakly represented in the normal decision-making processes. Article 12 of the Convention on the Rights of the Child therefore lays down the principle and purpose of meaningful participation of children and young people, and at the Special Session on Children of the General Assembly, the Governments committed to increase the participation of children.[43] Article 7 of the Convention on the Elimination of All Forms of Discrimination against Women provides that States parties shall eliminate discrimination against women in the political and public life of the country and, in particular, shall ensure to women, on equal terms with men, the right: (a) to vote in all elections and public referenda

[40] UNGA Resolution 61/295, UN Doc. A/RES/61/295 (Sep. 13, 2007); *see* Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development*, Hum. Rts. Council, para. 41, UN Doc. A/HRC/9/9 (Aug. 1, 2008) (by S. James Anaya).

[41] See also Universal Declaration of Human Rights, UN Doc. A/810, article 21.

[42] Committee on Economic, Social and Cultural Rights, *Poverty and the International Covenant on Economic, Social and Cultural Rights* (2001), UN Doc. E/C.12/2001/10, para. 12.

[43] "A World Fit for Children", General Assembly Resolution S-27/2 (A/RES/S-27/2), 10 May 2002, para. 32.

and to be eligible for election to all publicly elected bodies; (b) to participate in the formulation of government policy and the implementation thereof and to hold public office and perform all public functions at all levels of government; and (c) to participate in non-governmental organizations and associations concerned with the public and political life of the country. In adopting the Millennium Declaration, the Heads of States and Governments pledged to "work collectively for more inclusive political processes, allowing genuine participation by all citizens in all our countries".[44]

## II. Scope of extraterritorial obligations of States

### 8. Definition of extraterritorial obligations

For the purposes of these Principles, extraterritorial obligations encompass:
a) obligations relating to the acts and omissions of a State, within or beyond its territory, that have effects on the enjoyment of human rights outside of that State's territory; and
b) obligations of a global character that are set out in the Charter of the United Nations and human rights instruments to take action, separately, and jointly through international cooperation, to realize human rights universally.

**Commentary**

(1) A State's extraterritorial obligations in the area of human rights may arise on the basis of either the situation referred to in Principle 8 (a), that outlined in Principle 8 (b) or both. Extraterritorial obligations arising under Principle 8 (a) often overlap or are simultaneous to those arising under Principle 8 (b), with similar legal consequences. For this reason, the present Principles aim to address both these situations together.

(2) An example of a case where the two grounds are combined is the obligation of the State to ensure that a corporate actor domiciled within its jurisdiction does not provide loans to projects leading to forced evictions. This obligation arises under Principle 8 (a) because the State has the legal and factual power to regulate the corporation's conduct. The obligation also arises under Principle 8 (b) due to the obligation to take separate and joint action to realize human rights internationally. However, the obligation to provide assistance to other States in order to strengthen respect for human rights in those States, in the absence of any particular link between a State and the denial of human rights in those States, arises only by virtue of the obligation of a global character as decribed in Principle 8 (b).

(3) Principle 8 (a) recalls that the acts and omissions of a State, whether adopted within or beyond its territory, may entail certain obligations linked to the commitments of that State in the area of human rights, if such conduct has effects on the enjoyment of human rights outside of that State's territory. Several human rights treaties require states to ensure human rights to all people within their "jurisdiction". When used to refer to the scope of application of human rights and comparable treaties, the term "jurisdiction" refers to the territory and people over which a state has factual control, power or authority. It should not be confused with the limites imposed under international law to the ability of a State to exercise prescriptive (or legislative) and enforcement "jurisdiction". Indeed, the application of human rights treaties in force vis-à-vis one State extends to conduct adopted by that State that it carries out outside its entitlement to exercise jurisdiction in accordance with international law, such as when illegally sending military forces into another State's territory without the latter State's consent.[45] The Committee on Economic, Social and Cultural Rights has stated 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

[44] United Nations Millennium Declaration, UN Doc. A/55/49 (2000), article 25.
[45] See M. Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles and Policy* (Oxford University Press, 2011), pp. 30-34 and 39-41.

within its power to protect the economic, social and cultural rights of the affected population."[46] The state's entitlement under international law to exercise jurisdiction is relevant only in determining whether a State is permitted to extend its authority over a person or territory, by regulating conduct outside its national territory, in order to contribute to the protection of human rights (see Principle 10 below).

(4) Several human rights treaties and declarations do not specify the rights-holders to whom a State owes the obligations contained in that instrument. Examples include the International Covenant on Economic, Social and Cultural Rights and the American Declaration of the Rights and Duties of Man. It may be presumed that such obligations are always owed at least to those persons whose enjoyment of the human rights referred to in that instrument it is within a State's control, power or authority, to ensure. For instance, when applying the American Declaration to a complaint of a violation, the Inter-American Commission considered it necessary to find that the affected person is "subject to the jurisdiction" of a State (even through the American Declaration does not refer to jurisdiction) and therefore that the State has observed the rights of a person subject to its authority and/or control.[47] In addition, the preservation of human rights is in the interest of all States, even in the absence of any specific link between the State and the situation where human rights are violated: they are owed *erga omnes*.[48] Thus, while the beneficiaries of human rights obligations are the rights-holders who are under a State's authority and/or control, the legal obligations to ensure the rights in question are owed to the international community as a whole.

(5) In its decision on Provisional Measures in *Application of the International Convention on the Elimination of all Forms of Racial Discrimination (Georgia* v. *Russian Federation),* the International Court of Justice has noted that "there is no restriction of a general nature in CERD relating to its territorial application" and that, "in particular, neither Article 2 nor Article 5 of CERD, alleged violations of which are invoked by Georgia, contain a specific territorial limitation"; it consequently found that "these provisions of CERD generally appear to apply, like other provisions of instruments of that nature, to the actions of a State party when it acts beyond its territory." The International Court of Justice consequently called on both Russia and Georgia to: "do all in their power to ensure that public authorities and public institutions under their *control or influence* do not engage in acts of racial discrimination against persons, groups of persons or institutions."[49]

(6) Principle 8 (b) includes among extraterritorial obligations in the area of human rights obligations of a global character that are set out in the Charter of the United Nations and human rights instruments to take action, separately, and jointly through international cooperation, to realize human rights universally. Such obligations of international cooperation are contained in a range of international instruments listed in the commentary to Principle 3. In describing the obligation of international cooperation, the Principles rely on the terminology of articles 55 and 56 of the UN Charter ("joint and separate action") rather than the article 2 (1) of the International Covenant on Economic, Social and Cultural Rights ("individually and through international assistance and cooperation"). However, there

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[46] Committee on Economic, Social and Cultural Rights, *General Comment No. 8: The relationship between economic sanctions and respect for economic, social and cultural rights* (Seventeenth session, 1997), UN Doc. E/C.12/1997/8, para. 13.

[47] *Victor Saldaño v Argentina*, Report No. 38/99, 11 March 1999, para. 21 (referring to "authority or control"), *Coard et al v United States*, Case no. 10.951, Report no. 109/99, 29 September 1999, para. 37 (referring to "authority and control".

[48] International Court of Justice, *Case concerning the Barcelona Traction, Light and Power Co. (Belgium v. Spain)* (second phase - merits), 5 February 1970, [1970] I.C.J. Rep. 3, para. 33-34; Human Rights Committee, *General Comment No. 31(80). The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, (Eightieth session, 2004) UN Doc. CCPR/C/21/Rev.1/Add. 13, para. 2. See Ian Seiderman, *Hierarchy in International Law. The Human Rights Dimension* (Hart-Intersentia, 2001), chapter IV.

[49] *Application of the International Convention on the Elimination of all Forms of Racial Discrimination (Georgia* v. *Russian Federation),* Provisional Measures, Order of 15 October 2008, [2008] I.C.J. Reports 353, paras. 109 and 149 (emphasis added). The Committee on the Elimination of Discrimination against Women has also confirmed that the Convention on the Elimination of All Forms of Discrimination against Women applies to the actions of a State outside its territory, *General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women* (Forty-seventh session, 2010) UN Doc. CEDAW/C/GC/2 at para. 12.

are no legal consequences attached to these variations in the terms used in these treaties. "Separately and jointly" implies that State conduct to realize human rights can be either carried out by one State or by several States acting jointly.

(7) International cooperation includes, but is not limited to, international assistance. Whereas the International Covenant on Economic, Social and Cultural Rights refers to an obligation of "international assistance and cooperation", more recent treaties, such as the Convention on the Rights of the Child and the Convention on the Rights of People with Disabilities refer only to "international cooperation", as the drafters of the latter treaties took the view that international cooperation comprised international assistance. The Declaration on the Right to Development similarly refers only to international cooperation. International cooperation must be understood broadly to include the development of international rules to establish an enabling environment for the realization of human rights and the provision of financial or technical assistance (see Principles 29 and 33 below). It also includes an obligation to refrain from nullifying or impairing human rights in other countries, and to ensure that non-State actors whose conduct the State is in a position to influence are prohibited from impairing the enjoyment of such rights.

## 9. Scope of jurisdiction

A State has obligations to respect, protect and fulfil economic, social and cultural rights in any of the following:
a) situations over which it exercises authority or effective control, whether or not such control is exercised in accordance with international law;
b) situations over which State acts or omissions bring about foreseeable effects on the enjoyment of economic, social and cultural rights, whether within or outside its territory;
c) situations in which the State, acting separately or jointly, whether through its executive, legislative or judicial branches, is in a position to exercise decisive influence or to take measures to realize economic, social and cultural rights extraterritorially, in accordance with international law.

**Commentary**

(1) Principle 9 defines the situations in which obligations may arise for a State, corresponding to that State's undertaking to comply with human rights, although such situations may occur outside its national territory.

(2) Jurisdiction is essentially an application of state power, or authority to act, pursuant to or as an expression of sovereignty. Jurisdiction has served notoriously as a doctrinal bar to the recognition and discharge of human rights obligations extra-territorially. Conversely, jurisdiction has also sometimes constituted a basis for the permissive or even prescriptive exercise of extraterritorial conduct.

(3) Because the ability of a State to comply with its international obligations generally requires that a State may exercice effective control over a situation by regulatory, adjudicatory, and enforcement means, the Vienna Convention on the Law of Treaties establishes a presumption that treaties are binding on States in respect of their national territory.[50] However, human rights treaties are of a different kind. In the *Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory,*[51] the International Court of Justice noted as regards the scope of application of the International Covenant on Civil and Political Rights, the following:

> ... while the jurisdiction of States is primarily territorial, it may sometimes be exercised outside the national territory. Considering the object and purpose of the International Covenant on Civil

[50] See Vienna Convention on the Law of Treaties, 23 May 1969, entered into force 27 January 1980, 1155 UNTS 331, article 29: "Unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory."

[51] Advisory Opinion, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 9 July 2004, at para. 109.

> and Political Rights, it would seem natural that, even when such is the case, States parties to the Covenant should be bound to comply with its provisions.
> The constant practice of the Human Rights Committee is consistent with this. Thus, the Committee has found the Covenant applicable where the State exercises its jurisdiction on foreign territory. It has ruled on the legality of acts by Uruguay in cases of arrests carried out by Uruguayan agents in Brazil or Argentina (case No. 52/79, *Lopez Burgos* v. *Uruguay:* case No. 56/79, *Lilian Celiherti de Cusariego* v. *Uruguay)*. It decided to the same effect in the case of the confiscation of a passport by a Uruguayan consulate in Germany (case No. 106181, *Montero* v. *Uruguay).*
> The *travaux preparatoires* of the Covenant confirm the Committee's interpretation of article 2 of that instrument. These show that, in adopting the wording chosen, the drafters of the Covenant did not intend to allow States to escape from their obligations when they exercise jurisdiction outside their national territory. They only intended to prevent persons residing abroad from asserting, vis-à-vis their State of origin, rights that do not fa11 within the competence of that State, but of that of the State of residence (see the discussion of the preliminary draft in the Commission on Human Rights, ElCN.4lSR.194, para. 46; and United Nations, *Officia1 records of the General Assembly, Tenth Session, Annexes,* Al2929, Part II, Chap. V, para. 4 (1955)).

The Court reiterated this position in the Case of *Democratic Republic of the Congo v. Uganda,*[52] where it confirmed that human rights law may extend extraterritorially in respect of core human rights instruments.

(4) Principle 9 identifies three distinct situations for which jurisdiction may extend extraterritorially. Principle 9(a) relates to situations where the concerned State has effective control over territory and/or persons, or otherwise exercises State authority. The Human Rights Committee has taken the view that each State Party to the International Covenant on Civil and Political Rights "must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party."[53] For the purpose of defining the conditions of applicability of the Covenant, the notion of jurisdiction refers to the relationship between the individual and the State in connection with a violation of human rights, wherever it occurred, so that acts of States which take place or produce effects outside the national territory may be deemed to fall under the jurisdiction of the State concerned.[54] In interpreting article 2(1) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, that provides that each State Party shall "take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction", the Committee against Torture has taken the view that 'any territory' includes all areas where the State party exercises, directly or indirectly, in whole or in part, *de jure* or *de facto* effective control, in accordance with international law. According to the Committee, the words "'any territory'… [refer] to prohibited acts committed not only on board a ship or aircraft registered by a State party, but also during military occupation or peacekeeping operations and in such places as embassies, military bases, detention facilities, or other areas over which a State exercises factual or effective control[…]. The Committee considers that the scope of 'territory' under article 2 must also include situations where a State party exercises, directly or indirectly, de facto or de jure control over persons in detention."[55] Similarly, regarding the Convention on the Elimination of all forms of Racial Discrimination, the International Court of Justice has confirmed that "there is no restriction of a general nature in CERD relating to its territorial application […]. The Court consequently finds that these provisions of CERD generally appear to apply, like other provisions of

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[52] *Armed Activities on the Territory of the Congo* (*Democratic Republic of the Congo v. Uganda*) 19 December 2005 at paras. 178-180 and 216-217.

[53] Human Rights Committee, *General Comment 31, the Nature of the General Legal Obligation Imposed on State Parties to the Covenant*, (Eightieth session, 2004) UN Doc. CCPR/C/21/Rev.1/Add.13, at para. 10.

[54] Communication no. 52/1979, *Lopez Burgos v. Uruguay*, final views of 29 July 1981 (thirteenth session) (UN Doc. CCPR/C/13/D/52/1979), para. 12.2.

[55] Committee against Torture, *General Comment 2: Implementation of article 2 by State Parties*, (2008) UN Doc. CAT/C/GC/2, at para 16.

instruments of that nature, to the actions of a State party when it acts beyond its territory."[56] While these various statements were made under different instruments and in different contexts, they confirm the view of human rights bodies or of the International Court of Justice that human rights obligations are imposed on States in any situation over which they exercise effective control, whether or not that situation is located on the national territory of the State concerned.

(5) This is similar to the position adopted by human rights regional bodies. The American Convention on Human Rights extends to persons "subject to [the] jurisdiction" of the State Party. The Inter-American Commission on Human Rights holds that in relation to the American Convention, "jurisdiction [is] a notion linked to authority and effective control, and not merely to territorial boundaries."[57] The European Court of Human Rights has indicated that "as an exception to the principle of territoriality, a Contracting State's jurisdiction under article 1 may extend to acts of its authorities which produce effects outside its own territory." [58] Among the specific situations identified by the Court are "when, through the consent, invitation or acquiescence of the Government of that territory, it exercises all or some of the public powers normally to be exercised by that Government" and where "the use of force by a State's agents operating outside its territory […] bring[s] the individual thereby brought under the control of the State's authorities into the State's […] jurisdiction." However, while the duties imposed under the Convention may be invoked "whenever the State through its agents exercises control and authority over an individual, and thus jurisdiction", whether or not all the obligations under the Convention come into play shall depend on the specific circumstances: "the State is under an obligation…. to secure to that individual the rights and freedoms […] that are relevant to the situation of that individual. In this sense, therefore, the Convention rights can be 'divided and tailored'". Where a State exercises effective control over a territory, the State may be obliged to secure the entire range of substantive rights (see Principle 18 below). But the degree of the control exercised by the State may be more or less complete, and so will the extent of its obligations under the Convention.

(6) A State may, through its conduct, influence the enjoyment of human rights outside its national territory, even in the absence of effective control or authority over a situation or a person. Principle 9(b) is intended to take into account such situations.

(7) The European Court of Human Rights noted that, for the purpose of defining the scope of the duties of the High Contracting Parties under article 1 of the European Convention on Human Rights, jurisdiction "may extend to acts of its authorities which produce effects outside its own territory,"[59] and it listed some of the situations where this might be the case. It also noted that "a State's responsibility may …be engaged on account of acts which have sufficiently proximate repercussions on rights guaranteed by the Convention even if those repercussions occur outside its jurisdiction."[60] The Inter-American Commission on Human Rights similarly noted: "a state party to the American Convention may be responsible under certain circumstances for the acts and omissions of its agents which produce effects or are undertaken outside that state's own territory."[61] The Human Rights Committee also confirmed that "a State party may be responsible for extra-territorial violations of the Covenant, if it is a link in the causal chain that would make possible violations in another jurisdiction. Thus, the risk of an extra-territorial violation must be a necessary and foreseeable consequence and must be judged on the knowledge the State party had at the time […]."[62] Such statements relate only

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[56] International Court of Justice, Provisional Measures in the case of *Georgia v. Russia*, no. 35/2008, order of 15 October 2008, at para. 109.

[57] Inter-American Commission on Human Rights, *Victor Saldano v. Argentina*, Report No. 38/99, 11 March 1999, at para paragraph 19.

[58] *Case of Al-Skeini and Others v. the United Kingdom* (Appl. No.. 5572/107), judgment of 7 July 2011 (citations omitted), at para. 133.

[59] Ibid.

[60] *Ilascu and Others v. Moldova and Russia* (Appl. No. 48787/99), judgment of 8 July 2004, para. 317.

[61] Inter-American Commission of Human Rights, *Victor Saldano v. Argentina*, Report No. 38/99 11 March 1999 at para. 17.

[62] Human Rights Committee, *Munaf v. Romania*, Communication No. 1539/2006, UN Doc. CCPR/C/96/D/1539/2006, 21 August 2009, at para 14.2.

to where the obligations of the relevant treaties are engaged and does not purport to express the scope of obligations under general international law.

(8) Consistent with these statements, Principle 9 (b) acknowledges that the obligations of a State under international human rights law may effectively be triggered when its responsible authorities know or should have known that the conduct of the State will bring about substantial human rights effects in another territory. This element of foreseeability excludes that a State may be held liable for all the consequences that result from its conduct, no matter how remote.

(9) Finally, Principle 9 (c) takes into account that there are situations where a State is required to take measures in order to support the realization of human rights outside its national territory. This refers in particular to the role of international assistance and cooperation in the fulfilment of economic, social and cultural rights. The precise content of this obligation and its implications are considered in this Commentary to Principles 28-35.

## 10. Limits to the entitlement to exercise jurisdiction

The State's obligation to respect, protect and fulfil economic, social and cultural rights extraterritorially does not authorize a State to act in violation of the Charter of the United Nations and general international law.

**Commentary**

While Principle 9 sets forth the basis for the mandatory application of human rights obligations to a State's conduct that has extraterritorial effect, Principle 10 recalls that the duty of the State to respect, protect and fulfil human rights outside its national territory, should not be invoked as a justification for the adoption of measures that violate the Charter of the United Nations or general international law. Article 2(4) of the UN Charter imposes on the United Nations Member States to "refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations." Moreover, as described in greater detail under Principles 24 and 25 regarding the duty to protect human rights extraterritorially through regulation, the sovereignty of the State on the national territory of which a situation occurs that another State seeks to influence, as well as the principle of the equality of all States, may impose limits to the scope of the duty of that other State to contribute to the full realization of human rights.

## 11. State responsibility

State responsibility is engaged as a result of conduct attributable to a State, acting separately or jointly with other States or entities, that constitutes a breach of its international human rights obligations whether within its territory or extraterritorially.

**Commentary**

The question of State responsibility is distinct from that of jurisdiction as defined in Principles 9 and 10. Principles 11 and 12 reflect certain key conditions under which the responsibility of a State may be engaged in respect of its extraterritorial obligations. These principles restate the basic rules governing state responsibility, consistent with customary international law as reflected in the Articles on Responsibility of States for Internationally Wrongful Acts adopted by the International Law Commission.[63] Principle 11 expresses the content of article 2 of the Articles on Responsibility of States for Internationally Wrongful Acts, which provides that:

[63] *Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries adopted by the International Law Commission*, Report of the International Law Commission on the Work of its 53rd session (23 April to 1 June and 2 July to 10 August 2001), UN Doc. A/56/10.

> There is an internationally wrongful act of a State when conduct consisting of an action or omission:
> (a) is attributable to the State under international law; and
> (b) constitutes a breach of an international obligation of the State.

## 12. Attribution of State responsibility for the conduct of non-State actors

State responsibility extends to:
(a) acts and omissions of non-State actors acting on the instructions or under the direction or control of the State; and
(b) acts and omissions of persons or entities which are not organs of the State, such as corporations and other business enterprises, where they are empowered by the State to exercise elements of governmental authority, provided those persons or entities are acting in that capacity in the particular instance.

**Commentary**

(1) Principle 12 concerns those situations where State responsibility may be engaged, even where the primary source of the conduct giving rise to a violation is a non-State actor. Thus, where a business enterprise, armed group, or other private person or entity acting under color of law or State authority commits a wrongful act, that act may be attributed to the concerned State. The question as to whether State responsibility is engaged in relation to the conduct of non-State actors is distinct from that as to whether non-State actors may be held directly responsible for a wrongful act, before domestic or international procedures. The latter question is outside of the scope of the present principles.

(2) Principle 12 is derived from articles 5 and 8 of the Articles on Responsibility of States for Internationally Wrongful Acts adopted by the International Law Commission.[64] Article 5, concerning the conduct of persons or entities exercising elements of governmental authority, provides:

> The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.

(3) Principle 12 (a) replicates this provision, which seeks "to take account of the increasingly common phenomenon of parastatal entities, which exercise elements of governmental authority in place of State organs, as well as situations where former State corporations have been privatized but retain certain public or regulatory functions."[65] It may not, however, always be clear what constitutes a governmental function. "Beyond a certain limit, what is regarded as 'governmental' depends on the particular society, its history and traditions. Of particular importance will be not just the content of the powers, but the way they are conferred on an entity, the purposes for which they are to be exercised and the extent to which the entity is accountable to government for their exercise."[66] However, it seems that even under the narrowest understanding of such functions, they should comprise law enforcement activities and armed forces, as well as the provision of basic infrastructure, certain essential public services such as water and electricity, and traditionally public functions of the State such as education and, arguably, health. These functions may thus be considered to constitute elements of governmental authority, for which the State should be held responsible even if it has chosen to delegate these functions to private entities. In order for its acts are to be attributed to the State, the private entity must have been explicitly empowered to exercise elements of governmental authority.

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64 Ibid.

65 *Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries adopted by the International Law Commission,* Report of the International Law Commission on the Work of its 53rd session (23 April to 1 June and 2 July to 10 August 2001), UN Doc. A/56/10, article 5, para. 1, p. 42.

66 Ibid., p. 43.

However, it is sufficient that the private entity has been explicitly delegated elements of governmental authority, whether or not this delegation of powers was effectuated through a formal legislation defining their scope and conditions of exercise.

(4) Article 8, concerning conduct directed or controlled by a State, provides:

> The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.

The rule has its origin in the *Nicaragua v. United States of America* judgment of the International Court of Justice, where the Court considered that despite the strong support provided by the United States to the contras, the acts of the latter could only be attributed to the former if it could be proved that the U.S. "had effective control of the military or paramilitary operations in the course of which the alleged violations were committed".[67] It follows from this rule that however strongly a company is supported by the State, and however close its connections to the State may be, the conduct of the company will be attributable to the State only if the State controls the company's conduct in a specific instance.

## 13. Obligation to avoid causing harm

States must desist from acts and omissions that create a real risk of nullifying or impairing the enjoyment of economic, social and cultural rights extraterritorially. The responsibility of States is engaged where such nullification or impairment is a foreseeable result of their conduct. Uncertainty about potential impacts does not constitute justification for such conduct.

**Commentary**

(1) Principle 13 articulates the duty of the State to avoid conduct that creates real risk to the enjoyment of economic, social and cultural rights outside the national territory of that State. In its Advisory Opinion on *Legality of the Threat or Use of Nuclear Weapons*, the International Court of Justice restated the general obligation of States "to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control."[68] Principle 13 also finds support in article 74 of the UN Charter, which in the context of non-self-governing territories articulates the obligation of States to adhere to "the general principle of good neighbourliness, due account being taken of the interests and wellbeing of the rest of the world, in social, economic, and commercial matters". Article 74 is thus relevant to the obligation of States to "desist from conduct" that creates a risk of nullifying or impairing economic, social or cultural rights.

(2) Principle 13 stresses that the duty is to avoid creating a "real risk", as opposed to merely hypothetical or theoretical risks. This definition of the nature of the risk that may result in a State's responsibility being engaged should be understood per analogy with the *EC-Hormones* case decided under the Dispute Settlement mechanism of the World Trade Organization, where the Appellate Body rejected the idea that risks could only be established through laboratory methods and instead focused on "risk in human societies as they actually exist, in other words, the actual potential for adverse effects on human health in the real world where people live and work and die."[69] In the *EC-Hormones* case, the Appellate Body also referred to "ascertainable risks" to distinguish risk from "the uncertainty that theoretically always remains since science can never provide absolute certainty that a given substance will not ever have adverse health effects."[70] The emphasis on "real risk" does not, however,

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[67] International Court of Justice in the case of *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) (merits)*, ICJ Rep. 1986, p. 14, para. 115.
[68] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996, p. 226, para. 29.
[69] Appellate Body, European Communities – Measures Concerning Meat and Meat Products (Hormones), para. 187.
[70] Ibid., para. 186.

establish a threshold of severity or intensity of the risk: it refers to the probability of the risk materializing, not to the consequences that might follow from such materialization of the risk.

(3) Under Principle 13, a State attracts its international responsibility where the resulting impairment of human rights is a "foreseeable" result of that State's conduct. By introducing the condition of foreseeability, Principle 13 sets out a standard of liability that is distinct from strict liability; and it constitutes a strong incentive for States to assess the impact of their choices on the enjoyment of economic, social and cultural rights abroad, since their international responsibility will be assessed on the basis of what their authorities knew or should have known. Forseeability serves an important limiting function by ensuring that a State shall not be surprised with claims of responsibility for unforeseeable risks that are only remotely connected to its conduct.

(4) The International Law Commission has addressed the concept of foreseeability in its Commentary to Article 23 of its Articles on Responsibility of States for Internationally Wrongful Acts: "To have been 'unforeseen', the event must have been neither foreseen nor of an easily foreseeable kind."[71] The ILC's commentary thus points to two dimensions of foreseeability: whether the result was actually foreseen, and whether the result should have been foreseen. The second strand of foreseeability involves a normative dimension, as it requires assessing whether at the time of conduct, steps were taken to obtain the scientific and other knowledge necessary to undertake a determination of risk. This normative dimension underscores the importance of foreseeability as a limiting element of the fault-based standard articulated in Principle 13, in contrast with a strict liability standard.

(5) The International Law Commission has also addressed the issues of foreseeability and causality (the link between conduct and result), in its Commentary to Principle 4 of its 2006 Draft Principles on the Allocation of Loss in the Case of Transboundary Harm Arising out of Hazardous Activities: "The principle of causation is linked to questions of foreseeability and proximity or direct loss. Courts in different jurisdictions have applied the principles and notions of proximate cause, adequate causation, foreseeability and remoteness of the damage. This is a highly discretionary and unpredictable branch of law. Different jurisdictions have applied these concepts with different results. It may be mentioned that the test of proximity seems to have been gradually eased in modern tort law. Developments have moved from strict *condicio sine qua non* theory over the foreseeability ("adequacy") test to a less stringent causation test requiring only the "reasonable imputation" of damage."[72] Consistent with this evolution, Principle 13 allows for a particular violation of economic, social and cultural rights to be attributed to the conduct of one State, if it was foreseeable that that conduct could have resulted in the said violation, and even if other, intervening causes, have also played a role in the violation.

(6) The knowledge that the State authorities have of the consequences of their conduct is relevant for the purposes of establishing State responsibility. In the *Corfu Channel* case the International Court of Justice observed that due diligence obligations "are based … on certain general and well-recognized principles, namely: … every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States."[73] However, Principle 13 provides that a State's responsibility may be engaged not only if its authorities are aware or were made aware of the risks to economic, social and cultural rights, but also if its authorities should have been aware, and have failed to seek the information that would have allowed them to make a sounder assessment of the risk.

(7) Principle 13 specifically references the precautionary principle in stating that "[u]ncertainty about potential impacts does not constitute justification for said conduct". This approach is widely regarded

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[71] *Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries adopted by the International Law Commission,* Report of the International Law Commission on the Work of its 53rd session (23 April to 1 June and 2 July to 10 August 2001), UN Doc. A/56/10 (at 76, article 23, common para. 2).

[72] Text adopted by the International Law Commission at its fifty-eighth session, in 2006, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/61/10).

[73] Corfu Channel (U.K. v. Alb.), Merits, 1949 I.C.J. Rep. 4 (Judgment of 9 April 1949), p. 22. See further the Commentary to Principle 24.

in international treaties, international decisions, and expert commentary as a critical tool to addressing risks resulting from planned activities.

(8) The International Law Commission has commented on the precautionary principle, in addressing article 3 of the Draft Articles on the Prevention of Transboundary Harm from Hazardous Activities it adopted in 2001. According to that provision, "The State of origin shall take all appropriate measures to prevent significant transboundary harm or at any event to minimize the risk thereof." The ILC noted that it is generally understood as the principle of "taking such measures as are appropriate by way of abundant caution, even if full scientific certainty does not exist, to avoid or prevent serious or irreversible damage."[74] Where there are threats or potential threats of serious economic, social or cultural impact, lack of full certainty about those threats should not be used as a reason for approving the planned intervention or not requiring the implementation of preventative measures and effective remedies.

(9) The precautionary principle has received support in recent international decisions. The International Court of Justice in the *Case concerning Pulp Mills on the River Uruguay* noted that "a precautionary approach may be relevant in the interpretation and application of the provisions of the Statute".[75] Similarly, the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea noted in its Advisory Opinion from February 2011 regarding Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the area that, "The Chamber observes that the precautionary approach has been incorporated into a growing number of international treaties and other instruments, many of which reflect the formulation of Principle 15 of the Rio Declaration. In the view of the Chamber, this has initiated a trend towards making this approach part of customary international law."[76]

## 14. Impact assessment and prevention

States must conduct prior assessment, with public participation, of the risks and potential extraterritorial impacts of their laws, policies and practices on the enjoyment of economic, social and cultural rights. The results of the assessment must be made public. The assessment must also be undertaken to inform the measures that States must adopt to prevent violations or ensure their cessation as well as to ensure effective remedies.

**Commentary**

(1) Principle 14 codifies the obligation of each State to assess the impact of its conduct, to implement preventative measures, and to ensure cessation of violations as well as effective remedies when rights are negatively impacted. Principle 14 is thus closely linked with Principle 13 in articulating ways in which States can give effect to their obligation to desist from conduct that creates real risks on economic, social and cultural rights.

(2) States are under an obligation to seek to inform themselves about the potential impact of their conduct on the enjoyment of economic, social and cultural rights outside their national territories, prior to adopting such conduct. The obligation to obtain information, in order to identify and assess the potential impact of State conduct, is referred to in the Commentary on Article 3 ("Prevention") of the International Law Commission's Draft Articles on the Prevention of Transboundary Harm from Hazardous Activities, 2001: "[T]he obligation to 'take all appropriate measures' to prevent harm, or to minimize the risk thereof, cannot be confined to activities which are already properly appreciated as involving such a risk. The obligation extends to taking appropriate measures to identify activities

[74] *Commentary to Article 3 of the International Law Commission's Draft Articles on the Prevention of Transboundary Harm from Hazardous Activities,* Report of the International Law Commission on the work of its fifty-third session (2001), at 155, article 3, Com. para. 14).

[75] *Case concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, judgment of 20 April 2010, para 164.

[76] Seabed Disputes Chamber of the International Tribunal for the Law of the Sea, *Advisory Opinion, Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area,* 1 February 2011, para. 135.

which involve such a risk, and this obligation is of a continuing character." It is a similar duty that Principle 13 restates, in relation to economic, social and cultural rights.

(3) A meaningful assessment allows persons affected by State conduct an opportunity to be consulted, either directly or through representatives. Principle 14 explicitly points to public participation as an indispensable element of an impact assessment. Principle 14 also underscores that the results of the assessment must be made public. This requirement gives effect to the right of access to information, which has been recognized by the Human Rights Committee,[77] the Inter-American Court of Human Rights[78] and the European Court of Human Rights.[79]

(4) Public access to the results of prior assessments is a guarantee of transparency. It also allows for State officials as well as particularly affected persons to take measures to prevent or mitigate the impacts on economic, social and cultural rights. Principle 14 articulates this role of impact assessments, linking the measures that States must adopt to prevent violations or ensure their cessation to the content of the impact assessments. The greater the potential risk to human rights, the more preventative measures should be taken. In its Commentary to Article 3 of the Draft Articles on the Prevention of Transboundary Harm from Hazardous Activities, which it adopted in 2001, the International Law Commission clarifies the preventative dimension of Principle 14 in the following terms: "The required degree of care is proportional to the degree of hazard involved. The degree of harm itself should be foreseeable and the State must know or should have known that the given activity has the risk of significant harm. The higher the degree of inadmissible harm, the greater would be the duty of care required to prevent it." This is transposable to the duty cited in Principle 14. The same Commentary lists the types of preventative measures that States may undertake, as including the following: "The modalities whereby the State of origin may discharge the obligations of prevention which have been established include, for example, legislative, administrative or other action necessary for enforcing the laws, administrative decisions and policies which the State of origin has adopted."

(5) Principle 14 specifies the content of the prior assessment in relation to the enjoyment of economic, social and cultural rights. The implementation of Principle 14 may build on the experience gained from human rights impact assessments developed in various areas, such as the Human Rights Compliance Assessment launched by the Danish Institute for Human Rights, the Guide to Human Rights Impact Assessment and Management by the International Business Leaders Forum, and the work of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises.[80] As regards the negotiation and conclusion of trade and investment agreements, the Special Rapporteur on the right to food presented guiding principles for a methodology of human rights impact assessments.[81]

(6) The requirement of a prior environmental assessment is enshrined in a large number of international agreements, such as the Convention on Biological Diversity, the United Nations Framework Convention on Climate Change, and the United Nations Convention on the Law of the Sea. In the *Case concerning Pulp Mills on the River Uruguay*, the International Court of Justice has also recognized the importance of impact assessments in the environmental arena concerning transboundary issues relating to international watercourse. The Court observed that the practice of environmental impact assessment "has gained so much acceptance among States that it may now be considered a requirement under general international law to undertake an environmental impact

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[77] Human Rights Committee, *General Comment 34. Article 19: freedoms of expression and opinion*, (One hundred and second session, 2011), UN Doc. CCPR/C/GC/34, paras 18 and 19.

[78] Claude Reyes et. al. v. Chile, Inter-Am. Ct. H.R. (ser. C) No. 151 (Sept. 19, 2006), para. 77.

[79] Eur. Ct. H.R,.*Társaság a Szabadságjogokért v. Hungary* (Appl. No. 37374/05), judgment of Apr. 14, 2009.

[80] Report of the Special Representative of the Secretary General on the issue of human rights and transnational corporations and other business enterprises, John G. Ruggie: *Business and Human Rights. Further Steps Toward the Operationalization of the Protect, Respect and Remedy" Framework,* UN Doc. A/HRC/17/31 (2010), para. 60.

[81] Report of the Special Rapporteur on the right to food to the 19th session of the Human Rights Council, Olivier De Schutter, Addendum: *Guiding Principles on human rights impact assessments of trade and investment agreements*, UN Doc. A/HRC/19/59/Add.5 (19 December 2011).

assessment where there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context, in particular, on a shared resource."[82]

(7) Principle 14 clarifies that prior assessments must inform measures that States must adopt to ensure effective remedies, in accordance with Principle 37 below. The disclosure of the results of human rights impact assessments should facilitate the possibility for victims of violations of economic, social and cultural rights to avail themselves of existing remedies.

## 15. Obligations of States as members of international organizations

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

**Commentary**

(1) The first sentence of Principle 15 provides that, as a member of the international organization, a State must take all reasonable steps to ensure that, in its decision-making processes, the international organization acts in accordance with the pre-existing human rights obligations of the State concerned. In addressing the impact of structural adjustment programmes on the enjoyment of economic, social and cultural rights, the Committee on Economic, Social and Cultural Rights took the view already in 1990 that "States parties to the Covenant, as well as the relevant United Nations agencies, should [...] *make a particular effort to ensure* that [the protection of the most basic economic, social and cultural rights] is, to the maximum extent possible, built-in to programmes and policies designed to promote adjustment".[83] The implication is that States parties to the Covenant have obligations, *as member States* of the international financial institutions in general and of the International Monetary Fund in particular, insofar as such institutions impose on indebted States certain austerity programmes as a condition for access to the international financial markets. In the General Comment on the right to the highest attainable standard of health, which it adopted in 2000,[84] the Committee on Economic, Social and Cultural Rights uses an even stronger formulation, moving from the affirmation of an obligation of means to an obligation of result. It notes that "States parties have an *obligation to ensure* that their actions as members of international organizations take due account of the right to health. Accordingly, States parties which are members of international financial institutions, notably the International Monetary Fund, the World Bank, and regional development banks, should pay greater attention to the protection of the right to health in influencing the lending policies, credit agreements and international measures of these institutions".[85] A very similar formulation appears in the General Comment on the right to water.[86]

(2) The second sentence of Principle 15 is concerned not with the life of the international organization once it has been set up, but with the establishment of the international organization and with the

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[82] *Pulp Mills on the River Uruguay case (Argentina v. Uruguay)*, (Judgment of April 20, 2010), para. 204.

[83] Committee on Economic, Social and Cultural Rights, *General Comment No. 2: International technical assistance measures (Art. 22),* (Fourth session, 1990), UN Doc. E/1990/23, para. 9.

[84] Committee on Economic, Social and Cultural Rights, *General Comment No. 14: The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights)*, (Twenty-second session, 2000), UN Doc. E/C.12/2000/4, para. 39 ("In relation to the conclusion of other international agreements, States parties should take steps to ensure that these instruments do not adversely impact upon the right to health").

[85] Ibid., para. 39.

[86] See Committee on Economic, Social and Cultural Rights, *General Comment No. 15, The right to water (arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights),* (Twenty-ninth session, 2002), UN Doc. E/C.12/2002/11, para. 36: 'States parties should ensure that their actions as members of international organizations take due account of the right to water. Accordingly, States parties that are members of international financial institutions, notably the International Monetary Fund, the World Bank, and regional development banks, should take steps to ensure that the right to water is taken into account in their lending policies, credit agreements and other international measures'.

transfer by the State of certain powers to the organization. Each State has a duty to ensure that the international organization which the State establishes or becomes a member of, complies with the pre-existing human rights obligations of that State in the exercise of the powers which that organization has been delegated. For instance, the European Court of Human Rights has noted that while the European Convention on Human Rights "does not exclude the transfer of competences to international organizations", this is "provided that Convention rights continue to be 'secured'. Member States' responsibility therefore continues even after such a transfer".[87]

(3) This rule follows from the prohibition on entering into treaties that are incompatible with pre-existing treaty obligations, in violation of the obligatory nature of treaties (*pacta sunt servanda*).[88] It is well established in international human rights law.[89] According to the Draft Articles on Responsibility of International Organizations, adopted on second reading by the International Law Commission at its sixty-third session, on 3 June 2011: "A State member of an international organization incurs international responsibility if, by taking advantage of the fact that the organization has competence in relation to the subject-matter of one of the State's international obligations, it circumvents that obligation by causing the organization to commit an act that, if committed by the State, would have constituted a breach of the obligation".[90] It is therefore incumbent on a State establishing an international organization or joining an international organization that it ensures that the powers delegated to that organization shall not be exercised in ways that may result in a violation of the human rights that the State has committed to uphold. The measures that the State may take to avoid such a consequence may include retaining a veto power over some of the decisions of the organization that may have such an impact; ensuring that the decision-making procedure within the organization shall ensure that no measure shall be adopted by the organization that may result in a violation of human rights; and/or ensuring that those affected by the measures adopted by the organization will have access to a court empowered to adjudicate human rights claims.

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87 Eur. Ct. HR (GC), *Matthews v. the United Kingdom* (Appl. N° 24833/94) judgment of 18 February 1999, § 32; Eur. Ct. HR (GC), *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* (Appl. N° 45036/98), judgment of 30 June 2005, § 154.

88 Vienna Convention on the Law of Treaties, 23 May 1969, entered into force 27 January 1980, 1155 UNTS 331, articles 26 and 30 § 4, (b).

89 Committee on Economic, Social and Cultural Rights, *General Comment No. 12: The right to adequate food (art. 11),* (Twentieth session, 1999), E/C.12/1999/5, at paras. 19 and 36 ("States parties should, in international agreements whenever relevant, ensure that the right to adequate food is given due attention"); Committee on Economic, Social and Cultural Rights, *General Comment No. 14: The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights)*, (Twenty-second session, 2000), E/C.12/2000/4, para. 39 ("In relation to the conclusion of other international agreements, States parties should take steps to ensure that these instruments do not adversely impact upon the right to health"); Committee on Economic, Social and Cultural Rights, *General Comment No. 15*, *The right to water (arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights),* (Twenty-ninth session, 2002), UN Doc. E/C.12/2002/11, paras. 31 and 35-36 ("States parties should ensure that the right to water is given due attention in international agreements and, to that end, should consider the development of further legal instruments. With regard to the conclusion and implementation of other international and regional agreements, States parties should take steps to ensure that these instruments do not adversely impact upon the right to water. Agreements concerning trade liberalization should not curtail or inhibit a country's capacity to ensure the full realization of the right to water.").

90 Article 61, para. 1, of the Articles on Responsibility of International Organizations (Circumvention of international obligations of a State member of an international organization), UN Doc. A/CN.4/L.778 (30 May 2011). This obligation, the article continues, applies whether or not the act in question in internationally wrongful for the international organization.

## 16. Obligations of international organizations

The present Principles apply to States without excluding their applicability to the human rights obligations of international organizations under, *inter alia*, general international law and international agreements to which they are parties.

**Commentary**

(1) As subjects of international law, international organizations are "bound by any obligations incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are parties".[91] Such obligations may include obligations in the area of human rights. Although stipulated in multilateral treaties that are binding on the States parties, a wide range of human rights have acquired a customary status in international law, and international organizations are therefore bound to exercise the powers that they have been delegated in compliance with the requirements that they impose.[92] Human rights may also be considered to form part of the "general principles of law recognized by civilized nations" mentioned by article 38(1)(c) of the Statute of the International Court of Justice.[93] The constitutions of several international organizations include human rights obligations, in particular the United Nations. Thus, the United Nations is necessarily bound by the human rights obligations contained in articles 1 (3) and 55 of the UN Charter, and its interpretation by the Universal Declaration on Human Rights, as are the UN's specialized agencies.[94]

(2) Principle 16 refers to the human rights obligations of international organizations as stipulated in international agreements to which such organizations are parties. Some treaties provide for the accession either of a specified international organization such as the European Union,[95] or of international organizations generally.[96]

(3) Although international organizations have no territory and generally do not exercise 'jurisdiction' by enforcing their own decisions, these Principles may be applicable to their activities, for instance in the context of peace-keeping operations decided under chapter VII of the Charter of the United Nations, whether or not such operations lead to the establishment of a civilian administration under the responsibility of the United Nations.[97] While these Principles are primarily addressed to States whose "jurisdiction" is generally seen as primarily territorial, their applicability to international organizations, *mutatis mutandis*, cannot therefore be excluded.

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[91] Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion (20 December 1980), I.C.J. Reports 1980, p. 73, at pp. 89-90 (para. 37).

[92] See, in particular, Louis Henkin, *The Age of Rights*, (Columbia University Press, 1990), p. 19; Nigel S. Rodley, *Human Rights and Humanitarian Intervention: The Case Law of the World Court*, 38(2) International and Comparative Law Quarterly 321 (1989), p. 333; Theodor Meron, *Human Rights and Humanitarian Norms as Customary Law*, (Clarendon Press, 1989); Louis B. Sohn, *The Human Rights Law of the Charter,* 12 Texas International Law Journal 129 (1977), pp. 132-134; Hurst Hannum, *The Status of the Universal Declaration of Human Rights in National and International Law*, 25 Georgia Journal of International and Comparative Law 287 (1995-1996).

[93] Bruno Simma and Philip Alston, *The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles*, 12 Australian Yearbook of International Law 82 (1988-1989), pp 102-108; Hurst Hannum, *The Status of the Universal Declaration of Human Rights in National and International Law*, 25 Georgia Journal of International and Comparative Law 287 (1995-1996), pp. 351-352; Theodor Meron, *Human Rights and Humanitarian Norms as Customary Law*, (Clarendon Press, 1989), p. 88

[94] M. Darrow and L. Arbour, *The Pillar of Glass: Human Rights in the Development Operations of the United Nations*, 103 American Journal of International Law 446 (2009), 462-4 and 471-2, and M. Darrow, *Between Light and Shadow: The World Bank, the International Monetary Fund and International Human Rights Law* (Hart, Oxford 2003), pp. 124-9.

[95] Convention for the protection of Human Rights and dignity of the human being with regard to the application of biology and medicine: Convention on Human Rights and Biomedicine (CETS No. 164, opened for signature in Oviedo, on 4 April 1997), article 33(1); Amendments to the Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (CETS No. 108, opened for signature on 28 January 1981 in Strasbourg), adopted in 1999 by the Committee of Ministers of the Council of Europe.

[96] The Convention on the Rights of Persons with Disabilities provides for the signature and expression of consent to be bound by regional integration organizations (see article 44 of the Convention, and article 12 of the Optional Protocol to the Convention) UN Doc. A/61/49 (2006). The European Union has now become a party to the Convention.

[97] See, e.g., Security Council Res. 1244 (June 10, 1999) (on the situation relating to Kosovo).

## 17. International agreements

States must elaborate, interpret and apply relevant international agreements and standards in a manner consistent with their human rights obligations. Such obligations include those pertaining to international trade, investment, finance, taxation, environmental protection, development cooperation, and security.

**Commentary**

(1) Principle 17 addresses the obligation incumbent upon States to observe their international human rights obligations also in respect of other areas of policy-making and international relations. It thus reflects the requirement to ensure that any agreements concluded by a State are consistent with its pre-existing international human rights obligations, in order to reduce the risks associated with the fragmentation of international law and the emergence of conflicting obligations,[98] and in order to ensure the primacy of human rights.

(2) Principle 17 finds support in various pronouncements linking human rights and other areas of international concern. The Inter-American Court of Human Rights has noted that the enforcement of bilateral investment or commercial treaties should always be compatible with the American Convention on Human Rights.[99] Similarly, the European Court of Human Rights has affirmed the principle that States cannot contract out of their human rights obligations.[100] The Committee on Economic, Social and Cultural Rights has urged that human rights principles and obligations be fully integrated in trade negotiations.[101] The Sub-Commission on Promotion and Protection of Human Rights has asserted the centrality and primacy of human rights obligations in all areas, including international trade and investment.[102] The special rapporteurs of the Sub-Commission on Human Rights on globalization and its impact on the full enjoyment of human rights have noted that, "the primacy of human rights law over all other regimes of international law is a basic and fundamental principle that should not be departed from."[103]

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[98] Report of the Study Group of the International Law Commission, *Fragmentation of international law: difficulties arising from the diversification and expansion of international law*, UN Doc. A/CN.4/L.702, 18 July 2006 (also reproduced in the Report on the work of the fifty-eighth session (1 May to 9 June and 3 July to 11 August 2006) of the International Law Commission to the UN General Assembly, Official Records, Sixty-first Session, Supplement No. 10 (A/61/10), chapter 12), para. 41.

[99] Inter-American Court of Human Rights, *Case of the Sawhoyamaxa Indigenous Community v. Paraguay*, Judgment of 29 March 2006, Series C No. 146, para. 140.

[100] *Bosphorus Hava Yollary Turizm ve Ticaret Anonim Sirketi v. Ireland* (Appl. No. 45036/98 [2005]), judgment of June 30, 2005, ECHR 440, para. 154.

[101] See, e.g., Statement of the Committee on Economic, Social and Cultural Rights to the Third Ministerial Conference of the World Trade Organization, Seattle, 30 November – 3 December 1999 (E/C.12/1999/9); Committee on Economic, Social and Cultural Rights, *General Comment No. 12, The right to adequate food (art. 11),* (Twentieth session, 1999), E/C.12/1999/5, at paras. 19 and 36 ("States parties should, in international agreements whenever relevant, ensure that the right to adequate food is given due attention"); Committee on Economic, Social and Cultural Rights, *General Comment No. 14: The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights)*, (Twenty-second session, 2000), E/C.12/2000/4, para. 39 ("In relation to the conclusion of other international agreements, States parties should take steps to ensure that these instruments do not adversely impact upon the right to health"); Committee on Economic, Social and Cultural Rights, *General Comment No. 15*, *The right to water (arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights),* (Twenty-ninth session, 2002), UN Doc. E/C.12/2002/11, paras. 31 and 35-36 ("States parties should ensure that the right to water is given due attention in international agreements and, to that end, should consider the development of further legal instruments. With regard to the conclusion and implementation of other international and regional agreements, States parties should take steps to ensure that these instruments do not adversely impact upon the right to water. Agreements concerning trade liberalization should not curtail or inhibit a country's capacity to ensure the full realization of the right to water").

[102] Sub-Commission on Promotion and Protection of Human Rights, *Human Rights as the Primary Objective of Trade, Investment and Financial Policy*, UN Doc. E/CN.4/Sub.2/ RES/1998/12 (1998); Report of the Sub-Commission on its 50th Sess., U.N. ESCOR, 50th Sess., at 39, UN Doc. E/CN.4/Sub.2/1998/45 (1998).

[103] J. Oloka-Onyango & Deepika Udagama, *The Realization of Economic, Social and Cultural Rights: Globalization and Its Impact on the Full Enjoyment of Human Rights*, U.N. ESCOR, 52d Sess., UN Doc. E/CN.4/Sub.2/2000/13 (2000).

(3) Principle 17 places emphasis on the elaboration, interpretation and application of relevant international agreements and standards. Elaboration includes the negotiation process, which should be informed by human rights considerations.[104] Interpretation includes the various instances where the meaning of the terms in agreements is ascertained, and influence over their interpretation is exercised, including in dispute settlement. Application includes the adoption of specific measures giving effect to the content of the relevant agreement. Principle 17 recalls that human rights obligations are intended to be respected in all situations by all UN Member States, even in situations where they cooperate in other regimes than the international human rights regime. As recalled by the European Court of Human Rights, this obligation is imposed under the Charter of the United Nations itself, and it extends, for instance, to the measures adopted by the UN Security Council in the name of international peace and security: "As well as the purpose of maintaining international peace and security, set out in the first subparagraph of article 1 of the United Nations Charter, the third subparagraph provides that the United Nations was established to "achieve international cooperation in ... promoting and encouraging respect for human rights and fundamental freedoms". Article 24(2) of the Charter requires the Security Council, in discharging its duties with respect to its primary responsibility for the maintenance of international peace and security, to "act in accordance with the Purposes and Principles of the United Nations". Against this background, the Court considers that, in interpreting its resolutions, there must be a presumption that the Security Council does not intend to impose any obligation on Member States to breach fundamental principles of human rights."[105]

(4) Principle 17 uses the terms "international agreements and standards" to include not only international treaties as understood under the Vienna Convention on the Law of Treaties, but also those standards derived from other standard-setting processes. For example, the standards of the Codex Alimentarius are recognized under the Agreement on Sanitary and Phytosanitary Measures of the World Trade Organization, but exist independently from that agreement.

(5) Principle 17 speaks of "relevant" international agreement and standards. This term is intended to denote that certain areas of international policy-making have the potential to affect the realization of economic, social and cultural rights more intensely than other areas. For greater clarity, Principle 17 includes an illustrative list of fields that are known to implicate these rights.

### 18. Belligerent occupation and effective control

A State in belligerent occupation or that otherwise exercises effective control over territory outside its national territory must respect, protect and fulfil the economic, social and cultural rights of persons within that territory. A State exercising effective control over persons outside its national territory must respect, protect and fulfil economic, social and cultural rights of those persons.

**Commentary**

(1) Principle 18 concerns a special situation involving extraterritorial obligations, whereby the State acting through its organs outside its national territory assumes special responsibilities with respect to its extra-territorial conduct. Indeed, where the State exercises belligerent occupation, its obligations are substantially similar to those it assumes with regard to situations or persons on its national territory.

(2) This general principle regarding the obligations of an Occupying Power was encapsulated in international treaty law already in 1907, with its inclusion in the Regulations annexed to the Hague Convention of 1907. Article 43 of the Regulations provides that an occupying power "shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country." In the Case of the *Armed*

[104] Report of the Special Rapporteur on the Right to Food to the 19th session of the Human Rights Council, Olivier De Schutter, Addendum: Guiding Principles on human rights impact assessments of trade and investment agreements, UN Doc. A/HRC/19/59/Add.5 (19 December 2011).

[105] *Al-Jedda v. The United Kingdom* (Appl. No. 27021/08), judgment of 7 July 2011, para 102.

*Activities on the Territory of the Congo (DRC v. Uganda)*, the International Court of Justice relied on this provision and stated that:

> "this obligation comprised the duty to secure respect for the applicable rules of international human rights law and international humanitarian law to protect the inhabitants of the occupied territory against acts of violence and not to tolerate such violence by any third party. […] The Court, having concluded that Uganda was an occupying Power in Ituri at the relevant time, finds that Uganda's responsibility is engaged both for [i] any acts of its military that violated its international obligations and for [ii] any lack of vigilance in preventing violations of human rights and international humanitarian law by other actors present in the occupied territory, including rebel groups acting on their own account. […] The Court notes that Uganda at all times has responsibility for all actions and omissions of its own military forces in the territory of the DRC in breach of its obligations under the rules of international human rights law and international humanitarian law which are relevant and applicable in the specific situation."[106]

(3) The application of the standard poses few difficulties in cases of complete occupation, such as in respect of Israel vis-à-vis the Occupied Palestinian Territory. Thus, the Committee on Economic, Social and Cultural Rights in its Concluding Observations on the Periodic Report of Israel noted that "the State Party's obligations under the Covenant apply to all territories and populations under its effective control."[107] The International Court of Justice, in the Advisory Opinion it adopted on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, stated that the Occupied Palestinian Territory is subject to Israel's "territorial jurisdiction as the occupying Power. In the exercise of the powers available to it on this basis, Israel is bound by the provisions of the International Covenant on Economic, Social and Cultural rights."[108]

(4) In other situations, where one State controls a portion of the territory of another State but where such control does not amount to complete control as in the case of an occupation, specific questions may arise. The European Court of Human Rights has made it clear that the duty to comply with human rights derives from the control that the State exercises, in fact, on the territory of another State:

> [An] exception to the principle that jurisdiction under Article 1 [of the European Convention on Human Rights] is limited to a State's own territory occurs when, as a consequence of lawful or unlawful military action, a Contracting State exercises effective control of an area outside that national territory. The obligation to secure, in such an area, the rights and freedoms set out in the Convention, derives from the fact of such control, whether it be exercised directly, through the Contracting State's own armed forces, or through a subordinate local administration…. Where the fact of such domination over the territory is established, it is not necessary to determine whether the Contracting State exercises detailed control over the policies and actions of the subordinate local administration. The fact that the local administration survives as a result of the Contracting State's military and other support entails that State's responsibility for its policies and actions. The controlling State has the responsibility under Article 1 to secure, within the area under its control, the entire range of substantive rights set out in the Convention and those additional Protocols which it has ratified. It will be liable for any violations of those rights. [...] It is a question of fact whether a Contracting State exercises effective control over an area outside its own territory. In determining whether effective control exists, the Court will primarily have reference to the strength of the State's military presence in the area…. Other indicators may also be relevant, such as the extent

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[106] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda),* 19 December 2005, at paras. 178-180.

[107] Committee on Economic, Social and Cultural Rights, UN Doc. E/C.12/1/Add.90. paras. 15 and 31.

[108] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, I.C.J. Reports 2004, para. 112.

> to which its military, economic and political support for the local subordinate administration provides it with influence and control over the region. [109]

Further explanations as to the scope of the duties that follow from one State's effective control of a portion of the territory of another State are provided under the Commentary to Principle 9(a) above.

## III. Obligations to respect

### 19. General obligation

All States must take action, separately, and jointly through international cooperation, to respect the economic, social and cultural rights of persons within their territories and extraterritorially, as set out in Principles 20 to 22.

**Commentary**

(1) Principle 19 lays out the general obligation of States to respect the economic, social and cultural rights of persons within and outside their national territory. This general obligation to respect economic, social and cultural rights is elaborated in Principles 20 to 22, including direct and indirect interference as well as sanctions and equivalent measures.

(2) The general obligation to respect is rooted in the three-pronged typology of international human rights obligations: respect, protect and fulfill. In this sense, Principle 19 recalls the duty of the State to organize its governmental apparatus through which it discharges public authority in a way that does not interfere with the enjoyment of economic, social and cultural rights. Principle 19 recalls the duty to refrain from conduct that nullifies or impairs the enjoyment and exercise of these rights. It also comprises obligations to take action separately and jointly through international cooperation to establish institutional arrangements necessary to respect economic, social and cultural rights.

(3) Principle 19 makes explicit what is imposed under article 56 of the Charter of the United Nations. As already noted above,[110] that provision stipulates that "All Members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55", among which purposes Article 55 lists "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion" as well as "higher standards of living, full employment, and conditions of economic and social progress and development, solutions of international economic, social, health, and related problems, and international cultural and educational cooperation". [111] The Charter imposes no territorial restriction to the obligations that it imposes on its Members. Instead, the reference to co-operation with the Organization suggests that, under the Charter, the realization of human rights is a duty that States owe to one another and that such duties extend beyond the individuals situated within their territories.

(4) The basic requirement that States have human rights obligations that extend beyond their national territory has been given particularly clear recognition in the area of economic, social and cultural rights. The Commentary to Principle 3 above refers to other instruments of international human rights law that set out a duty of international assistance and cooperation. The importance of international cooperation is also stressed in article 4 ("Cooperation") of the International Law Commission's Draft Articles on the Prevention of Transboundary Harm from Hazardous Activities, which provides that: "States concerned shall cooperate in good faith and, as necessary, seek the assistance of one or more competent international organizations in preventing significant transboundary harm or at any event in minimizing the risk thereof."

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[109] *Case of Al-Skeini and Others v. The United Kingdom* (Application No. 5572/107), judgment of 7 July 2011, at paras 138-139. (Citations omitted.)
[110] See the Commentary to Principle 3.
[111] Charter of the United Nations, June 26, 1945, 59 Stat. 1031, T.S. 993, 3 Bevans 1153, *entered into force* Oct. 24, 1945.

(5) In Principle 19, and subsequently in the present Principles, references to "persons" include individuals as well as groups. As noted in Guideline 20 the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights: "As is the case with civil and political rights, both individuals and groups can be victims of violations of economic, social and cultural rights. Certain groups suffer disproportionate harm in this respect such as lower-income groups, women, indigenous and tribal peoples, occupied populations, asylum seekers, refugees and internally displaced persons, minorities, the elderly, children, landless peasants, persons with disabilities and the homeless."

### 20. Direct interference

All States have the obligation to refrain from conduct which nullifies or impairs the enjoyment and exercise of economic, social and cultural rights of persons outside their territories.

**Commentary**

(1) Principle 20 establishes the duty of the State to refrain from conduct which nullifies or impairs the enjoyment of economic, social and cultural rights outside that State's national territory. In order to give effect to this obligation, a State confronted with a situation that could implicate risks to economic, social and cultural rights is required to undertake positive measures to ensure that its actions do not nullify or impair the enjoyment of these rights outside the national territory.

(2) Principle 20 distinguishes between direct and indirect interference. Indirect interference is addressed in Principle 21. Direct interference, which Principle 20 addresses, refers to situations where the conduct of the State has a potential impact on the enjoyment of economic, social and cultural rights, without any other State or international organization being involved in the situation that leads to nullification or impairment of the enjoyment of economic, social and cultural rights.

### 21. Indirect interference

States must refrain from any conduct which:
a) impairs the ability of another State or international organization to comply with that State's or that international organization's obligations as regards economic, social and cultural rights; or
b) aids, assists, directs, controls or coerces another State or international organization to breach that State's or that international organization's obligations as regards economic, social and cultural rights, where the former States do so with knowledge of the circumstances of the act.

**Commentary**

(1) Principle 21 addresses situations where a State's conduct impairs the ability or another State or international organization to discharge their international obligations. It also addresses situations where a State aids, assists, directs, controls or coerces another State or international organization to breach its international obligations regarding economic, social and cultural rights.

(2) The language replicates articles 16-18 of the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts.[112] Article 16 of these Articles states: "A State which *aids or assists* another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if: (a) that State does so with knowledge of the circumstances of the internationally wrongful act; and (b) the act would be internationally wrongful if committed by that State". As noted by the International Law Commission, this general principle has been embodied in a number of specific substantive rules of international law, including: the first

[112] *Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries adopted by the International Law Commission,* Report of the International Law Commission on the Work of its 53rd session (23 April to 1 June and 2 July to 10 August 2001), UN Doc. A/56/10.

principle of the Declaration on the Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations[113]; and article 3 (f) of the Definition of Aggression.[114]

(3) The International Law Commission elaborated on the meaning of article 16 of the Articles on Responsibility of States for Internationally Wrongful Acts, stating in particular: "Such situations arise where a State voluntarily assists or aids another State in carrying out conduct which violates the international obligations of the latter, for example, by knowingly providing an essential facility or financing the activity in question. Other examples include providing means for the closing of an international waterway, facilitating the abduction of persons on foreign soil, or assisting in the destruction of property belonging to nationals of a third country…. The requirement that the assisting State be aware of the circumstances making the conduct of the assisted State internationally wrongful is reflected by the phrase 'knowledge of the circumstances of the internationally wrongful act.' A State providing material or financial assistance or aid to another State does not normally assume the risk that its assistance or aid may be used to carry out an internationally wrongful act. If the assisting or aiding State is unaware of the circumstances in which its aid or assistance is intended to be used by the other State, it bears no international responsibility."

(4) Article 17 of the Articles on Responsibility of States for Internationally Wrongful Acts states: "A State which *directs and controls* another State in the commission of an internationally wrongful act by the latter is internationally responsible for that act if: (a) that State does so with knowledge of the circumstances of the internationally wrongful act; and (b) the act would be internationally wrongful if committed by that State." The International Law Commission notes that article 17 "is limited to cases where a dominant State actually directs and controls conduct which is a breach of an international obligation of the dependent State. International tribunals have consistently refused to infer responsibility on the part of a dominant State merely because the latter may have the power to interfere in matters of administration internal to a dependent State, if that power is not exercised in the particular case."

(5) The Commentary to Article 17 of the Articles on Responsibility of States for Internationally Wrongful Acts also explains the difference between the language in articles 16 and 17: "Under article 16, a State providing aid or assistance with a view to the commission of an internationally wrongful act incurs international responsibility only to the extent of the aid or assistance given. By contrast, a State which directs and controls another in the commission of an internationally wrongful act is responsible for the act itself, since it controlled and directed the act in its entirety."

(6) Article 18 of the Articles on Responsibility of States for Internationally Wrongful Acts states: "A State which *coerces* another State to commit an act is internationally responsible for that act if: (a) the act would, but for the coercion, be an internationally wrongful act of the coerced State; and (b) the coercing State does so with knowledge of the circumstances of the act". The Commentary of the International Law Commission describes coercion in this manner: "Coercion for the purpose of article 18 has the same essential character as force majeure [referred to in Article 23 of the Articles on Responsibility of States for Internationally Wrongful Acts]. Nothing less than conduct which forces the will of the coerced State will suffice, giving it no effective choice but to comply with the wishes of the coercing State. It is not sufficient that compliance with the obligation is made more difficult or onerous, [...]."

(7) Principle 21 also reflects the concepts of abetting and negligent assistance to the State in violation of its obligations to comply with economic, social and cultural rights. Such acts fall short of coercion. They do not necessarily cause another State or international organizations to breach their obligations as regards economic, social and cultural rights. As the Commentary on Article 16 of the Articles on Responsibility of States for Internationally Wrongful Acts notes, "There is no requirement that the aid

[113] General Assembly resolution 2625 (XXV) of 24 October 1970, annex.
[114] General Assembly resolution 3314 (XXIX) of 14 December 1974, annex.

or assistance should have been essential to the performance of the internationally wrongful act; it is sufficient if it contributed significantly to that act."

## 22. Sanctions and equivalent measures

States must refrain from adopting measures, such as embargoes or other economic sanctions, which would result in nullifying or impairing the enjoyment of economic, social and cultural rights. Where sanctions are undertaken to fulfil other international legal obligations, States must ensure that human rights obligations are fully respected in the design, implementation and termination of any sanctions regime. States must refrain in all circumstances from embargoes and equivalent measures on goods and services essential to meet core obligations.

**Commentary**

(1) Principle 22 may be seen as elaborating on Principles 19-21 as they apply to sanctions, embargoes and analogous measures that could have the effect of restricting the enjoyment of economic, social and cultural rights. The broad term "measures" is used in order to refer to a wide range of actions that could include, for example, military blockades, prohibitions on trade with another state, sanctions for non-compliance with World Trade Organization rulings or removal of trade preferential schemes. It also covers threats, pressures or inducement of such action. Principle 22 addresses situations where there would be a significant negative impact on the ability of a group of people to realize their economic, social and cultural rights. An example of such a situation would be where sanctions on a particular industry lead to low-paid workers being laid off and there is inadequate provision for their social security. Principle 22 does not apply to sanctions that simply reduce the income of producers or of government officials without impairing their ability to secure their economic, social and cultural rights.

(2) Principle 22 should be understood to be consistent with Article 50 of the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts, which stipulate that counter-measures by a State or group of States in response to an internationally wrongful act by another State may not affect "obligations for the protection of fundamental human rights."

(3) The second sentence of Principle 22 relates to the specific case where a State is required to impose sanctions in order to fulfil its other legal obligations, such as compliance with a sanctions regime established by the UN Security Council acting under Chapter VII of the UN Charter or when sanctions are required in order to fulfil a State's obligation to bring to an end violations of peremptory norms of international law. Article 103 of the UN Charter provides that States' obligations under the UN Charter prevail over States' obligations under any other international agreements. However, this cannot be interpreted to mean that the UN Security Council can adopt measures that set aside human rights obligations. As noted by the Committee on Economic, Social and Cultural Rights, even when the Security Council is acting under Chapter VII of the Charter, "those provisions of the Charter that relate to human rights (Articles 1, 55 and 56) must still be considered to be fully applicable in such cases."[115]

(4) Principle 22 does not take a position as to whether it is permissible for a State or group of States to impose sanctions nullifying or impairing economic, social and cultural rights where the objective is to ensure that the targeted State complies with its own international legal obligations. Any such sanctions would need to be consistent with the limitations provisions relating to the specific rights affected, such as, in particular, article 4 of the International Covenant on Economic, Social and Cultural Rights.

[115] See Committee on Economic, Social and Cultural Rights, *General Comment No. 8: The relationship between economic sanctions and respect for economic, social and cultural rights* (Seventeenth session, 1997), UN Doc. E/C.12/1997/8, para. 1.

(5) Where sanctions are permissible, Principle 22 indicates that States have distinct obligations at each of the three stages of design, implementation and termination of sanctions. First, as stated by the Committee on Economic, Social and Cultural Rights, "economic, social and cultural rights must be taken fully into account when designing an appropriate sanctions regime."[116] Sanctions must be proportional to the objectives of ensuring compliance with international obligations, and the negative impacts of the sanctions on human rights should be minimized to the greatest extent possible. common article 1 (2) of the International Covenant on Economic, Social and Cultural Rights and of the International Covenant on Civil and Political Rights indicates an unconditional limitation on sanctions, derived from the right of peoples to self-determination: "In no case may a people be deprived of its own means of subsistence." Article 4 of the International Covenant on Economic, Social and Cultural Rights indicates that any limitation must be "compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society."

(6) Second, the implementation of sanctions should be consistent with human rights obligations. The Committee on Economic, Social and Cultural Rights has stated that effective monitoring should be undertaken throughout the period that sanctions are in force. The external entity imposing sanctions has an obligation "to take steps, individually and through international assistance and cooperation, especially economic and technical" in order to respond to any disproportionate suffering experienced by vulnerable groups within the targeted country.[117]

(7) Third, human rights obligations should be taken into account in determining when sanctions must be terminated. Sanctions must therefore be ended if the impact on economic, social and cultural rights outweighs the objectives being sought.

(8) The last sentence of Principle 22 sets out an unconditional limitation on sanctions, stipulating that they may not restrict the provision of goods and services essential to meet core obligations. The Committee on Economic, Social and Cultural Rights has stated in its General Comments on the rights to water, food and health that States should refrain at all times from imposing embargoes or similar measures that prevent the supply of water, food and health care, as well as goods and services essential for securing these rights; denial of access to such rights should never be used as an instrument of political and economic pressure.[118] Such obligations almost certainly apply to other economic, social and cultural rights, such as the rights to sanitation and education.

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[116] Committee on Economic, Social and Cultural Rights, *General Comment No. 8: The relationship between economic sanctions and respect for economic, social and cultural rights* (Seventeenth session, 1997), UN Doc. E/C.12/1997/8, para. 12.

[117] Committee on Economic, Social and Cultural Rights, *General Comment No. 8: The relationship between economic sanctions and respect for economic, social and cultural rights* (Seventeenth session, 1997), UN Doc. E/C.12/1997/8, paras. 13-14; and *The adverse consequences of economic sanctions on the enjoyment of human rights. Working paper presented by Mr Marc Bossuyt*, Sub-Commission on the Promotion and Protection of Human Rights, UN Doc. E/CN.4/Sub.2/2000/33 (21 June 2000).

[118] Committee on Economic, Social and Cultural Rights, *General Comment No. 12: The Right to Adequate Food (Art. 11)*, (Twentieth session, 1999) UN Doc. E/C.12/1999/5, para. 37; Committee on Economic, Social and Cultural Rights, *General Comment No. 14, The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights)*, (Twenty-second session, 2000), UN Doc. E/C.12/2000/4, para. 41; Committee on Economic, Social and Cultural Rights, *General Comment No. 15: The right to water (articles 11 and 12 of the International Covenant on Economic, Social and Cultural Rights),* (Twenty-ninth session, 2002), UN Doc. E/C.12/2002/11, para. 32.

## IV. Obligations to protect

### 23. General obligation

All States must take action, separately, and jointly through international cooperation, to protect economic, social and cultural rights of persons within their territories and extraterritorially, as set out in Principles 24 to 27.

**Commentary**

(1) Principle 23 states the general obligation to protect economic, social and cultural rights extraterritorially. The general obligation to protect is elaborated in Principles 24 to 27, including through regulation where this is in compliance with general international law.

(2) The general obligation to protect is rooted in a three-pronged typology of international human rights obligations: respect, protect and fulfill. Principle 23 thus recalls the duty of the State to take practicable measures to protect economic, social and cultural rights against the risk of interference by private actors. Principle 23 thus imposes on the State a positive duty to take steps to protect economic, social and cultural rights from interference. Principle 23 also contemplates the duty to take action separately and jointly through international cooperation.

### 24. Obligation to regulate

All States must take necessary measures to ensure that non-State actors which they are in a position to regulate, as set out in Principle 25, such as private individuals and organizations, and transnational corporations and other business enterprises, do not nullify or impair the enjoyment of economic, social and cultural rights. These include administrative, legislative, investigative, adjudicatory and other measures. All other States have a duty to refrain from nullifying or impairing the discharge of this obligation to protect.

**Commentary**

(1) The duty to regulate the conduct of private groups or individuals, including legal persons, in order to ensure that such conduct shall not result in violating the human rights of others, is well established in international human rights law.[119] Outside exceptional circumstances, only the conduct of the organs of the State may be attributable to the State and thus engage its responsibility[120]; however, such conduct includes the failure of the State to adopt regulations, or to implement them effectively, where such a failure is in violation of the human rights undertakings of the State. The principle has been affirmed by a large number of decisions of human rights bodies, whether judicial or quasi-judicial, operating under both universal and regional instruments.[121]

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[119] Olivier De Schutter, *International Human Rights Law. Cases, Materials and Commentary*, (Cambridge University Press, 2010), chap. 4.

[120] International Court of Justice, Case of *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) (merits)*, judgment of 27 June 1986, I.C.J. Reports 1986, p. 14, para. 108. See generally International Law Commission, Articles on Responsibility of States for Internationally Wrongful Acts, Report of the International Law Commission on the Work of Its 53rd Session, 2001, UN Doc. A/56/10, as well as the Commentary to Principle 12 above.

[121] Only a small sample can be referred to here. See, under the International Covenant on Civil and Political Rights, Human Rights Committee, *General Comment No. 31, Nature of the General Legal Obligation Imposed on States Parties to the Covenant* (Eightieth session, 2004), UN Doc. CCPR/C/21/Rev.1/Add.13, para. 8 (**"**the positive obligations on States Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights in so far as they are amenable to application between private persons or entities"); under the International Covenant on Economic, Social and Cultural Rights, Committee on Economic, Social and Cultural Rights, *General Comment No. 12: The right to adequate food (Art. 11)*, (Twentieth session, 1999), UN Doc. E/C.12/1999/5, para. 15 ("The obligation to *protect* requires measures by the State to ensure that enterprises or individuals do not deprive individuals of their access to adequate food"); under the European Convention on Human

(2) The duty of the State to protect human rights by regulating the conduct of private actors extends to situations where such conduct may lead to violations of human rights on the territory of another State. International law imposes a prohibiton on the State to allow the use of its territory to cause environmental damage on the territory of another State.[122] But the obligation not to allow the national territory to be used to cause damage in another State is of a general nature: it is not limited to cases of transboundary pollution. In the *Corfu Channel Case*, while accepting that an activity cannot be imputed to the State by reason merely of the fact that it took place on its territory, the International Court of Justice nevertheless noted that "a State on whose territory or in whose waters an act contrary to international law has occurred, may be called upon to give an explanation": where the State knew or ought to have known that activities unlawful under international law (i.e., activities that would constitute a violation of international law if they were imputed to the State in question) are perpetrated on its territory and cause damage to another State, the first State is expected to take measures to prevent them from taking place or, if they are taking place, from continuing.[123] It has been remarked on this basis that the State "is under the duty to control the activities of private persons within its State territory and the duty is no less applicable where the harm is caused to persons or other legal interests within the territory of another State".[124]

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Rights, European Court of Human Rights (plenary), *Young, James and Webster v. the United Kingdom* (Application No. 7601/76; 7806/77), judgment of 13 August 1981, Series A, No. 44, para. 49, or European Court of Human Rights, *X and Y v. the Netherlands* (Application no. 8978/80), judgment of 26 March 1985, Series A, No. 91, para. 27; under the European Social Charter of the Council of Europe, European Committee of Social Rights, collective complaint n° 30/2005, *Marangopoulos Foundation for Human Rights (MFHR) v Greece*, decision on admissibility of 30 October 2005, para. 14 ("the state is responsible for enforcing the rights embodied in the Charter within its jurisdiction. The Committee is therefore competent to consider the complainant's allegations of violations, even if the State has not acted as an operator but has simply failed to put an end to the alleged violations in its capacity as regulator"); under the American Convention on Human Rights, see Inter-American Court of Human Rights, Case of *Velásquez-Rodríguez v. Honduras* (Merits), Judgment of 29 July 1988, Series C No. 4, para. 172 ("An illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention"); under the African Charter of Human and Peoples' Rights, see African Commission on Human and Peoples' Rights, application 74/92, *Commission Nationale des Droits de l'Homme et des Libertés v Chad*, 9th Annual Activity Report of the ACHPR (1995-96); 4 IHRR 94 (1997) ("The Charter specifies in Article 1 that the states parties shall not only recognise the rights, duties and freedoms adopted by the Charter, but they should also 'undertake . . . measures to give effect to them'. In other words, if a state neglects to ensure the rights in the African Charter, this may constitute a violation, even if the State or its agents are not the immediate cause of the violation"), or African Commission on Human and Peoples' Rights, application 55/96, *SERAC and CESR v Nigeria*, 15th Annual Activity Report of the ACHPR (2002), para. 46 ("the State is obliged to protect right-holders against other subjects by legislation and provision of effective remedies. This obligation requires the State to take measures to protect beneficiaries of the protected rights against political, economic and social interferences. Protection generally entails the creation and maintenance of an atmosphere or framework by an effective interplay of laws and regulations so that individuals will be able to freely realise their rights and freedoms"). These principles apply equally in the area of economic, social and cultural rights: Aoife Nolan, *Addressing Economic and Social Rights Violations by Non-State Actors through the Role of the State: A Comparison of Regional Approaches to the "Obligation to Protect",* 9(2) Human Rights Law Review 225*,* (2009).

122 See Commentary to Principle 20 above.

123 *Corfu Channel Case*, Judgment of April 9th, 1949, I.C.J. Reports 1949, p. 4, at p. 18. The fact of territorial control also influences the burden of proof imposed on the claiming State that the territorial State has failed to comply with its obligations under international law. Although "it cannot be concluded from the mere fact of the control exercised by a State over its territory and waters that that State necessarily knew, or ought to have known, of any unlawful act perpetrated therein, nor yet that it necessarily knew, or should have known, the authors", nevertheless "the fact of this exclusive territorial control exercised by a State within its frontiers has a bearing upon the methods of proof available to establish the knowledge of that State as to such events. By reason of this exclusive control, the other State, the victim of a breach of international law, is often unable to furnish direct proof of facts giving rise to responsibility. Such a State should be allowed a more liberal recourse to inferences of fact and circumstantial evidence. This indirect evidence is admitted in al1 systems of law, and its use is recognized by international decisions. It must be regarded as of special weight when it is based on a series of facts linked together and leading logically to a single conclusion".

124 I. Brownlie, *System of the Law of Nations. State responsibility*, (Clarendon Press, 1983), p. 165. See also N. Jägers, *Corporate Human Rights Obligations: in Search of Accountability*, (Intersentia, 2002), p. 172 (deriving from "the general principle formulated in the *Corfu Channel* case – that a State has the obligation not knowingly to allow its territory to be used for acts contrary to the rights of other States – that home State responsibility can arise where the home State has not exercised due diligence in controlling parent companies that are effectively under its control").

(3) The general obligation to exercise influence on the conduct of non-State actors where such conduct might lead to human rights being violated outside the State's national territory has been emphasized by various United Nations human rights treaty bodies. The Committee on Economic, Social and Cultural Rights in particular affirms that States parties should "prevent third parties from violating the right [protected under the International Covenant on Economic, Social and Cultural Rights] 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".[125] Specifically in regard to corporations, the Committee on Economic, Social and Cultural Rights has further stated that: "States Parties should also take steps to prevent human rights contraventions abroad by corporations that have their main seat under their jurisdiction, without infringing the sovereignty or diminishing the obligations of host states under the Covenant."[126] Similarly, the Committee on the Elimination of Racial Discrimination has called upon States to regulate the extraterritorial actions of third parties registered in their territory. For example, in 2007, it called upon Canada to "…take appropriate legislative or administrative measures to prevent acts of transnational corporations registered in Canada which negatively impact on the enjoyment of rights of indigenous peoples in territories outside Canada", recommending in particular that the State party "explore ways to hold transnational corporations registered in Canada accountable".[127] This latter requirement, to provide access to remedy to victims of conduct by non-State actors operating from one State into another, where the host State is unable or unwilling to provide such access, is detailed further under Section VI of the Principles, which addresses accountability and remedies.

### 25. Bases for protection

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

**Commentary**

(1) Principle 25 recalls the classic bases allowing a State, in compliance with international law, to exercise extra-territorial jurisdiction by seeking to regulate conduct that takes place outside its territory.[128]

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[125] See, e.g., Committee on Economic, Social and Cultural Rights, *General Comment No. 14: The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights),* (Twenty-second session, 2000), UN Doc. E/C.12/2000/4 (2000), para. 39; or Committee on Economic, Social and Cultural Rights, *General Comment No. 15: The right to water (arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights),* (Twenty-ninth session, 2002), UN Doc. E/C.12/2002/11 (26 November 2002), para. 31.

[126] Committee on Economic, Social and Cultural Rights, *Statement on the obligations of States Parties regarding the corporate sector and economic, social and cultural rights*, UN Doc. E/C.12/2011/1 (20 May 2011), para. 5.

[127] CERD/C/CAN/CO/18, paragraph 17 (Concluding Observations / Comments, 25 May 2007).

[128] See Olivier De Schutter, 'Sovereignty-plus in the Era of Interdependence: Towards an International Convention on Combating Human Rights Violations by Transnational Corporations', in P. Bekker, R. Dolzer and M. Waibel (eds), *Making Transnational Law work in the Global Economy: Essays in Honour of Detlev Vagts*, (Cambridge University Press, 2010) pp. 245-284.

(2) Some authors take the view that, as long as they stop short from sending their organs abroad (exercising what is sometimes referred to as "enforcement jurisdiction"), States are free to exercise extraterritorial jurisdiction by adopting legislation that seeks to regulate behavior in other States, and by allowing their jurisdictions to adjudicate cases related to such behavior.[129] That was the position adopted by judge *ad hoc* Van den Wyngaert in her dissenting opinion to the judgment delivered on 14 February 2002 by the International Court of Justice in the Case concerning the *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*.[130] Indeed, in the 1927 *Lotus* Case, the Permanent Court of International Justice had expressed the view in an *obiter dictum* that States were in principle free to regulate matters situated outside their national territory, unless specific rules of international law prohibited such exercise of extraterritorial jurisdiction.[131] However, that extreme view, based on an understanding of international law regarding jurisdiction that is indebted to an era when the sovereignty of the State was at its apex, is not the one espoused here. Instead, Principle 25 reflects that the exercise of extraterritorial jurisdiction should facilitate the coexistence between States and their cooperation in addressing situations that are of concern to more than one, or (as regards peremptory norms of international law or international crimes justifying the exercise of universal jurisdiction) to the international community as a whole. The Principle restates the relevant bases justifying the exercise by a State of extraterritorial (prescriptive) jurisdiction, i.e., the adoption of regulations that seek to influence conduct that may result in the violation of the human rights of individuals situated on the territory of another State.

(3) Principle 25 (a), (b) and (c) reflect the active personality principle as a basis for extraterritorial jurisdiction. According to this principle, a State may regulate the conduct of its nationals abroad.[132] Specific difficulties arise, however, with regard to the regulation of legal persons, in the absence of any particular mode of determination of the nationality under international law and the risk of abuse this might entail. Principle 25 (c) therefore makes it clear that, based on the active personality principle, a State could regulate an enterprise which has its centre of activity on the national territory, which is registered or domiciled on the territory, or which has its main place of business or substantial business activities on the territory.

(4) In practice, transnational corporations operating in different States are typically organized in different legal entities, incorporated under the laws of different States, and linked by an investment nexus. Doubts have sometimes been expressed as to whether it should be considered allowable for States to seek to regulate the conduct of legal persons incorporated under the laws of another country, but which are managed, controlled, or owned, by natural or legal persons which have the nationality of the State concerned. In the *Barcelona Traction* Case, the International Court of Justice recalled that, in municipal law, a distinction is made between the rights of the company and those of the shareholders, and that "the concept and structure of the company are founded on and determined by a firm distinction between the separate entity of the company and that of the shareholders, each with a distinct set of rights".[133] However, this ruling does not necessarily prohibit a State from treating a company incorporated in another State but controlled by a parent company incorporated in the State seeking to exercise extraterritorial jurisdiction, as having the nationality of that State for the purposes

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[129] P. Dailler et A. Pellet, *Droit international public*, Paris, L.G.D.J., 7th ed. 2002, p. 506.

[130] See particularly para. 19 of the dissenting opinion.

[131] The *Case of the S.S. 'Lotus' (France v. Turkey)*, Judgment No. 9 of 7 September 1927, *P.C.I.J. Reports* 1928, Series A, No. 10, at pp. 18-19 ('Far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, it leaves them in this respect a wide measure of discretion, which is only limited in certain cases by prohibitive rules; as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable'). There is still disagreement within legal scholarship as to the validity of the premise put forward in the Case of *S.S. Lotus*, according to which States are free to seek to regulate conduct outside their territory provided there is no specific prohibition under international law to do so: see R. Higgins, 'The Legal Basis of Jurisdiction', in C.J. Olmstead, *Extra-territorial Application of Laws and Responses Thereto* (I.L.A. & E.S.C. Publ. Ltd., 1984), p. 14.

[132] See, e.g., Restatement (Third) of the Foreign Relations Law of the United States (American Law Institute, 1987), § 402, (2) ("...a state has jurisdiction to prescribe law with respect to ... (2) the activities, interests, status, or relations of its nationals outside as well as within its territory").

[133] International Court of Justice, *Case concerning the Barcelona Traction, Light and Power Co. (Belgium v. Spain)* (second phase - merits), 5 February 1970, [1970] I.C.J. Rep. 3, 184.

of exercising such jurisdiction. Already in its *Barcelona Traction* judgment, the International Court of Justice noted that the veil of the company may be lifted in order to prevent the misuse of the privileges of legal personality, both in municipal and in international law.[134] Therefore, where the separation of legal personalities is used as a device by the parent company to limit the scope of its legal liability, the lifting of the veil may be justified. In addition, the recent proliferation of bilateral investment treaties under which States seek to protect their nationals as investors in foreign countries even in cases where they have set up subsidiaries under the laws of the host country, has shed further doubt on the validity of the classical rule enunciated by the *Barcelona Traction* judgment, according to which a State may not claim a legal interest in the situation of foreign companies, even where its nationals are in control.[135] The 2004 Model U.S. Bilateral Investment Treaty for instance defines as an "investor of a Party" protected under such a treaty "a Party or state enterprise thereof, or a national or an enterprise of a Party, that attempts to make, is making, or has made an investment in the territory of the other Party", the "investment" meaning in turn "every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk". Under these definitions, investments made by U.S. nationals in a State bound by a BIT concluded with the United States are protected under the treaty, even when (and, indeed, in particular when) their investment consists in a controlling participation in a corporation incorporated in the host country.

(5) Indeed, the practice of determining the nationality of the corporation on the basis of the nationality of its shareholders, particularly of the nationality of a controlling parent company, while not usual, is not unknown. For instance, while the practice of the United States has generally been to determine the nationality of the corporation on the basis of the company's place of incorporation,[136] it is occasionally defined by reference to the nationality of its owners, managers, or other persons deemed to be in control of its affairs. This is the case, in particular, in the area of taxation. But there seems to be no reason why this could not also justify the exercise of foreign direct liability regulation in other domains. The *Third Restatement on Foreign Relations Law* of the American Law Institute therefore does not exclude the regulation of foreign corporations, i.e., corporations organized under the laws of a foreign State, "on the basis that they are owned or controlled by nationals of the regulating state".[137]

(6) Another approach to regulating the conduct on transnational corporations, consists for a State in imposing on parent corporations domiciled in that State an obligation to comply with certain norms wherever they operate (i.e., even if they operate in other countries), or an obligation to impose compliance with such norms on the different entities they control (their subsidiaries, or even in certain cases their business partners). Under this approach, sometimes referred to as *parent-based extraterritorial regulation*, no question of extraterritoriality arises: the parent corporation is imposed certain obligations by the State of which it has the "nationality" (or where it is domiciled), and the impacts on situations located outside the national territory are merely indirect, insofar as such impacts would result from the parent company being imposed an obligation to control its subsidiaries, or to monitor the supply chain.

(7) Principle 25 (d) makes it clear that while a reasonable link must exist between the State and the situation which it seeks to regulate, it would be artificial to restrict the exercise of extraterritorial jurisdiction to prescribe certain forms of conduct to a limited range of instances, if it can be shown by the State in question that, by exercising such jurisdiction, it is not acting in violation of the Charter of the United Nations or other principles of international law, including in particular of the prohibition to intervene in the domestic affairs of the territorial State or to interfere with its sovereign rights, or the principle of equality of all States. Examples of instances where a State should take action to protect rights under Principle 25 point (d), and which may not be addressed by points (a) to (c) may include

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[134] Ibid., at 38-39.

[135] Doubts were raised at an early stage concerning the relevance of the *Barcelona Traction* case beyond the exercise of diplomatic protection: see S. D. Metzger, *Nationality of Corporate Investment Under Investment Guaranty Schemes – The Relevance of Barcelona Traction*, 65 American Journal of International Law 532, (1971), pp. 532-543.

[136] *Restatement (Third) of the Foreign Relations of the United States* (American Law Institute, 1987), at 213, n. 5.

[137] *Restatement (Third) of the Foreign Relations of the United States* (American Law Institute, 1987), § 414.

situations where a non-State actor accused of human rights abuse in another country has assets that can be seized in order to implement the judgment of a competent court, where there may be relevant evidence or witnesses, where relevant officials accused of criminal liability may be present or where the non-State actor may have carried out part of the operations that resulted in the abuse.

(8) The adoption by one State of a legislative instrument imposing human rights obligations on a private actor would only in exceptional cases violate the principles which have been enunciated. In the words of the International Court of Justice, the principle of non-intervention "forbids all States (...) to intervene directly or indirectly in internal or external affairs of other States. A prohibited intervention must accordingly be one bearing on matters in which each State is permitted, by the principle of State sovereignty, to decide freely. (...) Intervention is wrongful when it uses methods of coercion in regard to such choices, which mush remain free ones".[138] Nonetheless, it has long been acknowledged that internationally recognized human rights – such as those included in the Universal Declaration on Human Rights – impose limits to State sovereignty, and that such matters therefore cannot be said to belong to the exclusive national jurisdiction of the territorial State. Moreover, it is doubtful that one may speak here of "coercion", in the meaning attached to this term in international law. This is the case in particular where one State regulates the conduct on transnational corporations, including where that conduct may violate human rights outside that State's territory. In seeking to regulate the activities of foreign investors in the host States through the adoption of extra-territorial legislation, other States are not imposing on the territorial State that it comply with these norms itself, or that it impose compliance with these norms on the local corporations: without prejudice of its obligations under the international law of human rights, that State remains free to legislate upon activities on its national territory.[139]

(9) More generally, while the restrictions that international law imposes on extraterritorial jurisdiction remain debated, the interpretation of existing rules should take into account the specific nature of State regulations that seek to impose compliance with human rights or that seek to contribute to multilaterally agreed goals such as the Millennium Development Goals (MDGs). The *erga omnes* character of human rights[140] may justify allowing the exercise by States of extraterritorial jurisdiction, even in conditions which might otherwise not be permissible, where this seeks to promote such rights. Similarly, the realization of the MDGs is of interest to all States. Therefore, extraterritorial jurisdiction seeking to promote human rights or the achievement of the MDGs is not a case where one State seeks to impose its values on another State, as in other cases of extraterritorial jurisdiction. Principle 22, c), reflects the fact that, in such a case, a more flexible understanding of the limits on prescriptive extraterritorial jurisdiction may be justified.

(10) Principle 25 (e) reflects the fact that there is a category of crimes of international law which States must contribute to combating by exercising universal jurisdiction, i.e., by allowing their jurisdictions to prosecute such crimes wherever they occurred, and whatever the nationality of either the author or the victim.[141] Under the principle of universality, certain particularly heinous crimes may be prosecuted by any State, acting in the name of the international community, where the crime meets with universal reprobation. It is on this basis that, since times immemorial, piracy could be combated by all States: the pirate was seen as the *hostis humanis generis*, the enemy of the human race, which all States are considered to have a right to prosecute and punish. The international crimes for which treaties impose the principle *aut dedere, aut judicare*, or which are recognized as international crimes

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[138] International Court of Justice, *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)* (merits), judgment of 27 June 1986, para. 205.

[139] Solutions may have to be found in exceptional situations where obligations imposed by the home State on foreign investors enter into conflict with those which would be imposed by other States, including the home States of the investors concerned.

[140] See *Case concerning the Barcelona Traction, Light and Power Co. (Belgium v. Spain)* (second phase - merits), 5 February 1970, [1970] I.C.J. Rep. 3, para. 33-34, and above, para. 4 of the commentary to Principle 2.

[141] See, e.g., Menno T. Kamminga, *Lessons Learned from the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offenses*, 23 Human Rights Quarterly 940 (2001), pp. 941-942 ("Under the principle of universal jurisdiction a State is entitled or even required to bring proceedings in respect of certain serious crimes, irrespective of the location of the crime, and irrespective of the nationality of the perpetrator or the victim").

requiring that all States contribute to their prevention and repression by investigating and prosecuting such crimes where the author is found on their territory unless the suspected author is extradited, also belong to this list.[142] International crimes justifying the exercise of universal jurisdiction are war crimes,[143] crimes against humanity,[144] genocide,[145] torture,[146] and forced disappearances.[147] In prosecuting these crimes, States are not seen to act in their interest; they act as agents of the international community. The same applies to violations of *jus cogens* norms (peremptory norms of international law), since these are norms which serve the interests of the international community and in the compliane with which all States have a legal interest.

## 26. Position to influence

States that are in a position to influence the conduct of non-State actors even if they are not in a position to regulate such conduct, such as through their public procurement system or international diplomacy, should exercise such influence, in accordance with the Charter of the United Nations and general international law, in order to protect economic, social and cultural rights.

### Commentary

Principle 26 reflects the fact that there are many ways in which a State may seek to influence the conduct of private actors, other than by adopting regulations that impose certain forms of behaviour under the threat of sanctions (civil, criminal, or administrative). In other terms, the ability to influence conduct should not be limited to the ability to exercise extraterritorial (prescriptive) jurisdiction. It may include for instance various forms of reporting or social labelling, the use of indicators to monitor progress, the reliance on human rights-based conditions in public procurement schemes or export credit agencies, or fiscal incentives. The Guiding Principles on Business and Human Rights include a

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[142] See the joint separate opinion by Judges Higgins, Kooijmans, and Buergenthal, *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, ICJ Reports 2002, at para. 46 (citing Cherif Bassiouni, *International Criminal Law, Vol III: Enforcement,* 2nd edn, (1999), p. 228; T. Meron, *International Criminalization of Internal Atrocities*, 89 American Journal of International Law 576 (1995)).

[143] Article 49 of the Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949; article 50 of the Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 August 1949; article 129 of the Geneva Convention (III) relative to the Treatment of Prisoners of War, 12 August 1949; article 146 of the Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War, 12 August 1949; and article 85(1) of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977.

[144] The *jus cogens* character of the prohibition of crimes against humanity is generally considered to imply an obligation to contribute to their universal repression: see C. Bassiouni, *Crimes against Humanity: The need for a specialized Convention*, 31 Columbia Journal of Transnational Law 457 (1994), at pp. 480-481; K.C. Randall, *Universal Jurisdiction Under International Law,* 66 *Texas L. Rev.* 785 (1988), at pp. 829-830; and the Principles of international co-operation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity adopted by the UN General Assembly resolution 3074 (XXVIII) of 3 December 1973 (G.A. Res. 3074 (XXVIII), U.N. GAOR, 28th Sess., Supp. No. 30, at 78, UN Doc. A/9030 (1973)).

[145] See the Advisory Opinion delivered on 28 May 1951 by the International Court of Justice relating to the *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, *ICJ Rep.*, 1951, p. 23 (noting that "the principles underlying the Convention [on the Prevention and Punishment of the Crime of Genocide, approved and proposed for signature and ratification or accession by General Assembly resolution 260 A (III) of 9 December 1948, 78 UNTS 1021] are principles which are recognized by civilized nations as binding on States, even without any conventional obligation", and that "both (…) the condemnation of genocide and (…) the co-operation required 'in order to liberate mankind from such an odious scourge' (Preamble to the Convention) have a 'universal character'", i.e., are obligations imposed on all States of the international community). On the *erga omnes* character of the obligations imposed by the Convention, implying that "the obligation each State (...) has to prevent and to punish the crime of genocide is not territorially limited by the Convention", see the Judgment of 11 July 1996 delivered in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia-Hezegovina v. Yugoslavia)*, Preliminary objections, *ICJ Rep.,* 1996, pp. 615-616, para. 31.

[146] Article 5(2) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment UN Doc. A/39/51 (1984). (1465 UNTS 85).

[147] Article 9(2) of the International Convention for the Protection of All Persons from Enforced Disappearance, UN Doc. A/ RES/61/177, (2006); (Report to the General Assembly on the First Session of the Human Rights Council, at 32, UN Doc. A/HRC/1/L.10 (2006).

number of recommendations in this regard.[148]

### 27. Obligation to cooperate

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

**Commentary**

As made clear in the Guiding Principles on Business and Human Rights, "States should take appropriate steps to ensure the effectiveness of domestic judicial mechanisms when addressing business-related human rights abuses, including considering ways to reduce legal, practical and other relevant barriers that could lead to a denial of access to remedy." Such legal barriers can include "where claimants face a denial of justice in a host State and cannot access home State courts regardless of the merits of the claim".[149] The implication is that, in transnational situations, States should cooperate in order to ensure that any victim of the activities of non-State actors that result in a violation of economic, social or cultural rights, has access to an effective remedy, preferably of a judicial nature, in order to seek redress. This requirement is related to the provision of effective remedies to victims of violations of economic, social and cultural rights that is discussed further in Section VI.

## V. Obligations to fulfil

### 28. General obligation

All States must take action, separately, and jointly through international cooperation, to fulfil economic, social and cultural rights of persons within their territories and extraterritorially, as set out in Principles 29 to 35.

**Commentary**

(1) Principle 28 recognizes the positive obligation that States have to fulfil economic, social and cultural rights beyond their respective territories. The formulation is closely aligned with that of article 56 of the Charter of the United Nations, referred to above.[150] The duty to cooperate internationally in the realization of human rights is further reinforced by the obligations of international assistance and cooperation explicitly for the purpose of realizing economic, social and cultural rights provided for in the International Covenant on Economic, Social and Cultural Rights, as well as under other instruments that relate to such rights.[151]

(2) The Committee on Economic, Social and Cultural Rights has emphasized 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 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

[148] Guiding Principles on Business and Human Rights, included in the Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John G. Ruggie, UN Doc. A/HRC/17/31 (21 March 2011) (Principles 2 and 3 to 10 (operationalizing the duty of States to protect human rights)), endorsed by Human Rights Council res. 17/4).
[149] Ibid., Principle 26.
[150] See para. 3 of the commentary to Principle 3, and para. 3 of the commentary to Principle 19.
[151] See the references in paras. 6 and 8 of the commentary to Principle 3.

economic, social and cultural rights will remain an unfulfilled aspiration in many countries."[152] Similarly, the Committee on the Rights of the Child has stated: "When States ratify the Convention, they take upon themselves obligations not only to implement it within their jurisdiction, but also to contribute, through international cooperation, to global implementation."[153] The Vienna Declaration and Programme of Action adopted at the Vienna World Conference on Human Rights of 14-25 June 1993 is also premised on the idea that States are duty-bound to fulfil human rights and to contribute to their full realization, both within their national territory and on the territory of other States.[154] The failure of another State or States to act jointly through international cooperation in fulfilling economic, social and cultural rights extraterritorially does not relieve a State of its own international obligations, the breach of which may give rise to its international responsibility.

(3) While the duty to fulfil economic, social and cultural rights outside one State's national territory shall in principle take the form of inter-State cooperation, Principle 28 does not exclude that it may also take the form of other measures, directly supporting the enjoyment of economic, social and cultural rights of individuals found on another State's territory. Consistent with Principle 10, however, the scope of this duty is limited by the obligation to respect the sovereignty of the territorially competent State. In addition, as further expressed in Principle 31, the duty of all States to contribute to the fulfilment of economic, social and cultural rights in other States should not be interpreted as limiting the scope of the obligation of any State to discharge its obligations towards all individuals located on its territory.

## 29. Obligation to create an international enabling environment

States must take deliberate, concrete and targeted steps, separately, and jointly through international cooperation, to create an international enabling environment conducive to the universal fulfilment of economic, social and cultural rights, including in matters relating to bilateral and multilateral trade, investment, taxation, finance, environmental protection, and development cooperation.

The compliance with this obligation is to be achieved through, *inter alia*:
a) elaboration, interpretation, application and regular review of multilateral and bilateral agreements as well as international standards;
b) measures and policies by each State in respect of its foreign relations, including actions within international organizations, and its domestic measures and policies that can contribute to the fulfilment of economic, social and cultural rights extraterritorially.

**Commentary**

(1) Although the rights in the International Covenant on Economic, Social and Cultural Rights must be progressively realized, the steps towards the full realization of the relevant rights in the Covenant "should be deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognized in the Covenant". [155] The language in Principle 29 reflects this requirement in the context of obligations of international cooperation for the creation of an international enabling environment. That the steps are to be taken "separately and jointly" is drawn from the relevant provisions of the UN Charter, particularly article 56 thereof. Principle 29 also draws on the Universal Declaration of Human Rights, which provides at article 28 that: "Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized".[156]

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[152] Committee on Economic, Social and Cultural Rights, *General Comment No 3: The Nature of States Parties' Obligations (Art. 2(1))* (Fifth session, 1990), UN Doc. E/1991/23, annex III (1990), para. 14.

[153] Committee on the Rights of the Child, *General Comment No. 5: General Measures of Implementation for the Convention on the Rights of the Child* (Thirty-fourth session, 2003), UN Doc. CRC/GC/2003/5 at para. 5.

[154] Paragraph 24 of the Vienna Declaration and Programme of Action states: "Increased efforts should be made to assist countries which so request to create the conditions whereby each individual can enjoy universal human rights and fundamental freedoms" (UN Doc. A/CONF.157/23, 12 July 1993).

[155] Committee on Economic, Social and Cultural Rights, *General Comment No 3: The Nature of States Parties' Obligations (Art. 2(1)),* (Fifth session, 1990), para 2.

[156] Universal Declaration of Human Rights, UN Doc. A/810 (1948).

(2) The UN Charter itself, the human rights treaties adopted within the framework of the United Nations, the General Assembly resolutions on a New International Economic Order, the Declaration on the Right to Development, and the Millennium Declaration, recognize the necessity of an international environment instrumental to confronting poverty, underdevelopment and supporting the realization of economic, social and cultural rights globally. Freeing all people from extreme poverty and the entire human race from want, and making the right to development a reality for everyone were central to the resolve of UN member States in the Millennium Declaration of 2000 "to create an environment – at the national and global levels alike – which is conducive to development and to the elimination of poverty".[157] Such commitments have clear implications for the interpretation of the obligations of States under the human rights treaties they have ratified, as they embody a practice by these States that sheds light upon such interpretation. For instance, the obligation of international cooperation under the International Covenant on Economic, Social and Cultural Rights requires States parties to the Covenant, in order to contribute to the realization of the right to adequate food, to address the "structural causes" at the international level of food insecurity, malnutrition and undernutrition: the Committee on Economic, Social and Cultural Rights refers in this regard, *inter alia,* to aspects of the international trade regime, climate change, investment, and the practices of international development agencies.[158]

(3) Principle 29 distinguishes among various duties that apply to States acting separately and jointly through international cooperation, to create an international enabling environment conducive to the universal fulfilment of economic, social and cultural rights. While the appropriate management of the international regulatory spheres of trade, investment, taxation, finance, environmental and development cooperation is critical to the creation of international enabling environment in which economic, social and cultural rights can be realized for all, the list provided in the chapeau of Principle 29 is not exhaustive: for instance, the realization of economic, social and economic rights may have to be taken into account in intergovernmental arrangements concerning security or fisheries.

(4) The second sentence of Principle 29 relates to means of compliance with the obligation defined in the first sentence. Point (a) highlights the different stages at which an international enabling environment can be facilitated or undermined. As such, compliance with this obligation applies equally to the elaboration, interpretation, application, and regular review of agreements and international standards. The reference to "interpretation" takes into account that interpretative practices can influence greatly the degree to which the international environment is supportive of human rights.[159] Point (a) applies both to legally binding international instruments, as well as agreed "international standards", for example, the Codex Alimentarius under the Joint FAO/WHO Food Standards Programme. As stated above under Principle 17, the Committee on Economic, Social and Cultural Rights consistently states that international agreements concluded by States should give due attention to economic, social and cultural rights.

(5) Point (b) makes clear that giving effect to the obligation to cooperate in ensuring an international enabling environment applies equally to measures and policies undertaken in respect of a State's foreign relations, including as exercised through international organizations of which it is a member, and as regards its internal decisions with positive external effect. An example of the latter are unilateral measures taken by a State to grant preferential access to its markets to products from low-income countries, with the objective of facilitating the realization of economic, social and

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[157] United Nations Millennium Declaration, UN Doc. A/55/49 (2000),, art 12. Among other sources, see also Declaration on the Right to Development, GA res A/RES/41/128, 4 December 1986, annex 41 UN GAOR Supplement. (no 53) 186, UN Doc. A/RES/41/53 (1986), art 3(1): "States have the primary responsibility for the creation of national and international conditions favourable to the realization of the right to development."

[158] *Statement on the World Food Crisis* (40th session, 2008), UN Doc. E/C.12/2008/1, paras. 10,12-13.

[159] See also R. Howse, *Mainstreaming the Right to Development into International Trade Law and Policy at the World Trade Organization*, UN Doc. E/CN 4/Sub 2/2004/17; R. Howse and R. Teitel, 'Global Justice, Poverty, and the International Economic Order' in S. Besson and J. Tasioulas (eds), *The Philosophy of International Law* (Oxford University Press, 2010), p. 447.

cultural rights in those countries. Principle 29 complements Principle 15, which states the general obligation of States as members of international organizations.

### 30. Coordination and allocation of responsibilities

States should coordinate with each other, including in the allocation of responsibilities, in order to cooperate effectively in the universal fulfilment of economic, social and cultural rights. The lack of such coordination does not exonerate a State from giving effect to its separate extraterritorial obligations.

**Commentary**

(1) The Committee on Economic, Social and Cultural Rights has repeatedly affirmed that international assistance and cooperation for the realization of economic, social and cultural rights is "particularly incumbent on those States in a position to assist",[160] as well as "other actors in a position to assist".[161] Yet, international human rights law, at present, does not determine with precision a system of international coordination and allocation that would facilitate the discharging of obligations of a global character (in the meaning given to this expression under Principle 8(b)) among those States "in a position to assist". Principle 30 seeks to address this difficulty.

(2) International law recognizes a principle of common but differentiated responsibilities among States,[162] and there are several examples of negotiated systems of burden-sharing established to address challenges or duties of a global character.[163] Based on these precedents, Principle 30 affirms a procedural obligation that should be seen as complementary to the substantive obligation to cooperate internationally with a view to fulfilling economic, social and cultural rights: the relevant States are to devise a suitable international division of responsibilities necessary to give effect to the obligation to cooperate in fulfilling economic, social and cultural rights throughout the world. Principle 30 expresses the expectation that States act in good faith in order to establish a system of burden-sharing in this area. Indeed, it is in order to facilitate this that criteria and indicators to assist in the allocation of particular obligations of international assistance and cooperation (and perhaps in the attribution of international responsibility for failure to comply with international obligations to fulfil rights) are currently being developed.[164]

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[160] Committee on Economic, Social and Cultural Rights, *General Comment No. 3: The Nature of States Parties' Obligations* (Fifth session, 1993), UN Doc. E/1991/23, para. 14; Committee on Economic, Social and Cultural Rights, *General Comment No. 14: The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights)*, (Twenty-second session, 2000), UN Doc. E/C.12/2000/4, para. 45; Committee on Economic, Social and Cultural Rights, *Statement on Poverty,* para. 16; Committee on Economic, Social and Cultural Rights, *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 is the author (art. 15 (1) (c)),* (Thirty-fifth session, 2005),UN Doc. E/C.12/GC/17, para. 37.

[161] Committee on Economic, Social and Cultural Rights, *General Comment No. 14: The right to the highest attainable standard of health*, (Twenty-second session, 2000), UN Doc. E/C.12/2000/4, para. 45; Committee on Economic, Social and Cultural Rights, *Statement on Poverty,* para. 16.

[162] For example, United Nations Framework Convention on Climate Change (1992, in force on 21 March 1994) (1994 (1771 UNTS 107; 31 ILM 851 (1992)), article 3.

[163] See *IDA's Long-Term Financing Capacity* (International Development Association Resource Mobilization, February 2007); *The Global Fund to Fight Aids, Tuberculosis and Malaria, Third Replenishment* (2011-2013) (The (Global Fund, March 2010); the shared commitment to 0.7% Gross National Income in Official Development Assistance from industrialized countries, which is perhaps the oldest negotiated burden-sharing scheme; or the Kyoto Protocol for burden-sharing in the reduction of greenhouse gas emissions.

[164] See, S. Fukuda-Parr, 'Millennium Development Goal 8: Indicators for International Human Rights Obligations', 28 *Human Rights Quarterly* 4 (2006) p. 966; M. E. Salomon, Global *Responsibility for Human Rights: World Poverty and the Development of International Law* (Oxford University Press, 2007) p. 193; M .E. Salomon, 'Deprivation, Causation, and the Law of International Cooperation' in M. Langford, M. Scheinin, W. van Genugten and W. Vandenhole (eds), *Global Justice, State Duties: The Extra-Territorial Scope of Economic, Social and Cultural Rights in International Law* (Cambridge University Press, 2012); A. Khalfan, 'Division of Responsibility between States' in M. Langford, M. Scheinin, W. van Genugten and W. Vandenhole (eds), *Global Justice, State Duties: The Extra-Territorial Scope of Economic, Social and Cultural Rights in International Law*, cited above.

(3) As the latter part of Principle 30 provides, the lack of a clear system of coordination for the allocation of responsibilities does not relieve a State of its obligations to act separately in order to comply with its positive obligations in fulfilling economic, social and cultural rights extraterritorially. The international responsibility of each State is determined individually, on the basis of its own conduct and by reference to its own international obligations.

## 31. Capacity and resources

A State has the obligation to fulfil economic, social and cultural rights in its territory to the maximum of its ability. Each State must separately and, where necessary, jointly contribute to the fulfilment of economic, social and cultural rights extraterritorially, commensurate with, *inter alia*, its economic, technical and technological capacities, available resources, and influence in international decision-making processes. States must cooperate to mobilize the maximum of available resources for the universal fulfilment of economic, social and cultural rights.

**Commentary**

(1) The first sentence of Principle 31 states clearly that a State possessing capacity and resources to contribute to the fulfilment of economic, social and cultural rights extraterritorially is not relieved of its obligation to fulfil those rights at home to the maximum of its ability. The wording is consistent with the interpretation given to the phrase "to the maximum of its available resources" in article 2(1) of the International Covenant on Economic, Social and Cultural Rights.[165]

(2) The second and third sentences of Principle 31 embody the "adequate and reasonable" test set out by the Committee on Economic, Social and Cultural Rights in order to determine whether a State party acting at the domestic level has failed to take steps to the maximum of its available resources in meeting its obligations under the Covenant.[166] A similar test should be applied in determining whether a State Party has taken steps to fulfil its extraterritorial obligation.

(3) The territorial and extraterritorial obligations are separate. Irrespective of whether economic, social and cultural rights have been fully realized for persons located on its own territory, a State could still be said to have positive obligations to fulfil the human rights of people outside its borders on the basis of an objective determination as to what constitutes the "adequate and reasonable" use of its available resources towards the realization of rights.[167]

(4) Principle 31 provides that "Each State must separately and, *where necessary*, jointly contribute to the fulfilment of economic, social and cultural rights extraterritorially …" It thus recognizes that meeting some aspects of the obligation to cooperate internationally in fulfilling economic, social and cultural rights globally cannot be achieved by any one State on its own. By way of example, in 1970, it was agreed that "Each economically advanced country will progressively increase its official development assistance to the developing countries and will exert its best efforts to reach a minimum net amount of 0.7 percent of its gross national product at market prices by the middle of the

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[165] Committee on Economic, Social and Cultural Rights, *General Comment No. 14: The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights)*, (Twenty-second session, 2000), UN Doc. E/C.12/2000/4,, para. 40.

[166] Committee on Economic, Social and Cultural Rights, *Statement on an Evaluation of the Obligations to Take Steps to the 'Maximum Available Resources' under an Optional Protocol to the Covenant* (Thirty-eighth session, 2007), UN Doc. E/C12/2007/1, para. 8.

[167] For detailed consideration of options as to how it can be determined that a state has met its domestic obligations so as to give rise to extraterritorial obligations, see M .E. Salomon, *Deprivation, Causation, and the Law of International Cooperation*, in M. Langford, M. Scheinin, W. van Genugten and W. Vandenhole (eds), *Global Justice, State Duties: The Extra-Territorial Scope of Economic, Social and Cultural Rights in International Law* (Cambridge University Press, 2012); G. Ooms and R. Hammonds, *Taking up Daniels' Challenge: The Case for Global Health Justice*, 12(1) Health and Human Rights 29 (2010), at 36; and A. Khalfan, 'Division of Responsibility between States' in M. Langford, M. Scheinin, W. van Genugten and W. Vandenhole (eds), *Global Justice, State Duties: The Extra-Territorial Scope of Economic, Social and Cultural Rights in International Law*, cited above.

decade."[168] This joint commitment has been re-affirmed in subsequent international declarations.[169] The Committee on Economic, Social and Cultural Rights has affirmed this benchmark as a necessary component of giving effect to the obligation of international assistance. As regards State responsibility, in circumstances where more than one State is responsible for the same wrongful act, each State is separately responsible for its own conduct, and its responsibility is not diminished by the fact that it is not the only responsible State.[170] Thus on the matter of a truly joint obligation to cooperate internationally, whereby one or several States are unable on their own to provide what is required to comply with the obligation, the existence of collective legal obligations is recognized, while relying on an individualised regime of legal responsibility in the event of a breach of those obligations.[171]

(5) It follows from article 2(1) of the International Covenant on Economic, Social and Cultural Rights that the States which have particular duties are those with economic and technical capacity. It can be further deduced from article 23 of the Covenant that each State is required to promote the fulfillment of economic, social and cultural rights to the full extent of its influence when it comes to the "conclusion of conventions and the adoption of recommendations" that would propel "international action for the achievement of the rights" recognized in the Covenant, as well as those able to furnish technical assistance, i.e. those that have a capacity. Only one general basis for assigning obligations of international assistance and cooperation has so far been adopted by the Committee: that international cooperation for development and thus for the realization of economic, social and cultural rights, while an obligation of all States, "is particularly incumbent upon those States which are in a position to assist".[172] As such, capacity is explicitly included herein as an important determinant in recognizing the requirement to contribute to the fulfillment of economic, social and cultural rights extraterritorially.

(6) Principle 31 indicates by the use of the term "inter alia" that capacity and resources do not exhaust the bases for assigning obligations of international assistance and cooperation. It leaves open the possibility of assigning obligations on the grounds of other bases, for example, historical responsibility and/or causation, which take a compensatory approach based on some determination of liability for contributing to a problem that undermines the fulfillment of economic, social and cultural rights extraterritorially.[173]

(7) Moreover, the list of such capacities and resources provided in Principle 31 is non-exhaustive. The list begins with references to capacities explicitly provided for in article 2(1) of the International Covenant on Economic, Social and Cultural Rights ("economic and technical"). "Economic"

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[168] General Assembly, International Development Strategy for the Second United Nations Development Decade, GA Res. 2626, UN GAOR (Twenty-fifth session, 1970), UN Doc. A/RES/25/2626 (XXV), at 43 (1970).

[169] In particular, in the 'Monterrey Consensus on Financing for Development' (22 March 2002), UN Doc. A/AC.257/32, at 42 (2002) and the 'Doha Declaration on Financing for Development: Outcome Document of the Follow-up International Conference on Financing for Development to Review Implementation of the Monterrey Consensus', annexed to GA Res. 63/239, UN Doc. A/RES/63/239, at 43 (2009).

[170] Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries adopted by the International Law Commission, Report of the International Law Commission on the Work of its 53rd session (23 April to 1 June and 2 July to 10 August 2001), UN Doc. A/56/10, article 47(1).

[171] M. E. Salomon, 'Deprivation, Causation, and the Law of International Cooperation', in M. Langford, M. Scheinin, W. van Genugten and W. Vandenhole (eds), *Global Justice, State Duties: The Extra-Territorial Scope of Economic, Social and Cultural Rights in International Law*, cited above.

[172] Committee on Economic, Social and Cultural Rights, *General Comment No. 3: The Nature of States Parties' Obligations* (Fifth session, 1993), UN Doc. E/1991/23, para. 14; Committee on Economic, Social and Cultural Rights, *General Comment No. 15, The right to water (arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights),* (Twehnty-ninth session, 2002), UN Doc. E/C.12/2002/11, para. 34; Committee on Economic, Social and Cultural Rights, *General Comment No. 19: The right to social security (art. 9)*, (Thirty-ninth session, 2007), UN Doc. E/C.12/GC/19, para. 55.

[173] Capacity offers both a specific and a general requirement: specific in that it is one of the bases that points to the requisite duty-bearers, e.g. 'those in a position to assist', and general in that it is a prerequisite to discharging any obligation. Thus, even if it were argued for example that historical responsibility should form a basis for assigning international obligations, but capacity would still be a necessary element in order to see that obligation fulfilled even when the basis is determined on some other ground.

capacities here should be understood to include "financial" capacities but also the capacity to attract investments, etc. The term "technical" capacity usually applies to human resources and know-how and is distinguished here from "technological capacities"; the latter may include, for example, control over technologies and intellectual property ownership, thereby imposing particular obligations in that regard to contribute to the fulfilment of economic, social and cultural rights extraterritorially. The reference to "available resources" was included to highlight that countries that are rich in a range of resources (including human and natural resources), even if not high-income, may have particular obligations to contribute to fulfilling economic, social and cultural rights extraterritorially on the basis of other particular capacities. "Influence in international decision-making processes" is also identified as a "capacity", and as such States should apply that asset in a manner that contributes to the fulfilment of human rights extra-territorially. The language in Principle 31 indicates that such capacity can take many forms, and was drafted so as to explicitly take into account varied forms of capacity and influence, thereby signaling that there are a wide range of possible States with potential obligations, and that "those States in position to assist" are not limited to industrialized countries.

(8) The last sentence of Principle 31 highlights a significant procedural component of a State's obligation to cooperate: the requirement to cooperate in the mobilization of the maximum available resources for the universal fulfilment of economic, social and cultural rights. A State is not relieved of its obligation simply because it lacks resources: instead, it could be held internationally responsible also for a failure to have sought to mobilize the necessary resources globally.

## 32. Principles and priorities in cooperation

In fulfilling economic, social and cultural rights extraterritorially, States must:
a) prioritize the realization of the rights of disadvantaged, marginalized and vulnerable groups;
b) prioritize core obligations to realize minimum essential levels of economic, social and cultural rights, and move as expeditiously and effectively as possible towards the full realization of economic, social and cultural rights;
c) observe international human rights standards, including the right to self-determination and the right to participate in decision-making, as well as the principles of non-discrimination and equality, including gender equality, transparency, and accountability; and
d) avoid any retrogressive measures or else discharge their burden to demonstrate that such measures are duly justified by reference to the full range of human rights obligations, and are only taken after a comprehensive examination of alternatives.

**Commentary**

(1) Principle 32 draws on the views of the Committee on Economic, Social and Cultural Rights, which has noted that the principles and priorities should guide States in discharging their obligations under the Covenant: the obligation to prioritize the realization of the rights of disadvantaged, marginalized and vulnerable groups;[174] the core obligation to prioritize the "minimum essential levels" of economic, social and cultural rights;[175] the requirement to move as "expeditiously and effectively" as possible towards the full realization of economic, social and cultural rights;[176] and the requirement to avoid retrogressive measures.[177] These principles and priorities apply equally to the measures required to create an international enabling environment (Principle 29) and to seek international assistance (Principles 33 and 34).

(2) The Committee on Economic, Social and Cultural Rights has noted that States must pay special attention to groups who traditionally face difficulties in exercising economic, social and cultural rights. The groups referred to by the Committee on Economic, Social and Cultural Rights include

[174] Committee on Economic, Social and Cultural Rights, *General Comment No. 3: The Nature of States Parties' Obligations* (Fifth session, 1993), UN Doc. E/1991/23, para. 12.
[175] Ibid. para. 10.
[176] Ibid. para. 9.
[177] Ibid., para. 9.

disadvantaged and marginalized groups, such as women and refugees, as well as vulnerable groups, such as children.[178] The Committee has stated that "even in times of severe resource constraints, the most disadvantaged and marginalized individuals and groups can and indeed must be protected by the adoption of relatively low-cost targeted programmes."[179] The relevance of this obligation to international cooperation is illustrated in General Comment No. 14 which stipulates that: "Priority in the provision of international medical aid, distribution and management of resources, such as safe and potable water, food and medical supplies, and financial aid should be given to the most vulnerable or marginalized groups of the population."[180]

(3) The Committee on Economic, Social and Cultural Rights has elaborated on the obligation to prioritize the core obligations aimed at ensuring the minimum essential levels of rights also in the context of international cooperation, stating that: "[C]ore human rights obligations create national obligations for all States, and international responsibilities for developed States, as well as others that are in a 'position to assist'"[181] and "When grouped together, the core obligations establish an international minimum threshold that all developmental policies should be designed to respect .. it is particularly incumbent on all those who can assist, to help developing countries respect this international minimum threshold. If a national or international anti-poverty strategy does not reflect this minimum threshold, it is inconsistent with the legally binding obligations of the State party". [182]

(4) The reference in (c) to the right to self-determination signals that international cooperation does not imply, nor does it sanction, an interventionist agenda by foreign states that would undermine a people's right of self-determination by virtue of which that people must be able to determine freely its political status and freely pursue its economic, social and cultural development, as well as exercise sovereignty over its natural wealth and resources.[183] Point (c) also affirms the requirement for States to abide by central human rights principles when cooperating to fulfil economic, social and cultural rights. The Committee on Economic, Social and Cultural Rights has stated that the right of individuals and groups to participate in decision-making processes must be an integral component of any policy, programme or strategy developed to discharge governmental obligations.[184] To act consistently with this right, States acting extraterritorially must refrain from imposing conditions linked to its cooperation that would preclude individuals and groups from being able to have an opportunity to influence decision-making affecting their rights. General Comments Nos. 15 and 19 adopted by the Committee indicate that "International assistance should be provided in a manner that is consistent with the Covenant and other human rights standards, and sustainable and culturally appropriate."[185] Such obligations can be presumed to apply to the broader obligation of international cooperation. As also implied by Principle 2 above, any form of international cooperation would need also to be consistent with the fundamental principles of international human rights law that require non-discrimination and equality, including gender equality, transparency, and accountability.

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[178] See for example, *General Comment No. 19,* para. 31; Committee on Economic, Social and Cultural Rights, *General Comment No. 15, The right to water (arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights),* (Twenty-ninth session, 2002), UN Doc. E/C.12/2002/11, para. 16.

[179] Committee on Economic, Social and Cultural Rights, *General Comment No. 21: Right of everyone to take part in cultural life*, (Forty-third session, 2009), UN Doc. E/C.12/GC/21, para. 23.

[180] Committee on Economic, Social and Cultural Rights, *General Comment No. 14: The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights)*, (Twenty-second session, 2000), UN Doc. E/C.12/2000/4, para. 40.

[181] Committee on Economic, Social and Cultural Rights, *Poverty and the International Covenant on Economic, Social and Cultural Rights* (2001) UN Doc. E/C.12/2001/10 para. 16.

[182] Committee on Economic, Social and Cultural Rights, *Poverty and the International Covenant on Economic, Social and Cultural Rights* (2001) UN Doc. E/C.12/2001/10 para. 17.

[183] ICESCR and ICCPR common article 1.

[184] See for example, Committee on Economic, Social and Cultural Rights, *General Comment No. 14: The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights)*, (Twenty-second session, 2000), UN Doc. E/C.12/2000/4 para. 54.

[185] Committee on Economic, Social and Cultural Rights, *General Comment No. 15, The right to water (arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights),* (Twenty-ninth session, 2002), UN Doc. E/C.12/2002/11, para. 34; Committee on Economic, Social and Cultural Rights, *General Comment No. 19: The right to social security (art. 9)*, (Thirty-ninth session, 2007), UN Doc. E/C.12/GC/19, para. 55.

(5) As recalled in point (d), the principle that retrogressive measures on the part of the State must be fully justified applies equally in the context of international assistance and cooperation. The Committee on Economic, Social and Cultural Rights takes the view that "there is a strong presumption that retrogressive measures" taken in relation to the rights of the Covenant are prohibited; the burden of proof rests with the State where there is a retrogression of rights.[186] In its General Comment No. 3, the Committee on Economic, Social and Cultural Rights refers to the obligation to move as expeditiously and effectively as possible towards the full realization of economic, social and cultural rights and, as elsewhere further stipulates that "any deliberately retrogressive measures in that regard would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources."[187] In principle, any deliberately retrogressive steps should have to be assessed against whether the State party: had reasonable justification for the action; undertook a comprehensive examination of alternatives; ensured genuine participation of affected groups in examining the proposed measures; determined if the measures were directly or indirectly discriminatory; determined if the measures would have a sustained impact on the right to social security, an unreasonable impact on the right to social security or deprive an individual or group of the minimum essential level of the right, and; whether there was independent review of the measures at the national level.[188] Such criteria are likely to apply, *mutatis mutandis,* to the assessment of potentially retrogressive steps in regard to other economic, social and cultural rights.

### 33. Obligation to provide international assistance

As part of the broader obligation of international cooperation, States, acting separately and jointly, that are in a position to do so, must provide international assistance to contribute to the fulfilment of economic, social and cultural rights in other States, in a manner consistent with Principle 32.

**Commentary**

As noted above in paragraph 7 of the commentary to Principle 8, international assistance is to be understood as a component of international cooperation. The undertaking in article 2 (1) of the International Covenant on Economic, Social and Cultural Rights requires States "to take steps, individually and through international assistance and co-operation, especially economic and technical". While this provision refers in particular to economic and technical assistance and cooperation, it does not limit the undertaking to such measures. International assistance may, and depending on the circumstances must, comprise other measures, including provision of information to people in other countries, or cooperation with their State, for example to trace stolen public funds or to cooperate in the adoption of measures to prevent human trafficking.

### 34. Obligation to seek international assistance and cooperation

A State has the obligation to seek international assistance and cooperation on mutually agreed terms when that State is unable, despite its best efforts, to guarantee economic, social and cultural rights within its territory. That State has an obligation to ensure that assistance provided is used towards the realization of economic, social and cultural rights.

**Commentary**

(1) The Committee on Economic, Social and Cultural Rights has repeatedly called on States to seek assistance where needed to realize economic, social and cultural rights.[189] While the requesting State

[186] Ibid,para. 42.
[187] Ibid, para. 42.
[188] Ibid, para. 42.
[189] See, for example, Committee on Economic, Social and Cultural Rights, *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Democratic Republic of the Congo* (2009) UN Doc. E/C.12/COD/CO/4 at paras. 16-17.

retains the prerogative to decline international assistance and cooperation towards those ends, where economic, social and cultural rights are not being met due to lack of capacity or resources, there is a strong presumption that it will accept suitable support and the burden of justifying the rejection of assistance would rest with the receiving State. In its interpretation of article 2(1) of the International Covenant on Economic, Social and Cultural Rights, the Committee on Economic, Social and Cultural Rights considers 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, which refer to international cooperation."[190]

(2) While these Principles are directed to States, they do not preclude that States may engage in cooperation, including providing assistance, with parties other than State(s), for example, groups, civil society organizations and international organizations.

### 35. Response to a request for international assistance or cooperation

States that receive a request to assist or cooperate and are in a position to do so must consider the request in good faith, and respond in a manner consistent with their obligations to fulfil economic, social and cultural rights extraterritorially. In responding to the request, States must be guided by Principles 31 and 32.

**Commentary**

(1) Good faith is a general principle of international law, that is implied by article 2(2) of the UN Charter, supported by General Assembly Resolution 2625 (XXV) on the Principles Governing Friendly Relations and Cooperation among States. In the context of treaty interpretation, the principle is mentioned in the Preamble (para. 3) and in articles 26 and 31(1) of the Vienna Convention on the Law of Treaties.[191] A good faith consideration of a request for international assistance and cooperation can be understood as a procedural requirement for a State to comply with its obligations of international assistance and cooperation in the fulfillment of economic, social and cultural rights. Such a requirement is a corollary of the obligation under the relevant multilateral human rights treaties for States to seek international assistance and cooperation when they are unable to give effect to their human rights obligations.

(2) In considering requests for assistance and cooperation, States must take into account their available resources and capacities as addressed in Principle 31. They must ensure that the provision of assistance and cooperation is consistent with international human rights standards, as set out in Principle 32. As the Committee on Economic, Social and Cultural Rights has noted, "… development cooperation activities do not automatically contribute to the promotion of respect for economic, social and cultural rights. Many activities undertaken in the name of 'development' have subsequently been recognized as ill-conceived and even counter-productive in human rights terms. In order to reduce the incidence of such problems, the whole range of issues dealt with in the Covenant should, wherever possible and appropriate, be given specific and careful consideration."[192] Measures that seek to provide assistance or by which a State seeks to discharge its duty to cooperate for the full realization of economic, social and cultural rights, are to be assessed for their compliance with human rights. Principle 7 on informed participation, and Principle 13 on the duty of States to avoid causing harm, are particularly relevant in this regard.

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[190] Committee on Economic, Social and Cultural Rights, *General Comment No. 3: The Nature of States Parties' Obligations* (Fifth session, 1993), UN Doc. E/1991/23, para. 13.

[191] Vienna Convention on the Law of Treaties, 23 May 1969, entered into force 27 January 1980, 1155 UNTS 331.

[192] Committee on Economic, Social and Cultural Rights, *General Comment No. 2: International technical assistance measures (Art. 22),* (Fourth session, 1990), UN Doc. E/1990/23, para. 7.

## VI. Accountability and Remedies

### 36. Accountability

States must ensure the availability of effective mechanisms to provide for accountability in the discharge of their extraterritorial obligations. In order to ensure the effectiveness of such mechanisms, States must establish systems and procedures for the full and thorough monitoring of compliance with their human rights obligations, including through national human rights institutions acting in conformity with the United Nations Principles relating to the Status of National Institutions (Paris Principles).

**Commentary**

(1) Accountability is even more important, not less, as regards the implementation of the dimensions of economic, social and cultural rights that are subject to progressive realization, because of the risk that, in the absence of adequate monitoring of progress, States shall indefinitely postpone the adoption of such measures. This is particularly true for the aspects of such implementation that are extraterritorial, because those affected by the actions or omissions of the State, who are located outside the national territory, shall generally have no or only limited opportunities to hold the authors of such measures accountable through the usual democratic political process.

(2) The Committee on Economic, Social and Cultural Rights has therefore emphasized that States parties to the International Covenant on Economic, Social and Cultural Rights shall develop and maintain mechanisms to monitor progress towards the realization of the rights listed in the Covenant, to identify the factors and difficulties affecting the degree of implementation of their obligations, and to facilitate the adoption of corrective legislation and administrative measures, including measures to implement their obligations under articles 2.1 and 23 of the Covenant.[193]

### 37. General obligation to provide effective remedy

States must ensure the enjoyment of the right to a prompt, accessible and effective remedy before an independent authority, including, where necessary, recourse to a judicial authority, for violations of economic, social and cultural rights. Where the harm resulting from an alleged violation has occurred on the territory of a State other than a State in which the harmful conduct took place, any State concerned must provide remedies to the victim.

To give effect to this obligation, States should:

a) seek cooperation and assistance from other concerned States where necessary to ensure a remedy;
b) ensure remedies are available for groups as well as individuals;
c) ensure the participation of victims in the determination of appropriate remedies;
d) ensure access to remedies, both judicial and non-judicial, at the national and international levels; and
e) accept the right of individual complaints and develop judicial remedies at the international level.

**Commentary**

(1) The principle that every right must be accompanied by the availability of an effective remedy is a general principle of law that exists across all legal systems, and it is enshrined in article 8 of the Universal Declaration on Human Rights. Any person or group who is a victim of a violation of any of the rights listed in the Universal Declaration on Human Rights should have access to effective judicial or other appropriate remedies at both national and international levels. All victims of such violations

[193] Committee on Economic, Social and Cultural Rights, *General Comment No. 12 (1999): The Right to Adequate Food (Art. 11)*, (Twentieth session, 1999), UN Doc. E/C.12/1999/5, para. 31.

are entitled to adequate reparation, which may take the form of restitution, compensation, satisfaction or guarantees of non-repetition.

(2) In adopting the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, the United Nations General Assembly affirmed in resolution 60/147 that "the obligation to respect … and implement international human rights law… includes…the duty to provide those who claim to be victims of a…violation with equal and effective access to justice…and…to provide effective remedies to victims…"[194] Paragraph 12 of the UN Basic Principles provides:[195]

> "A victim of a gross violation of international human rights law or of a serious violation of international humanitarian law shall have equal access to an effective judicial remedy as provided for under international law. Other remedies available to the victim include access to administrative and other bodies, as well as mechanisms, modalities and proceedings conducted in accordance with domestic law."

Under Parts I and II of the UN Basic Principles, this obligation pertains to all violations, not only gross violations.

(3) The right to an effective remedy is enshrined in numerous international legal instruments, including most international human rights treaties and a number of declaratory instruments. In addition to the Universal Declaration on Human Rights, these include: the International Covenant on Civil and Political Rights (article 2(3)); the Convention against Torture and other Forms of Cruel, Inhuman or Degrading Treatment or Punishment (articles 13 and 14); the International Convention on the Elimination of All Forms of Racial Discrimination (article 6); the Convention on the Rights of the Child (article 39); the American Convention on Human Rights (articles 25 and 63 (1)); the African Charter on Human and Peoples' Rights (article 7(1)(a)); the Arab Charter on Human Rights (articles 12 and 23); the European Convention on Human Rights (articles 5 (5), 13 and 41); the Charter of Fundamental Rights of the EU (article 47); and the Vienna Declaration and Program of Action (article 27). Although the International Covenant on Economic, Social and Cultural Rights makes no express provision regarding remedy, the Committee on Economic, Social and Cultural Rights has affirmed on numerous occasions that an obligation to provide remedies is inherent in the Covenant. For example, in General Comment 9, the Committee stated that there is an "obligation upon each State party to use all the means at its disposal to give effect to the rights recognized in the Covenant. In this respect, the fundamental requirements of international human rights law must be borne in mind. Thus the Covenant norms must be recognized in appropriate ways within the domestic legal order, appropriate means of redress, or remedies, must be available to any aggrieved individual or group, and appropriate means of ensuring governmental accountability must be put in place."[196] With the elaboration and adoption of the Optional Protocol to the Covenant, States have implicitly affirmed that they expect each State party to provide effective domestic remedies, as exhaustion of such remedies is an admissibility requirement for accessing the communication procedure.

(4) While effective remedies for human rights violations may in the first instance consist in administrative remedies, there should generally always be recourse to judicial remedies. Thus, the Committee on Economic, Social and Cultural Rights has indicated that the right to an effective remedy may be of a judicial or administrative nature and that "whenever a Covenant right cannot be made

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[194] Adopted by General Assembly resolution 60/147 of 2005.
[195] Ibid., para. 12.
[196] Committee on Economic, Social and Cultural Rights, *General Comment No 9: The domestic application of the Covenant*, (Nineteenth Session, 1998), UN Doc. E/C.12/1998/24, para 2. See also, e.g., Committee on Economic, Social and Cultural Rights, *General Comment No. 12: The Right to Adequate Food (Art. 11)*, (Twentieth session, 1999), UN Doc. E/C.12/1999/5, para. 32. See also Guideline 22 of the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights.

fully effective without some role of the judiciary, judicial remedies are necessary".[197] The Human Rights Committee has stressed the importance of both judicial and administrative mechanisms in providing remedies under the International Covenant on Civil and Political Rights, emphasizing the need for judicial remedies in cases of serious violations of the International Covenant on Civil and Political Rights.[198] The Committee on the Elimination of Discrimination against Women takes the view that effective protection includes: effective legal measures, including penal sanctions, civil remedies and compensatory remedies, preventive measures and protective measures.[199] In regional contexts, the right to a "judicial" remedy is enshrined in article XVIII of the American Declaration of the Rights and Duties of Man and article 25 of the American Convention on Human Rights. The jurisprudence of the Inter-American Court has held that victims must have a right to judicial remedies in accordance with the rules of due process of law.[200] The African Commission on Human and Peoples' Rights, in its Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, has asserted that "everyone has the right to an effective remedy by the constitution, by law or by the Charter",[201] meaning that an effective remedy can only be truly effective if there is a judicial remedy. The European Court of Human Rights has indicated that while the right to an effective remedy under article 13 of the European Convention on Human Rights does not require a judicial remedy in all instances, whichever remedy is provided must offer adequate guarantees, and while the scope of the Contracting States' obligations vary depending on the nature of the applicant's complaint, the remedy required by article 13 must be "effective" in practice as well as in law.[202]

(5) The Committee on Economic, Social and Cultural Rights made it clear that remedies should be available at both national and international levels.[203] A number of procedures are accessible to victims of violations of human rights at the international level. Individual communications may be filed to allege violations under most universal human rights treaties, including the International Covenant of Economic, Social and Cultural Rights. Specialized human rights courts have been established in the European, African, and Americas regions. States must respect the right of the individuals or groups aggrieved to exercise their right to access to such grievance mechanisms established at the international level.[204]

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[197] Committee on Economic, Social and Cultural Rights*, General Comment No 9: on the domestic application of the Covenant*, (Nineteenth Session, 1998), UN Doc. E/C.12/1998/24, para 9.

[198] See Human Rights Committee, *Bithashwiwa and Mulumba v Zaire*, Communication 241/1987, UN Doc. CCPR/C/37/D/241/1987 (1989), para 14, where the Committee considered that the State had to provide the applicants with an effective remedy under article 2(3) of the Covenant on Civil and Political Rights, and "in particular to ensure that they can effectively challenge these violations before a court of law".

[199] Committee on the Elimination of Discrimination against Women, General Recommendation No 19 (11th session, 1992) *Violence against Women*, UN Doc. A/47/38 (1992), para 24(t).

[200] See *Velasquez Rodriguez v Honduras*, Inter-American Court of Human Rights judgment of 26 June 1987, Series C No 1, para. 91.

[201] African Commission on Human and Peoples' Rights, *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, Principle C(a).

[202] *Conka v. Belgium* (Appl. No. 51564/99), judgment of 5 February 2002, para. 75.

[203] For example, Committee on Economic, Social and Cultural Rights, *General Comment No. 14: The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights)*, (Twenty-second session, 2000), UN Doc. E/C.12/2000/4, para. 59; *General Comment No. 18: The Right to Work*, (Thirty-fifth session, 2006), UN Doc. E/C.12/GC/18, para. 48. See also Guideline 22 of the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights.

[204] See, under the Inter-American human rights system, article 25 of the American Convention on Human Rights and article XVIII of the American Declaration of the Rights and Duties of Man, as well as article 8 of the Inter-American Democratic Charter; under the European Convention on Human Rights, article 34; as well as the UN Principles and Guidelines on Reparation, cited above, in article 14. See also the Latimer House Guidelines for the Commonwealth, Guideline 6; article 5.3 of the European Charter of the Judge; Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Guideline K: Access to Judicial Services. See also the requirements that the European Court of Human Rights has based on article 34 of the European Convention on Human Rights: *Petra v. Romania* (Appl. No. 27273/95, judgment of 23 September 1998, *Reports* 1998-VII, pp. 2854-55, § 43; *Kurt v. Turkey* (Appl. No. 24276/94, judgment of 25 May 1998, *Reports* 1998-III, p. 1192, § 159; *Aksoy v. Turkey* (Appl. No. 21987/93), judgment of 18 December 1996, *Reports* 1996-VI, p. 2288, § 105; and *Akdivar and Others v. Turkey* (Appl. No. 21893/93), judgment of 16 September 1996, *Reports* 1996-IV, p. 1219, § 105.

(6) The reference to international cooperation in the second paragraph, (a), of Principle 37, seeks to take into account the fact that where a violation is committed in State B as a result of a measure adopted on the territory of State A, specific obstacles arise for victimes seeking a remedy, imposing correlative duties on the States concerned to cooperate with a view to removing such obstacles. This is the case, for instance, where the branch or subsidiary of one transnational corporation operates in State B, where the parent company is domiciled in State A. It has been noted with reference to such a situation that "The violations committed by the transnational corporations in their mainly transboundary activities do not come within the competence of a single State and, to prevent contradictions and inadequacies in the remedies and sanctions decided upon by States individually or as a group, these violations should form the subject of special attention. The States and the international community should combine their efforts so as to contain such activities by the establishment of legal standards capable of achieving that objective". [205] Further guidance on the duty to cooperate in this context is provided by Principle 27 and its accompanying Commentary.

## 38. Effective remedies and reparation

Remedies, to be effective, must be capable of leading to a prompt, thorough and impartial investigation; cessation of the violation if it is ongoing; and adequate reparation, including, as necessary, restitution, compensation, satisfaction, rehabilitation and guarantees of non-repetition. To avoid irreparable harm, interim measures must be available and States must respect the indication of interim measures by a competent judicial or quasi-judicial body. Victims have the right to truth about the facts and circumstances surrounding the violations, which should also be disclosed to the public, provided that it causes no further harm to the victim.

**Commentary**

(1) Remedies, to be effective, must be capable of leading to a prompt, thorough and impartial investigation; cessation of the violation if it is ongoing; and adequate reparation, including, as necessary, restitution, compensation, satisfaction, rehabilitation and guarantees of non-repetition. To avoid irreparable harm, interim measures must be available and States must respect the indication of interim measures by a competent judicial or quasi-judicial body. Victims have the right to truth about the facts and circumstances surrounding the violations, which should also be disclosed to the public, provided that it causes no further harm to the victim.

(2) Under international law, the right to a remedy entails the right to receive reparation for harm incurred as the result of a violation.[206] The right to reparation, which covers all injuries suffered by victims,[207] includes the right to restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition, as reflected in international standards including UN Principles and Guidelines on the Right to a Remedy and Reparation and the UN Set of Principles for the Protection and Promotion of Human Rights through action to Combat Impunity.[208] The right to truth, which is an inherent

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[205] *The Realization of Economic, Social and Cultural Rights, Final report on the question of the impunity of perpetrators of human rights violations (economic, social and cultural rights)*, prepared by Mr. El Hadji Guissé, Special Rapporteur, pursuant to Sub-Commission resolution 1996/24, UN Doc. E/CN.4/Sub.2/1997/8, 27 June 1997, para. 131.

[206] *UN Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Rights Law and Serious Violations of International Humanitarian Law* (UN Principles and Guidelines on Reparation), adopted by GA Resolution 60/147 of 16 December 2005, article 3. See also *UN Set of Principles for the Protection and Promotion of Human Rights through action to Combat Impunity* (UN Impunity principles), recommended by UN Commission on Human Rights resolution 2005/81 of 21 April 2005, Principle 31: "Any human rights violation gives rise to a right to reparation on the part of the victim or his or her beneficiaries, implying a duty on the part of the State to make reparation and the possibility for the victim to seek redress from the perpetrator."

[207] *UN Impunity Principles*, Principle 34: "The right to reparation shall cover all injuries suffered by victims…".

[208] *UN Principles and Guidelines on Reparation*, articles 18-23; UN Impunity Principles, Principle 34: "The right to reparation...shall include measures of restitution, compensation, rehabilitation, and satisfaction as provided by international law."

component of satisfaction, has been established under the UN Principles and Guidelines and in several resolutions of the UN Human Rights Commission and Council. [209]

(3) The principles on reparation acknowledge the key role and participation of the victim in crafting a remedy. Effective restitution and satisfaction, in particular, will have to be tailored to the individual needs.

### 39. Inter-State complaints mechanisms

States should avail themselves of, and cooperate with, inter-State complaints mechanisms, including human rights mechanisms, to ensure reparation for any violation of an extraterritorial obligation relating to economic, social and cultural rights. States should seek reparation in the interest of injured persons as beneficiaries under the relevant treaties addressing economic, social and cultural rights, and should take into account, wherever feasible, the views of injured persons with regard to the reparation to be sought. Reparation for the injuries obtained from the responsible State should be transferred to the injured persons.

**Commentary**

(1) Inter-state complaints mechanisms that can address extraterritorial obligations include the International Court of Justice, inter-state communication procedures established under most of the international and regional human rights treaties and ad hoc international arbitration, which may be established by the parties to a dispute. Although Principle 39 uses the term "should", the steps set out in this Principle are legally required in certain circumstances described below. A State's obligation to realize economic, social and cultural rights within its territory requires it to take steps to prevent and mitigate violations by other States that affect its inhabitants. Such steps can include diplomatic means or legal complaints. Recourse to legal means is essential when other alternatives have been exhausted – and in such cases, the territorial State must provide for and avail itself of inter-State complaint mechanisms.

(2) In some situations, the obligation of all States concerned to ensure the right to remedy as set out in Principle 37 may only be feasible through an inter-state complaint mechanism or through an inquiry process (as described in Principle 41 below). Such States concerned are the State(s) alleged to be responsible for the conduct constituting a violation and the State(s) in which the impact of the harmful conduct is felt. An inter-State complaint mechanism or inquiry process may be the only feasible forum to address the violation in circumstances where victims of a violation are unable to seek remedy themselves, for example, due to fear of retaliation or lack of access to information or legal aid. In such cases, the States concerned must accept the competence of a relevant international or regional mechanism to hear the complaint, and cooperate with it. Such cooperation includes observing the procedures of the complaint mechanism, acting in good faith throughout the process and taking all feasible steps to redress the non-compliance identified by the mechanism.

(3) When taking forward a complaint in regard to the violation of the rights of particular victims, to give effect to the victim's right to a remedy to the extent possible, States should consult with the victims or with the genuine representatives of the communities affected by the violation.

(4) Human rights impose obligations *erga omnes*: all States have a legal interest in their fulfilment and all States to whom these obligations are owed will be injured by breaches of human rights obligations, irrespective of the nationality or place of residence of the victims.[210] Moreover, human rights treaties also are contractual in nature: any State Party to a treaty is obligated to every other State Party to

[209] *UN Principles and Guidelines on Reparation*, article 22(b): "Satisfactions should include…..verification of the facts and full and public disclosure of the truth to the extent that such disclosure does not cause further harm or threaten the safety and interests of the victim, the victim's relatives, witnesses, or persons who have intervened to assist the victim or prevent the occurrence of further violations."

[210] See paragraph 4 of the commentary to Principle 8.

comply with its undertakings under the treaty.[211] Although States which do not have a close link to the victim are not legally required to claim a remedy on the victim's behalf, they may and should seek to do so where possible.

### 40. Non-judicial accountability mechanisms

In addition to the requisite judicial remedies, States should make non-judicial remedies available, which may include, *inter alia*, access to complaints mechanisms established under the auspices of international organizations, national human rights institutions or ombudspersons, and ensure that these remedies comply with the requirements of effective remedies under Principle 37. States should ensure additional accountability measures are in place at the domestic level, such as access to a parliamentary body tasked with monitoring governmental policies, as well as at the international level.

**Commentary**

(1) Principles 37 and 38 concern the requirement of States to ensure access to effective remedies, in principle of a judicial nature. Principle 40 provides a non-exhaustive list of mechanisms that could supplement judicial remedies. Non-judicial accountability mechanisms in some cases may be more accessible to victims, and they may provide a more speedy resolutions of the issues they are presented with; their working methods may be more flexible; they may more easily address problems of a collective or structural nature; they may more easily enter into various forms of collaboration with the other branches of the State in order to provide effective redress and to ensure that the violations denounced shall cease and shall not be repeated. These are among the reasons that have led the Principles relating to the Status of National Institutions (The Paris Principles), adopted by General Assembly resolution 48/134 of 20 December 1993, to include a number of principles concerning the status of human rights commissions with quasi-jurisdictional competence. These principles may be referred to in order to define the competence of national institutions for the promotion and protection of human rights, established in conformity with the Paris Principles, to receive individual or group complaints or petitions.

(2) Further guidance is offered by the Guiding Principles on Business and Human Rights, endorsed by the Human Rights Council in its resolution 17/4. The Guiding Principles on Business and Human Rights state that non-judicial grievance mechanisms, both State-based and non-State-based, should present a number of characteristics in order to provide an effective contribution to improving accountability, particularly in the context of the activities of corporations that have an impact on the enjoyment of human rights. These mechanisms, the Guiding Principles state, should be legitimate; accessible; predictable; equitable; transparent; rights-compatible; the source of continuous learning; and based on engagement and dialogue.

### 41. Reporting and monitoring

States must cooperate with international and regional human rights mechanisms, including periodic reporting and inquiry procedures of treaty bodies and mechanisms of the UN Human Rights Council, and peer review mechanisms, on the implementation of their extraterritorial obligations in relation to economic, social and cultural rights, and redress instances of non-compliance as identified by these mechanisms.

**Commentary**

(1) States that are parties to the relevant human rights treaties are legally bound to periodically report to these mechanisms and should respond to queries in accordance with the applicable procedures. States that have accepted the competence of the relevant treaty bodies to carry out inquiry procedures

[211] Human Rights Committee, *General Comment No. 31(80): The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, (Eightieth session, 2004), UN Doc. CCPR/C/21/Rev.1/Add. 13 (26 May 2004), para. 2.

should act in accordance with the procedures applicable to such inquiries. States should participate in the Human Rights Council's Universal Peer Review process and in other international and regional peer review processes that can monitor their compliance with human rights standards. Further, States should facilitate monitoring of their human rights performance by cooperating with the Human Rights Council's Special Procedures and human rights monitoring mechanisms established under regional organizations. Such cooperation comprises facilitating visits and responding in full and in timely fashion to the communications from monitoring mechanisms.

(2) The reporting and monitoring carried out under these processes supplements complaints mechanisms, as they permit monitoring bodies to address the systemic impacts of State conduct on economic, social and cultural rights. As stated in the commentary to Principle 39, the obligation of all States concerned to ensure the right to remedy for violations may in certain circumstances only be feasible through an inter-State complaint mechanism or through an inquiry process. In such instances, a State must therefore accept the competence of a relevant international mechanism to hear the complaint and cooperate with it.

## VII. Final provisions

42. States, in giving effect to their extraterritorial obligations, may only subject economic, social and cultural rights to limitations when permitted under international law and where all procedural and substantive safeguards have been satisfied.

**Commentary**

(1) Principle 42 recognizes that international instruments which form the basis for extraterritorial obligations in relation to economic, social and cultural rights restrict limitations to such rights. Such treaties, and their interpretation by courts and treaty monitoring bodies, also provide for a range of safeguards in the event that a limitation is proposed. For example, article 4 of the International Covenant on Economic, Social and Cultural Rights provides that States parties may subject economic, social and cultural rights "only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society." Examples of procedural and substantive safeguards are those elaborated by the Committee on Economic, Social and Cultural Rights in regard to forced evictions,[212] interferences with the right to water,[213] and retrogressive measures affecting the right to social security.[214]

(2) The Limburg Principles clarify that article 4 of the International Covenant on Economic, Social and Cultural Rights was primarily intended to be protective of the rights of individuals and was not meant to introduce limitations on rights affecting the subsistence or survival of the individual or integrity of the person.[215] The Limburg Principles also specify that limitations may not be arbitrary, unreasonable or discriminatory nor may they be interpreted or applied so as to jeopardize the essence of the right concerned.[216] Furthermore, legal rules limiting the exercise of economic, social and cultural rights must be clear and accessible and provide for safeguards and effective remedies against illegal or abusive imposition or application of limitations.[217]

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[212] Committee on Economic, Social and Cultural Rights, *General Comment No. 7: The right to adequate housing: Forced evictions*, (Sixteenth session, 1997), UN Doc. E/1998/22, annex IV, paras. 13-16.
[213] Committee on Economic, Social and Cultural Rights, *General Comment No. 15: The right to water*, (Twenty-ninth session, 2002), UN Doc. E/C.12/2002/11, para. 56.
[214] These are elaborated upon in paragraph 5 of the commentary to Principle 32.
[215] The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, UN Doc. E/CN.4/1987/17, paras. 46-7.
[216] Ibid., paras. 49 and 56.
[217] Ibid., paras. 50-51.

43. Nothing in these Principles should be read as limiting or undermining any legal obligations or responsibilities that States, international organizations and non-State actors, such as transnational corporations and other business enterprises, may be subject to under international human rights law.

44. These principles on the extraterritorial obligations of States may not be invoked as a justification to limit or undermine the obligations of the State towards people on its territory.