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### EXTRA-NATIONAL OBLIGATIONS TOWARDS ECONOMIC AND SOCIAL RIGHTS

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#### INTRODUCTION

1. International human rights law has traditionally been regarded to be part of international law, and the processes employed to create obligations in relationship to human rights are similar to those used to enter into international law obligations. Thus, international human rights law is largely built through states entering into treaties, the functioning of which are governed by the international law of treaties as expressed through customary international law and the Vienna Convention on the Law of Treaties (1969).
2. Although international human rights regulation has happened through treaties, and states are under international obligations to perform the treaties in accordance with the *pacta sunt servanda* principle<sup>1</sup>, the practical implementation of the human rights treaties, and the observance of obligations are seen through a direct relationship between the state and its subjects, rather than among states. In this sense, international human rights law has been seen to create a vertical relationship between the individual and his/her state, rather than a horizontal relationship among states as is common for other areas of international law.<sup>2</sup>
3. Thus, traditionally international human rights law is seen to represent a relationship between the state that has ratified human rights conventions and the individuals within that state. This is reflected in certain provisions in international human rights treaties, *inter alia* in the International Covenant on Civil and Political Rights (ICCPR),<sup>3</sup> where it is provided that “Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory

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<sup>1</sup> As codified in Article 26 of the Vienna Convention on the Law of Treaties.

<sup>2</sup> Rosas, Allan “State Sovereignty and Human Rights: Towards a Global Constitutional Project”, XLIII, *Political Studies*, 1995, p. 61, at 62/63.

<sup>3</sup> Adopted by the United Nations General Assembly in December 1966, entered into force in 1976. Hereinafter: ICCPR.

and subject to its jurisdiction the rights recognized in the present Covenant...”<sup>4</sup> Likewise, in the European Convention on Human Rights, “The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms contained in Section 1 of this Convention”.<sup>5</sup>

4. There are, however, other instruments that contain other provisions that may indicate that the obligations to protect human rights go further than to the national setting. One of these provisions is to be found in the International Covenant on Economic, Social and Cultural Rights (ICESCR), in which it is stated that “Each State Party to the present Covenant undertakes to stake steps, individually and *through international assistance and co-operation*...with a view to achieving progressively the full realisation of the rights recognised in the present Covenant”.<sup>6</sup> Similarly, in the Rights of the Child Convention, Article 4 provides that “...With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation”.<sup>7</sup>
5. The increased level of international interaction and co-operation that the international community has witnessed in the latter half of the 20<sup>th</sup> century, often labelled ‘globalisation’, has changed the realities of states’ abilities to control internal affairs to the extent that the notion of sovereignty may need rethinking. States’ and other actors’ activities have national *and* international implications, which may influence people’s ability to enjoy the human rights guaranteed through international human rights law. Thus, the question becomes: as states have less possibility to control the effect of external actors’ activities within their jurisdictions, are there provisions and principles in international law that will subject these other actors to human rights obligations?
6. In order to address this question, the following paper will address the concept of obligations in international human rights law, the relevant sources of international law in this context, and an analysis of the areas of trans-border activities where human rights obligations may become important. However, before entering into this discussion, it is necessary to look at a historic development of the content of obligations, and the subjects of obligations.

### **A historic overview of content of obligations**

7. The philosophy of human rights as a moral concept stems from a notion that there are certain limits on the freedom of manoeuvre for autocratic rulers, often represented by royal rulers in the 18<sup>th</sup> and 19<sup>th</sup> centuries. This developed into a notion that there is a certain limit as to what the state can legitimately do to its subjects, and the focus was on the *negative* approach. The state was supposed to *refrain from interference*. This was the classic notion of obligations – as long as the state refrained from interference, the human rights obligations would be fulfilled. These obligations were often conceptualised in terms of ‘freedom from’ something.
8. This notion of human rights obligations to encapsulate a duty rather than to interfere only, is built on a liberal political philosophy of the ‘night-watchman’ state. It has retained significant strength among a number of political and legal commentators on human rights, particularly during the ideological war that was fought between the East and West in the Cold War period. More significant, the ‘western’ approach to human rights was often built on the notion that this

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<sup>4</sup> ICCPR, Article 2(1).

<sup>5</sup> The European Convention for the Protection of Human Rights and Fundamental Freedoms, adopted by Council of Europe, 1950, entered into force in 1953. Hereinafter: ECHR. Article 1.

<sup>6</sup> The International Covenant on Economic, Social and Cultural Rights, adopted by the United Nations General Assembly in December 1966, entered into force in 1976, hereinafter: ICESCR; article 2(1), emphasis added.

<sup>7</sup> The Convention on the rights of the Child was adopted by the United Nations General Assembly, 20 November 1989, entered into force 2, September 1990.

was the only obligation, and that as long as interference did not take place, the states had complied with their obligations.

9. This negative approach to human rights obligations has, however, not been substantiated in the drafting of treaties in this area, nor in the practice of the bodies established to monitor compliance with the treaty provisions.<sup>8</sup> Already in the Charter of the United Nations, the responsibility in terms of human rights has been expressed in a more comprehensive manner. Article 1(3) provides that the purposes of the United Nations are *inter alia* to achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in *promoting and encouraging* respect for fundamental freedoms for all without distinction as to race, sex, language, or religion”. (emphasis added). Further, in article 55, “...the United Nations shall promote: (c) universal respect for, and observance of, human rights and fundamental freedoms for all...”, and “All Members pledge themselves *to take joint and separate action* in co-operation with the Organisation for the achievement” of this.<sup>9</sup> (emphasis added). Thus, both Article 1 and Articles 55 and 56 reaffirm that action needs to be taken in order to honour the obligations laid down in the Charter and also that this action may be ‘joint’.<sup>10</sup> The UN Committee on Economic, Social and Cultural Rights have taken this view in their General comment on State Obligations pertaining to the Covenant on Economic, Social and Cultural Rights:
10. The Committee wishes to emphasize that in accordance with Articles 55 and 56 of the Charter of the United Nations, with well-established principles of international law, and with the provisions of the Covenant itself, international cooperation for development and thus for the realization of economic, social and cultural rights is an obligation of all States.<sup>11</sup>
11. This approach to human rights obligations, that positive action needs to be taken to comply with them, is also evident in later treaties. In the ICCPR, the ratifying states are under an obligation to “respect and *to ensure* to all individuals within [their] territory... the rights recognized in the...” Covenant.<sup>12</sup> (emphasis added). Further, the ICESCR reaffirms this point in providing that the ratifying state “undertakes to *take steps*” to realise the rights contained in the Covenant.<sup>13</sup> In the European Convention on Human Rights and Fundamental Freedoms, this point is expressed through Article 1, which confirms that “The High Contracting Parties shall *secure* to everyone within their jurisdiction the rights and freedom defined in Section I of this Convention”. Likewise, the African Charter of Human and Peoples’ Rights recognises that “The member States of the Organization of African Unity parties to the present Charter shall recognize the rights, duties and freedoms enshrined in this Chapter and *shall undertake to adopt legislative or other measures to give effect to them*”.<sup>14</sup> (emphasis added). Finally, in the American Convention on Human Rights, the similar recognition is to be found where it is stated that “The States Parties to this

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<sup>8</sup> Most notable in this context are the European Court of Human Rights, established in accordance with article 19 of the European Convention on Human Rights; the Inter-American Commission and Court of Human Rights, established in Charters VI and VII of the American Convention on Human Rights (note that the Inter-American Commission was established by the Organisation of American States in 1948, and was responsible for the drafting of the convention. The Commission’s role has been solidified by the Convention provisions; the African Commission on Human and Peoples’ Rights, established by Article 30 of the African Charter of Human and Peoples’ Rights; the UN Human Rights Committee, established in accordance with Article 28 of the ICCPR, the UN Committee on Economic, Social and Cultural Rights, established by ECOSOC in 1985 (first session held in 1987); and the four other committees established in accordance with their respective treaties.

<sup>9</sup> UN Charter, Article 56.

<sup>10</sup> For a further elaboration of the content of these articles, see Simma, Bruno *The United Nations Charter: A Commentary*, Oxford, Oxford University Press, 1994.

<sup>11</sup> UN Committee on Economic, Social and Cultural Rights, General Comment no. 3 (1990) on State Obligations, para. 14.

<sup>12</sup> ICCPR, Article 2(1).

<sup>13</sup> ICESCR, Article 2(1).

<sup>14</sup> African Charter on Human and Peoples’ Rights, Article 1.

Convention undertake to respect the rights and freedoms recognized herein and *to ensure* to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms...”<sup>15</sup> Thus, in all the major universal human rights treaties, and the regional human rights treaties, obligations that go beyond the negative obligation to refrain from interference are recognised. There is therefore an obligation to take positive action to ensure that human rights are being enjoyed, it is not enough to refrain from interference. This positive obligation has been recognised by the Human Rights Committee,<sup>16</sup> the European Court of Human Rights,<sup>17</sup> and not least by the UN Committee on Economic, Social and Cultural Rights, which has emphasised this point in a large number of General Comments.<sup>18</sup> It can thus safely be assumed that international human rights obligations as expressed in human rights treaties encompass both the negative obligation to refrain from interference in rights enjoyment and the positive obligation to ensure that rights enjoyment is obtained.

12. The discussion surrounding obligations has also been expressed through a division between civil and political rights on the one side and economic, social and cultural rights on the other. It was held that civil and political rights could be observed through non-interference on part of the state, thus an application of the negative obligations only, while economic, social and cultural rights were held to require provisions from the state, and thus represent positive obligations.<sup>19</sup> This division does not have much credibility in human rights circles any longer, as it is recognised that all groups of rights are followed both by negative and positive obligations. The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights<sup>20</sup> express this in the following terms:
13. Like civil and political rights, economic, social and cultural rights impose three different types of obligations on States: the obligations to respect, protect and fulfil. Failure to perform any one of these three obligations constitutes a violation of such rights. The obligation to respect requires States to refrain from interfering with the enjoyment of economic, social and cultural rights...The obligation to protect requires States to prevent violations of such rights by third parties...the obligation to fulfil requires States to take appropriate legislative, administrative, budgetary, judicial and other measures towards the full realization of such rights.<sup>21</sup>
14. Without it being made explicit in the various treaty texts cited above, this understanding of obligations is expressed in the general obligations provisions in the various treaties, as has been made evident by the General Comments and jurisprudence of the bodies implementing them. Thus, there is no direct distinction according to type of rights as to what obligations are pertaining to the various rights. The obligation that is triggered, and at what ‘level’ of obligations this is, will be determined by the concrete situation. Jack Donnelly has clearly expressed this in the following example:
15. The right to food is a fairly negative right in the wheat fields of Kansas but rather positive in Watts or East Los Angeles. The right to protection against torture is largely negative in Stockholm but

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<sup>15</sup> American Convention on Human Rights, Article 1.

<sup>16</sup> See *inter alia*, General Comment no. 6 on Article 6, *Right to Life*, 30 August, 1982.

<sup>17</sup> X vs. UK – child abuse.

<sup>18</sup> See *inter alia*, General Comments no. 3 (states obligations), no. 4 (housing), no. 12 (food), no. 13 (education), no. 14 (health).

<sup>19</sup> Eide, Asbjorn “Realization of Social and Economic Rights and the Minimum Threshold Approach”, 10 *Human Rights Law Journal*, No. 1-2, 1989.

<sup>20</sup> Adopted by a group of thirty experts in Maastricht from 22 - 26<sup>th</sup> January 1997. The objective of the meeting was to ‘elaborate on the Limburg Principles as regards the nature and scope of violations of economic, social and cultural rights and appropriate responses and remedies’ Introduction to the Maastricht Guidelines, as published by the International Commission of Jurists, November 1997, p. 81.

<sup>21</sup> Maastricht Guidelines, Article 6.

somewhat more positive in the South Bronx; in Argentina it was very positive indeed in the late 1970s, but today it is much closer to a negative right.<sup>22</sup>

16. This circumstantial and level-based obligation approach has gained significant strength in the last few years.<sup>23</sup> The Committee on Economic, Social and Cultural Rights have employed this approach to human rights obligations in their General Comments on the substantive rights of the ICESCR.<sup>24</sup> In his follow-up report on the right to adequate food as a human right, Special Rapporteur, Asbjørn Eide develops these levels further, and introduces another category of 'facilitate'. This may imply "the obligation to facilitate opportunities by which the rights listed can be enjoyed. It takes many forms, some of which are spelled out in the relevant instruments. For example, with regard to the right to food, the State shall, under the International Covenant (art. 11 (2)), take steps to "improve measures of production, conservation and distribution of food by making full use of technical and scientific knowledge and by developing or reforming agrarian systems".<sup>25</sup> Other bodies have incorporated this level of 'facilitate' as a sub-category to the obligation to fulfil.<sup>26</sup>

### A historic overview of subjects of obligations

17. Traditional human rights law has been quite strict in its approach to subjects of obligations. Generally, the view has been taken that the individual is the subject of the right, while the state is the subject of the obligation. This stems directly from the origins of human rights as an attempt to limit the actions of autocratic rulers. Therefore, through constitutional and legislative measures in a domestic setting, human rights were guaranteed for the individuals with the obligations of their implementation put on the state. This approach was clearly followed in the codification of human rights in international treaties, such as the UN Charter and the two international covenants, as well as the regional human rights treaties – at least the European and the American.<sup>27</sup> Article by article, these instruments emphasise the States' obligations, through the employment of terms such as "Each Contracting Party shall...", "every State Member shall" etc. In the two general obligation articles of the two Covenants, this is clearly recognised, as Article 2(1) of the ICCPR starts by "Each State Party to the present Covenant undertakes to respect and to ensure...", while Article 2(1) of the ICESCR states that "Each State Party to the present Covenant undertakes to take steps...".<sup>28</sup> This approach is not surprising, taken that

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<sup>22</sup> Donnelly, Jack *Universal Human Rights in Theory and Practice*, Ithaca, Cornell University Press, 1989, p. 33.

<sup>23</sup> The approach was first applied by Asbjørn Eide in his study on *The Right to Adequate Food as a Human Right*, (UN/Commission on Human Rights *Report on the Right to Adequate Food as a Human Right*, report by Asbjørn Eide, Special Rapporteur, UN Doc., C/CN.4/Sub.2/1987/23, 7 July, 1987), and later presented in his article "Realization of Social and Economic Rights and the Minimum Threshold Approach", 10 *Human Rights Law Journal*, No. 1-2, 1989.

<sup>24</sup> See in particular, General Comment no. 12 on the Right to Food, General Comment no. 13 on the Right to Education, and General Comment no. 14 on the Right to Education.

<sup>25</sup> *The right to adequate food and to be free from hunger*. Updated study on the right to food, submitted by Mr. Asbjørn Eide, in accordance with Sub-Commission decision 1998/106, E/CN.4/Sub.2/1999/12, 28 June 1999, para. 52 (c).

<sup>26</sup> See for instance, General Comment no. 12 on the Right to Food by the UN Committee on Economic, Social and Cultural Rights.

<sup>27</sup> The African Charter on Human and Peoples' Rights differ quite significantly from the traditional approach to human rights obligations as being held uniquely by the state. The African Charter emphasises the obligations of individuals in much stronger terms than any other human rights instrument. See generally, *The African Charter on Human and Peoples Rights*, articles 27-29.

<sup>28</sup> This approach has been mirrored in all three regional systems: ACHPR, article 1: The Member States of the Organisation of African Unity parties to the present Charter shall recognize the rights, duties and freedoms enshrined in this Chapter and shall undertake to adopt legislate or other measure to give effect to them". The American Convention provides for these obligations by states in Article 1: "The States parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their

international human rights law is part of the body of international law generally, and it is customary for states to enter into treaties establishing obligations for themselves (as subjects of international law), rather than other entities. Thus it can be firmly assumed that the States are the primary subjects of human rights obligations.

18. There have, however, been developments in the last fifty years, which have questioned the notion that *only* states have human rights obligations. The first development in this regard came with the Nuremberg and Tokyo trials after the Second World War, and the development of the field of law regarding crimes against humanity.<sup>29</sup> According to the Nuremberg trials, and the law developed in this area since, *the individual* may be held directly responsible according to international law for crimes against humanity.<sup>30</sup> In this context, individuals have obligations pertaining to international human rights law irrespective of the national legal provisions in his/her own country. However, apart from crimes against humanity, war crimes and the crime of genocide,<sup>31</sup> the individual is not, according to the vast majority of international human rights treaties, seen as an obligation subject.
19. More discussions have been heard in the last ten years about other possible human rights obligation subjects, and in particular international actors – both of a public and a private kind. The public international actors in question have particularly been addressed in terms of intergovernmental organisations, such as the United Nations itself and its specialised agencies. Commentators have held that these institutions, both as independent international legal subjects, and as composed of states with international human rights obligations, would have certain levels of human rights obligations.<sup>32</sup> This latter point has been confirmed by the Maastricht Guidelines, in that it states that “The obligations of States to protect economic, social and cultural rights extend also to their participation in international organizations, where they act collectively”.<sup>33</sup> There seems to be a consensus forming that these institutions do have a practical impact on people’s human rights enjoyment, and that they may contribute positively to human rights developments.<sup>34</sup> However, there is less consensus on the question of attributing the institutions with legal obligations. This question will be discussed in more detail in the final section of this paper.
20. As for the role of private international actors, much has been discussed in recent years.<sup>35</sup> It has been recognised that private international actors, such as transnational corporations, may have significant impact on individuals’ human rights enjoyment. Some will argue that this direct influence should imply an obligation to take human rights into account. This has been addressed by corporations and NGOs alike, and many of the voluntary codes of conduct that were drafted by TNCs in the 1990s, contained certain human rights standards.<sup>36</sup> Others argue that although

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jurisdiction the free and full exercise of those rights and freedoms...”; and finally, the European Convention states in this following terms: “The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention” (Article 1).

<sup>29</sup> For an assessment of the development of ‘crimes against humanity’ as a topic of international law, see generally Dinstein, Yoram “Crimes Against Humanity”, in Makarczyk, Jerzy (ed.) *Theory of International Law at the Threshold of the 21<sup>st</sup> Century – Essays in honour of Krzysztof Skubiszewski*, The Hague, Kluwer Law International, 1996.

<sup>30</sup> As an example, Article 25 (2) of the Statute of the International Criminal Court (adopted in Rome, July 1988 – yet to enter into force) provides that “A person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment in accordance with this Statute”.

<sup>31</sup> These are the three main substantive areas over which the ICC has jurisdiction. See Statutes of the International Criminal Court, articles 7-9.

<sup>32</sup> See generally, Skogly, Sigrun *The Human Rights Obligations of the World Bank and the International Monetary Fund*, London, Cavendish Publishing, 2001.

<sup>33</sup> Maastricht Guidelines, Article 19.

<sup>34</sup> Ref.

<sup>35</sup> See generally Addo, Michael K. (ed.) *Human Rights Standards and the responsibility of Transnational Corporations*, Deventer, Kluwer Law International, 1999.

<sup>36</sup> Ref.

TNCs do have tremendous impact on the enjoyment of human rights, they are not international legal persons that can be held accountable according to international law, and thus, it remains the states' responsibility to regulate the conduct of these actors. An expression of this argument can be seen in the Maastricht Guidelines, where the obligation to protect is defined as the obligation to protect against human rights violations perpetrated by third parties, including TNCs.<sup>37</sup> More specifically, the Maastricht Guidelines state that

21. The obligation to protect includes the State's responsibility to ensure that private entities or individuals, including transnational corporations over which they exercise jurisdiction, do not deprive individuals of their economic, social and cultural rights. States are responsible for violations of economic, social and cultural rights that result from their failure to exercise due diligence in controlling the behaviour of such non-State actors.<sup>38</sup>
22. The way in which such a dilemma between States and private actors as human rights obligations subjects, is to be solved is the topic of intense debate currently. Should the onus of negative human rights effects as a result of TNCs activities be put on the TNCs themselves, the states in which they operate, or on the states' in which they are incorporated as legal persons? The analysis of this question will be part of the following discussion, particularly in the final part. What is important to point out, is that the negative effect of both states' activities internationally and private actors' activities internationally is of increased concern to those witnessing human suffering and human rights abuses. The question is often addressed in terms of the effect on human rights of globalisation. In this regard, globalisation is connoted as the penetration by international actors (public or private) into the territorial/jurisdictional sphere of nation states, and that these nation states for a variety of reasons are unable to control the effect of these international actors in the national context. In the words of the Special Rapporteurs on globalisation and human rights: "Developing States are, more often than not, compelled by the dynamics of globalisation to take measures that negatively impact on the enjoyment of those rights. The result is that States cannot fulfil their international human rights obligations, even if they are desirous of improving the human rights situation in their countries".<sup>39</sup>
23. It is in this international climate, where nation state – and in particular poor, developing states – are less able to control external actors that impact on their population's enjoyment of human rights, that the very pertinent question as to what *states' extra-national obligations may be*. The following paper will address this question in light of current international human rights law.
24. The first section will discuss what extra-national obligations for states may be with a particular reference to the three types of obligations: respect, protect and fulfil. Furthermore, the paper will address the legal arguments relating to possible *obligations* in this field, based on an assessment of the various sources of international law. Finally, the paper will conclude by discussing the various areas that possible extra-national obligations may be relevant in, and relate them to the types of obligations discussed in.

## TYPES OF EXTRA-NATIONAL OBLIGATIONS

25. Although the subjects of obligations now seem to have moved from a singular focus on the state to discuss possible other actors, such as intergovernmental organisations and transnational corporations, the topic for this paper is *states' extra-national obligations*. Therefore, in the remaining parts of this paper, the sole focus will be on the role of the state as obligation holder.

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<sup>37</sup> Maastricht Guidelines, Article 6.

<sup>38</sup> Maastricht Guidelines, Article 18.

<sup>39</sup> *Globalization and its impact on the full enjoyment of human rights* Preliminary report submitted by J. Oloka-Onyango and Deepika Udagama, in accordance with Sub-Commission resolution 1999/8. E/CN.4/Sub.2/2000/13, para. 44.

26. As was presented in the historic overview, both the legal texts,<sup>40</sup> and the opinion of the bodies established to supervise the implementation of the rights contained in these texts, reflect various types of obligations dependent upon the circumstances in which human rights enjoyment is to take place. These types are now generally recognised as *respect, protect and fulfil*. The areas of states' extra-national activities that may be relevant for these obligations will be addressed below.

## Respect

27. As was indicated above, the obligation to respect human rights represents the obligation not to interfere in the individual's enjoyment of human rights. This level is clearly reflected in the UN Charter,<sup>41</sup> and all of the international treaties in the area of human rights.<sup>42</sup> This obligation is often considered the 'traditional' or 'classic' human rights obligation, stemming from the liberal tradition of limiting the activities of the state so not to infringe on the freedom and liberties of its subjects. Asbjørn Eide has defined the obligation to respect in the following terms:

The obligation to respect requires the state to abstain from doing anything that violates the integrity of the individual or infringes on her or his freedom, including the freedom to use the material resources available to that individual in the way she or he finds best to satisfy basic needs.<sup>43</sup>

28. This type of obligation will imply that the state is duty bound to respect people's human rights, and not to interfere or deprive them of rights that they are already enjoying. This is the case both in terms of civil and political right (a state is under an obligation to respect an individual's right to be free from torture, thus to refrain from torturous practices), and to economic, social and cultural rights alike.<sup>44</sup> Economic, social and cultural rights have often been seen to represent obligations to provide only, but as with any other right, the obligation to *respect* is of paramount importance, as states' violation of this obligation would imply a direct interference in individuals' abilities to ensure their own enjoyment of these rights. This issue has been duly recognised by the UN Committee on Economic, Social and Cultural Rights, in several of its General Comments. For instance, in the General Comment on The Right to Health, the Committee held that
29. States are under the obligation to *respect* the right to health by, *inter alia*, refraining from denying or limiting equal access for all persons, including prisoners or detainees, minorities, asylum seekers and illegal immigrants, to preventive, curative and palliative health services; abstaining from enforcing discriminatory practices as a State policy; and abstaining from imposing discriminatory practices relating to women's health status and needs. Furthermore, obligations to respect include a State's obligation to refrain from prohibiting or impeding traditional preventive care, healing practices and medicines, from marketing unsafe drugs and from applying coercive medical treatments, unless on an exceptional basis for the treatment of mental illness or the prevention and control of communicable diseases. Such exceptional cases should be subject to specific and restrictive conditions, respecting best practices and applicable international

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<sup>40</sup> In particular the ICCPR, the ICESCR, the European Convention on Human Rights, the American Convention on Human Rights and the African Charter on Human and Peoples' Rights.

<sup>41</sup> Articles 55 and 56 provides that all members pledge themselves to promote universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

<sup>42</sup> See section under Relevant Sources of Law and Customary International Law below.

<sup>43</sup> Eide, Asbjørn, "Realization of Social and Economic Rights and the Minimum Threshold Approach", 10 *Human Rights Law Journal*, No. 1-2, 1989. This definition builds on an earlier definition of human rights obligations in relationship to the right to adequate food specifically, and can be found in his report to the UN/Commission on Human Rights *Report on the Right to Adequate Food as a Human Right*. Report by Asbjørn Eide, Special Rapporteur, UN Doc., C/CN.4/Sub.2/1987/23, 7 July, 1987.

<sup>44</sup> Maastricht guidelines, *op.cit.*, Article 6.

standards, including the Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care.<sup>45</sup>

30. Thus, for all categories of human rights, there is a basic obligation not to interfere or to deprive to the extent to jeopardise current human rights enjoyment for any individual. The important question in the current context would be to determine what this might imply in terms of extra-national obligations. If states are under international legal obligations to respect human rights, and this can be extended beyond national borders,<sup>46</sup> what would this imply? To follow the reasoning for domestic obligations, it would imply that a state's actions should not impair human rights already enjoyed by individuals in other states. An example of this could possibly be that a state, through its testing of nuclear weapons spread deadly or severely harmful radiation to people in other countries, to an extent to violate these people's right to health and to life. Another example could be the export of contaminated food distributed to people with the effect that they suffered adverse effects from this food, contrary to their right to food.<sup>47</sup> Thus, any state's activity that interferes or deprives people in other states of their human rights, will represent violations of the obligation to respect.

## Protect

31. The second type of obligation, the obligation to protect, implies a duty upon the state to regulate the activities of third parties to the extent that it prohibits violations of human rights as a result of their conduct. In the earlier mentioned article, Asbjørn Eide clarifies that

The obligation to protect requires from the state the measures necessary to prevent other individuals or groups from violating the integrity, freedom of action, of other human rights of the individual - including the prevention of infringements of his of her material resources.<sup>48</sup>

32. This is often achieved through legislation, which is seen as a major tool for protecting human rights in a variety of international human rights treaties.<sup>49</sup> In the domestic scene this is reflected in states' legislation of the activities of private parties, them being private individuals or legal persons in an effort to prevent these actors from infringing upon the rights of individuals. This is done in all areas of human rights, for instance through protection of privacy by banning telephone tapping, interference with private correspondence, etc., or through legislation of maximum work weeks, employers right to participation in decision-making, etc.
33. Extra-national obligations in this sphere would imply an obligation upon states to regulate the activities of third parties over whom they have jurisdiction, to ensure that they do not infringe upon individuals' rights in other countries in which they may operate. [An example of this may be the United States Trade Act of 1974.]

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<sup>45</sup> UN Committee on Economic, Social and Cultural Rights, General Comment no. 14 – Right to Health, Adopted by the Committee in May 2000, para. 34.

<sup>46</sup> See below for the discussion on the legal justification for this claim.

<sup>47</sup> In the UN Committee on Economic, Social and Cultural Rights' General Comment on the Right to Food, part of the normative content of the right to food is said to be that food should be "*Free from adverse substances* [which] sets requirements for food safety and for a range of protective measures by both public and private means to prevent contamination of foodstuffs through adulteration and/or through bad environmental hygiene or inappropriate handling at different stages throughout the food chain; care must also be taken to identify and avoid or destroy naturally occurring toxins". General Comment no. 12 *Right to Adequate Food as Human Right*, adopted by the Committee May 1999, para. 10.

<sup>48</sup> Eide, *op.cit.*, p.

<sup>49</sup> See section Types of extra-national obligations under Respect.

34. In more concrete terms, this could be the obligation upon states to regulate the conduct of their domestic businesses when they operate internationally. As an example, according to newspaper reports in June 2000, a Norwegian ship owner ordered ships from a yard in Belfast. The conditions included in the contract were that the workers did not have a right to strike, and that there would be a 3-year wage freeze. These provisions in the contract clearly jeopardise central rights at work, as codified in through the ICESCR.<sup>50</sup> Norway has ratified this Covenant, and is thus obligated to protect this right. If an extra-national obligation to protect rights were recognised, Norway would clearly be under an obligation to regulate against these kinds of contracts. Thus, the obligation to protect in extra-national terms would be to protect individuals abroad from human rights violations that could be attributed to actions committed by third parties over which the state has jurisdiction.

## **Fulfil**

35. The obligation to fulfil is most relevant in situations where measures taken to respect and protect are not sufficient to ensure that all individuals do enjoy the rights as guaranteed by international human rights instruments. According to Eide,

The obligation to fulfil requires the state to take the measures necessary to ensure for each person within its jurisdiction opportunities to obtain satisfaction of those needs, recognised in the human rights instruments, which cannot be secured by personal efforts.<sup>51</sup>

36. This has been further elaborated through the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, which in article 6 provides that “The obligations to fulfil requires States to take appropriate legislative, administrative, budgetary, judicial and other measures towards the full realization of such rights”. In his report updating the first report to the Commission on Human Rights on the Right to Adequate Food as a Human Right, Eide elaborates on this type of obligation, by introducing the obligation to facilitate.<sup>52</sup>
37. In terms of extra-national obligations this type of obligation may imply that states extra-national activities positively improve the human rights situations for individuals in third states. This may be the most controversial of the three types of obligations, as it may be seen to indicate that states have a positive obligation to promote human rights in other states, and this may *inter alia* be interpreted as a right to development assistance. Whether this is the case will be discussed in detail after the examination of the sources of international law relevant for extra-national obligations.

## **RELEVANT SOURCES OF LAW**

38. States’ obligations pertaining to human rights stem from a variety of sources of law, such as treaties, customary international law, general principles of international law, and expressions of soft law. The nature and content of human rights obligations will vary from state to state dependent upon which sources that are applied, and more particularly, which treaties each state has ratified. In this section of the paper I will address each source of international law systematically to establish which obligations can be derived from each of them.

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<sup>50</sup> Article 8 of the ICESCR guarantees the right to form trade unions, to join trade unions, and to strike. The limitations of these rights can only be those prescribed by law and which as necessary in a democratic society in the interests of national security or public order or for the protection the rights and freedoms of others”.

<sup>51</sup> Eide, *op.cit.*

<sup>52</sup> See quote from Eide, *op.cit.*

## Treaties

39. Treaties are one of the primary sources of international law, and thus one of the primary sources of rights and obligations for states acting in the international community. There are a large number of treaties relevant in the international human rights law field, and each of them will be discussed separately.

## The Charter of the United Nations

40. The UN Charter was adopted in June 1945, and entered into force on October 24<sup>th</sup> the same year. The organisation established by the Charter has grown from the original membership of 51 in 1945, to 189 members in 2001. This implies that 189 states are bound by the United Nations Charter, and that they according to the *pacta sunt servanda* principle<sup>53</sup> are bound by its provisions, including its purposes and principles as stated in the preamble, and Articles 1 and 2.<sup>54</sup> What makes the UN Charter, and its provisions, even more important is that according to Article 103, obligations under the UN Charter will take priority over any other obligations based on international law in case of conflict.<sup>55</sup> Thus, whatever substantive human rights obligations the member states of the UN have under the Charter will prevail over other obligations stemming from international treaties.
41. The protection and promotion of human rights are cornerstones of the United Nations Charter. The Preamble confirms that “We the Peoples of the United Nations determined to reaffirm faith in *fundamental human rights*, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small” (emphasis added), and Article 1(3) provides that “The Purposes of the United Nations are: to achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and *in promoting and encouraging respect for human rights and for fundamental freedoms* for all without distinction as to race, sex, language, or religion”.<sup>56</sup> The provisions that most directly deal with the nature of the obligations upon member states of the UN, are articles 55 and 56. According to article 56 “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”. (Emphasis added). These purposes are, *inter alia*, to promote “universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion”.<sup>57</sup>
42. The specific obligations stemming from these articles have been topics of debate among scholars. Some argue that the obligations refer to what the organisation as such shall do, rather than addressing the member states. Others, pointing to the passage ‘joint and separate action’ interpret this to imply states individually and together, and that the obligation to promote universal respect for and observance of human rights and fundamental freedom will be firm for individual states that have ratified the UN Charter. In an elaboration of the legislative history and interpretation of Article 56, it is explained that the text is a compromise between a wording

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<sup>53</sup> Vienna Convention on the Laws of Treaties, Article 26 codifies this principle: “Every treaty in force is binding upon the parties to it and must be performed by them in good faith”.

<sup>54</sup> The Vienna Convention on the Law of Treaties establishes that the preamble is part of the text of a treaty for purposes of interpretation, and will thus be included in what constitutes rights and obligations. (Article 31).

<sup>55</sup> Article 103 of the UN Charter reads: “In the event of a conflict between the obligations of the Members of the united Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail”.

<sup>56</sup> Article 13 deals with the mandate of the General Assembly, and in this contexts gives the Assembly the power to initiate studies and make recommendation for the purposes of “prompting international co-operation in the economic, social, cultural, educational, and health fields, and assisting in the realization of human rights and fundamental freedoms...”

<sup>57</sup> Article 55 (c).

suggested by Australia, and the views of the United States in the drafting process.<sup>58</sup> Australia had proposed that “all members of the UN should pledge to take action, on both national and international levels, for the purpose of securing for all peoples, including their own, such goals as improved labour standards”<sup>59</sup> and thus suggested a formulation in which the pledge would mean that the ‘members would both co-operate internationally and act within their own countries to pursue the economic and social objectives of the Organization, in their own way and without interference in their domestic affairs by the Organization’.<sup>60</sup> This was opposed by the US, as they claimed that all that could be included in the Charter was to provide for ‘collective action and thus it could not oblige a nation to take separate action because that would constitute an infringement upon the internal affairs of the member states’.<sup>61</sup> Thus, the interpretation of the article has tended to accept a compromise of the two positions, where the ‘rather limited obligatory function of Article 56 is [...] the result of the wording of Article 55, to which it refers. The latter only describes purposes (and not substantive obligations) to be achieved by means of co-operation. To this extent, Article 56 can thus only create substantive obligations (as opposed to procedural obligations) in so far as Article 55 contains a corresponding basis in that respect’.<sup>62</sup> However, the author holds that Article 55 (c) contains substantive obligations in respect to human rights,<sup>63</sup> and it can thus be held that in terms of human rights, articles 55 and 56 in conjunction establish obligations to take joint action to promote the respect for human rights. According to this interpretation, it seems that the obligation to act collectively to promote respect for human rights through the United Nations system, may be stronger in the Charter than the similar obligation to act individually. The obligation to secure human rights nationally, has as we shall see later, been firmly accepted through the developments of international human rights treaty law and customary international law in the field.

43. However, to address articles 55 and 56 in terms of extra-national obligations, it is necessary to discuss the provisions in conjunction with Article 2(7) of the Charter that prohibits the UN from intervening in matters that are essentially within the domestic jurisdiction of a state.<sup>64</sup> This is the clause of the Charter that preserves the customary right of states to exercise full sovereignty within their own territory and over their own subjects.
44. There has been much debate as to whether this clause prevents international scrutiny into the human rights situation within nation states. However, there seems to be a relatively strong acceptance today of the opinion that human rights do no longer belong to the domains exclusively within domestic jurisdiction. Writing as early as 1950, Hersch Lauterpacht argues that with the inclusion of human rights in the UN Charter, human rights have been elevated to the international sphere, and is no longer within the exclusive domain of the nation state.<sup>65</sup> This approach seems to have gained ground, both through the practice of states and international organisations. States and organisations are now readily criticising the human rights situation in other states without being told that they are interfering in these other states’ internal matters. Before the World Conference on Human Rights in Vienna in 1993, several of the East Asian States held that human rights and the way in which they were implemented or not implemented were matters of domestic jurisdiction and not an issue of international concern. However, this attitude seemed to change, and the Vienna Declaration and Programme of Action proclaims that

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<sup>58</sup> Simma, Bruno (ed.) *The Charter of the United Nations – A Commentary*, Oxford, Oxford University Press, 1995, p. 793. Hereinafter: Simma, 1995.

<sup>59</sup> *Ibid.*

<sup>60</sup> *Ibid.*

<sup>61</sup> Discussion UNCIO X, Doc. 699, II/3/30 and Doc. 747, II/3/46, pp. 139-40. As cited in Simma, *Ibid.*

<sup>62</sup> *Ibid.*, p. 794.

<sup>63</sup> *Ibid.*

<sup>64</sup> Article 2(7) reads: Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter...”

<sup>65</sup> Lauterpacht, Hersch *International Law and Human Rights*, 1950, London, Stevens and Sons, p. 177-178.

45. The promotion and protection of all human rights and fundamental freedoms must be considered as a priority objective of the United Nations in accordance with its purposes and principles, in particular the purpose of international cooperation. In the framework of these purposes and principles, the promotion and protection of all human rights is a legitimate concern of the international community.<sup>66</sup>
46. The UN has also gone further, and directly intervened in domestic situation for humanitarian reasons (humanitarian intervention). The legal foundations for humanitarian intervention are still controversial,<sup>67</sup> but it has been held that for instance, the Security Council's decision to intervene in the case of the Kurdish population in Iraq in 1991 "confirmed the principle that a matter does not fall essentially within domestic jurisdiction when it involves systematic and massive violations of human rights".<sup>68</sup> Thus, it can be observed that the concern for human rights is now both a national and international legitimate concern, and that states have obligations to promote respect for human rights. It should be noted that neither in the UN Charter, nor in later documents such as the Vienna Declaration, is the obligation to respect and promote human rights limited to the domestic jurisdiction of the state, but is phrased in rather general terms, such as 'human rights and fundamental freedoms *for all*'.<sup>69</sup>
47. Having stated that human rights are now legitimate concerns, does not necessarily imply that there is an obligation to be concerned. Or put in other words, even if massive human rights violations in states like Kosovo is a legitimate concern for the United Kingdom, for instance, it does not automatically follow that the United Kingdom is under an obligation to be concerned. This is of great relevance to the overall project currently studied, and it needs to be related back to the types of obligations discussed above. As was stated above, the obligation to respect deals with the duty not to interfere with individuals' human rights enjoyment, the obligation to protect deals with the protection against third parties over which the state has jurisdiction, while the obligation to fulfil deals with the obligation to carry out positive action. If one were to assert that massive human rights violations in Kosovo represent situations where states have a duty (not only a right) to be concerned, then it follows that states would be under a duty to fulfil (in terms of providing assistance) human rights for victims in Kosovo.
48. This discussion is complex in international law, as it touches upon the spheres of sovereignty – indeed, it would imply that international (human rights) law would prescribe what states should do not only domestically in relationship to its own citizens, but also in relationship to citizens in other states. It relates to *obligations erga omnes*, which have been defined as "obligations of a State towards the international community as a whole... By their very nature... [these] are the concern of all States. In view of the importance of the right involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*".<sup>70</sup> While the existence of *obligations erga omnes* is now generally accepted, it is still discussed which 'rights' carry this status, and more specifically, which *human rights* may carry this status. Some commentators have argued that all human rights that belong to the principles of *jus cogens*, which may include all human rights guaranteed through customary international law, will carry these obligations *erga omnes*.<sup>71</sup> However, as indicated, whether or not a foreign state may have a legitimate legal interest in the case based on obligations *erga omnes* is only half the story. The other half, and of more interest to this study, is whether there are any corresponding obligation on the foreign state to take action.

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<sup>66</sup> Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights, 12 July 1993, UN Doc. A/CONF.157/23, para. 4.

<sup>67</sup> See for instance....

<sup>68</sup> Simma 1995, p. 146.

<sup>69</sup> See for instance, Article 55 of the UN Charter as quoted above.

<sup>70</sup> *Barcelona Traction, Light and Power Company Limited*, Second Phase, Judgement, I.C.J. Reports, 1970, p. 32, para 33.

<sup>71</sup> Kamminga, Menno T. *Inter-state accountability for violations of human rights*, Philadelphia, University of Pennsylvania Press, 1992, p. 163.

As far as the present author is aware, the theories in relationship to obligations *erga omnes* only deal with the legitimate interest, not any duty to proceed with the case through any kinds of channels. This, it would seem, still belong in the theory of international law to the sphere of sovereignty, and it is up to the individual state to decide whether to take action or not. It may be that the rapid change in the international community through globalisation and other interaction described in the introduction may imply that it is time to consider this issue seriously, to evaluate whether the legitimate interest doctrine need to be amended to carry obligations to act. This question will be discussed in more detail in the final section.<sup>72</sup>

49. Coming back to the other types of obligations, it can be concluded that due to the principles, purposes and specific provisions of the UN Charter, states that have ratified the Charter are under an obligation at least to respect human rights through their extra-national activities. This would mean that they should not interfere in individuals' human rights enjoyment through their extra-national operations. Without such an understanding of the Charter, much of the *raison d'être* of the provisions of the Charter may be lost. When the Charter provides that the purposes of the United Nations are to promote and encourage '*respect for human rights and for fundamental freedoms*', and to this end, take 'joint and separate action' to promote 'universal respect for, and observance of human rights and fundamental freedoms...' to understand this as to only relate to domestic and not foreign affairs, would be too narrow an interpretation.

## THE INTERNATIONAL COVENANTS ON HUMAN RIGHTS

### The International Covenant on Economic, Social and Cultural Rights

50. The International Covenant on Economic, Social and Cultural Rights was adopted by the United Nations General Assembly in December 1966, and entered into force in January 1976. As of April 2001, 144 states had ratified the Covenant, and are thus bound by the provisions of it.
51. Article 2(1) of the Covenant provides for the general obligations that states that ratify are supposed to fulfil. Article 2(1) reads:
  52. Each State Party to the present Covenant undertakes to take steps, *individually and through international assistance and co-operation*, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the right recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures. (emphasis added).
  53. The section that is important for the present discussion is the one emphasised – *individually and through international assistance and co-operation*. The question as to the meaning of this passage is currently being raised by a number of commentators, and the UN Committee on Economic, Social and Cultural Rights have started to address this in their comments and observations.<sup>73</sup>
  54. During the drafting of this article, the discussions in the Commission on Human Rights and the Third Committee of the General Assembly are interesting to revisit. There were discussions as to this passage, and the drafting of it during two particular periods: in 1951/52 and in 1962. In 1951/52 the discussion was held in the framework of the drafting of a single legally binding Covenant, while in 1962, the drafting had long since moved on to two separate Covenants.
  55. The main aspects of the debates in the first drafting stages in 1951/52 seemed not to cause much controversy. The suggestion to include *international assistance and co-operation*, came *inter alia* from

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<sup>72</sup> See section under Areas of extra-national activities where economic, social and cultural rights become relevant.

<sup>73</sup> Refer to the reporting guidelines.

the US delegation,<sup>74</sup> and was strongly supported by a large number of delegations.<sup>75</sup> This passage was included as a recognition that “countries with insufficient resources should be able to obtain help under the technical assistance programmes or similar projects”<sup>76</sup>, that “the available resources of the small countries, even if utilised to the maximum, would be insufficient; [and] as a result, those countries would have to fall back on international co-operation...”<sup>77</sup>; and that “international co-operation [was] a point which was of cardinal importance to the under-developed countries, which needed help if they were to be capable of implementing economic rights”.<sup>78</sup> Thus, it seems that in 1951/52 there was a general consensus that the inclusion of international co-operation in the Covenant would be necessary to implement economic and social rights,<sup>79</sup> that it would be necessary in order to get developing countries to ratify the Covenant,<sup>80</sup> and that international co-operation and assistance should be considered part of ‘available resources’.<sup>81</sup> In the discussions at this stage, there did not seem to be a clear view as to whether states facing resource shortages would have a duty to try to obtain resources from wealthier states, or whether wealthier states had a duty to provide such assistance. Both views were voiced,<sup>82</sup> and no substantial discussion as to either way of looking at it seems to have taken place. Only Egypt made quite a strong statement as to the nature of this international co-operation and assistance at this point in time, asserting that “By international co-operation he meant the co-operation achieved through international bodies such as the United Nations, the International Monetary Fund, the Technical Assistance Board, etc”.<sup>83</sup>

56. When these provisions were discussed in the Third Committee in 1962, the emphasis of the discussion was slightly different. While the Commission’s discussion very much had focused on the link between resources and international co-operation and assistance, the discussion in the Third Committee was to a large part confined to the discussion on whether or not this international co-operation and assistance was only financial and technical.<sup>84</sup> Chile held that “the effective realization of the rights recognized in the Covenant very often necessitated technical assistance by experts from abroad and the investment of foreign capital”.<sup>85</sup> However, the word ‘technical’ “no longer applied solely to the activities of engineers but also to legislative and cultural efforts and – a very important point – to commercial activities relating to basic commodities”.<sup>86</sup> The Tunisian representative confirmed this wider view on ‘technical and financial’ and held that it was now applied to cultural and social matters.<sup>87</sup> The United States shared the view that international co-operation should not be limited, and that the text without ‘technical and financial’ adequately covered all forms of international assistance.<sup>88</sup> The Third

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<sup>74</sup> E/CN.4/L.54/Rev.2.

<sup>75</sup> For instance Chile (E/CN.4/SR.216, 21 May 1951) France (E/CN.4/L.55), India (E/CN.4/SR.231), Greece (E/CN.4/SR.236) Egypt (E/CN.4/SR. 236), and Denmark (E/CN.4/SR. 236).

<sup>76</sup> Denmark, *Ibid.*

<sup>77</sup> Egypt *Ibid.*

<sup>78</sup> India, E/CN.4/SR.231.

<sup>79</sup> *Ibid.*

<sup>80</sup> The United States, E/CN.4/SR. 236.

<sup>81</sup> Greece, E/CN.4/SR.236, p. 26.

<sup>82</sup> France held that “...in implementing the rights in question...countries with substantial resources should lend their assistance internationally” (E/CN.4/SR.233, p. 8; 2 July 1951); India held the view that “If the meaning was that when the resources of a State were inadequate it would receive international help on certain conditions which it would have to accept, she would be unable to agree to that text. It should be for a State to declare that its resources were inadequate and to ask the United Nations for assistance, which should be granted provided the request was justified”. E/CN.4/SR.233, page 12.

<sup>83</sup> E/CN.4/SR.236, p. 22.

<sup>84</sup> General Assembly, Seventeenth Session, Third Committee 1202<sup>nd</sup> meeting, Official Records, Agenda Item 43, para. 14.

<sup>85</sup> *Ibid.*, para. 15.

<sup>86</sup> *Ibid.*, para. 17.

<sup>87</sup> General Assembly, Seventeenth Session, Third Committee 1203<sup>rd</sup> meeting, Official Records, para. 8.

<sup>88</sup> General Assembly, Seventeenth Session, Third Committee 1204<sup>th</sup> meeting, Official Records, para. 49.

Committee also discussed the voluntary/mandatory nature of this co-operation, and some delegations held that this co-operation should be voluntary,<sup>89</sup> while Chile for instance held that

57. International assistance to under-developed countries has in a sense become mandatory as a result of commitments assumed by States in the United Nations. This history and structure of United Nations technical assistance funds and programmes clearly demonstrated the trend to replace or supplement voluntary bilateral aid with multilateral assistance which tended, by its nature, to entail binding commitments.<sup>90</sup>
58. This view was shared by Iraq, whose delegation held that “the obligation on States to resort to international co-operation for the advancement of human rights was an extremely important and novel element of the draft Covenant”.<sup>91</sup>
59. Thus, the drafting history of Article 2(1) shows that there are some inconsistencies in the approaches held as to the concrete meaning of *through international co-operation and assistance*. However, it seems that the delegations were quite agreed that international co-operation and assistance is needed for the full implementation of the rights, and that the resources available based upon this co-operation and assistance should be part of the resources used for the full realisation of these rights. The controversies did not arise significantly as to whether there would be a duty to assist, and indeed the representative from the United States held that

. . . her government vigorously supported all efforts to co-operate with the world’s developing nations. Its record in extending assistance through international co-operation to all countries spoke for itself . . . the words “international co-operation” in the original text of article 2, paragraph 1 adequately covered all forms of international assistance. The addition of qualifying phrases could only limit the range of possible co-operative activities.<sup>92</sup>

60. Another aspect that needs to be emphasised is that initially civil political, economic, social and cultural rights were intended to be covered in one Covenant. During the drafting period of this covenant, much discussion took place whether to have a separate general clause on the obligations pertaining to economic, social and cultural rights. The first drafts of the article that has become article 2 of the ICESCR were draft Article 19 of this one Covenant. There was therefore a clear distinction between the two sets of rights as to the perception of the general obligations, as the civil and political rights part of the ‘unified’ covenant referred to States obligations in regards to ‘individuals within its territory and subject to its jurisdiction’<sup>93</sup>, while the proposal for the draft article 19 did not make any references to ‘within territory’ or ‘its jurisdiction’. Quite the contrary, the representatives in the drafting process clearly recognised the need for international co-operation and assistance, and that wealthier states had a duty to assist less well-off states to realise the economic, social and cultural rights.
61. During the last 25 years, when the Covenant has been in force, the understanding of the obligations pertaining to Article 2(1) has become more sophisticated. Particularly in the last then years, with the experience of the Committee on Economic, Social and Cultural Rights, this has moved forward rapidly. Nevertheless, the implications of the highlighted passage have not been thoroughly debated. The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights<sup>94</sup> (1986) contain a section on this passage.<sup>95</sup>

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<sup>89</sup> General Assembly, Seventeenth Session, Third Committee 1203rd meeting, Official Records, Saudi Arabia, *Ibid.*, para. 5.

<sup>90</sup> Chile, *Ibid.*, para.10.

<sup>91</sup> Iraq, *Ibid.* para. 21.

<sup>92</sup> General Assembly, Seventeenth Session, Third Committee 1204th meeting, Official Records, para. 49.

<sup>93</sup> Wording of current Article 2 (1) of the ICCPR.

<sup>94</sup> The Limburg Principles were adopted by a group of distinguished experts in international law, convened by the International Commission of Jurists, the Faculty of Law of the University of Limburg, and the Urban Morgan

The principles in this section, however, are not very specific in terms of what states are under an obligation to do. Principle 29 refers to articles 55 and 56 of the United Nations Charter<sup>96</sup>, principle 30 the right to an international order in which the rights and freedoms set forth in the Covenant can be fully realized (paraphrasing from Article 28 of the Universal declaration of Human Rights), principle 31 relates to international co-operation irrespective of differences in political, economic and social systems to promote international social, economic, and cultural progress, while principle 32 confirms that “States parties shall take steps by international means to assist and co-operate in the realization of the rights recognized by the Covenant”. The final two principles in this section confirm that international co-operation and assistance shall be based on the sovereign equality of States, and that international organisations and non-governmental organisations have contributions to make.

62. However, in the experience of the Committee on Economic, Social and Cultural Rights, the significance of this passage has been made more explicit. In General Comment no. 3 on State obligations, the Committee emphasises that the ‘maximum resources’ that should be used for the realisation of economic, social and cultural rights include both those “existing within a State and those available from the international community through international cooperation and assistance”.<sup>97</sup>

63. It further recognises that

- It is particularly incumbent upon those States which are in a position to assist others in this regard. The Committee notes in particular the importance of the Declaration on the Right to Development adopted by the General Assembly in its resolution 41/128 of 4 December 1986 and the need for States parties to take full account of all of the principles recognized therein. It emphasizes that, in the absence of an active programme of international assistance and cooperation on the part of all those States that are in a position to undertake one, the full realization of economic, social and cultural rights will remain an unfulfilled aspiration in many countries.<sup>98</sup>
- There are several other articles in the Covenant on Economic, Social and Cultural Rights that indicate the importance and necessity of international co-operation - in particular Articles 11,<sup>99</sup> Article 22<sup>100</sup> and Article 23.<sup>101</sup> In the General Comments on these articles, the Committee has emphasised the notion of obligation contained in these provisions.

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Institute for Human Rights, who met in Maastricht on 2-6 June 1986 to consider the nature and scope of the obligations of States parties to the International Covenant on Economic, Social and Cultural Rights. The principles may be accessed on [www.law.uu.nl/english/sim/instr/limburg.asp](http://www.law.uu.nl/english/sim/instr/limburg.asp).

<sup>95</sup> Limburg Principles, principles no. 29 – 34.

<sup>96</sup> See discussion above.

<sup>97</sup> UN Committee on Economic, Social and Cultural Rights, General Comment no. 3 (100(0) State Obligations, para. 13.

<sup>98</sup> *Ibid.*, para. 14.

<sup>99</sup> Article 11 (2) provides that “The States Parties to the present Covenant, recognizing the fundamental right of everyone to be free from hunger, shall take, *individually and through international co-operation*, the measures, including specific programmes, which are needed...” (emphasis added).

<sup>100</sup> Article 22 provides that “The Economic and Social Council may bring to the attention of other organs of the United Nations, their subsidiary organs and specialized agencies concerned with furnishing technical assistance any matters arising out of the reports referred to in this part of the present 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 effect progressive implementation of the present Covenant”.

<sup>101</sup> Article 23 provides that “The States Parties to the present Covenant agree that international action for the achievement of the rights recognized in the present Covenant 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”.

Regarding article 11 related to the right to adequate food and freedom from hunger, the Committee expresses that

- States parties should take steps to respect the enjoyment of the right to food *in other countries, to protect that right, to facilitate access to food and to provide the necessary aid when required*. States parties should, in international agreements whenever relevant, ensure that the right to adequate food is given due attention and consider the development of further international legal instruments to that end.<sup>102</sup> (emphasis added)
- States parties should refrain at all times from food embargoes or similar measures which endanger conditions for food production and access to food in other countries. Food should never be used as an instrument of political and economic pressure.<sup>103</sup>
- Discussion on the content of Article 22, led the Committee to conclude, *inter alia* that “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”.<sup>104</sup> Further, the Committee emphasises that “Every effort should be made, at each phase of a development project, to ensure that the rights contained in the Covenants are duly taken into account. This would apply, for example, in the initial assessment of the priority needs of a particular country, in the identification of particular projects, in project design, in the implementation of the project, and in its final evaluation”.<sup>105</sup>
- This is also evidenced in other articles of the same Covenant, particularly in article 23, which states, *inter alia*, that
- The States Parties to the present Covenant agree that *international action* for the achievement of the rights recognized in the present Covenant *includes such methods as* the conclusion of conventions, the adoption of recommendations, the furnishing of technical assistance, etc. (emphasis added.)

64. This article is seemingly rather weak in the role it envisages for extra-national operations in terms of promoting economic, social and cultural rights. However, it is significant that this Covenant specifically recognises the role of not *only* the ratifying state, but also states outside national borders in this endeavour. It should also be noted that the listing of activities which other states are supposed to engage in to achieve the rights in the Covenant are examples, and cannot be read as an exhaustive list, as the article itself uses the terms ‘such methods as...’

65. Having examined the specific provisions related to international co-operation in the Covenant on Economic, Social and Cultural Rights, it can safely be concluded that for the states that have ratified the Covenant, human rights obligations are not confined to national or territorial borders, but indeed go further through an obligation to enter into international co-operation and assistance with a view to realising economic, social and cultural rights. The practical implications of this will be addressed below.

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<sup>102</sup> UN Committee on Economic, Social and Cultural Rights, General Comment no. 12 On the Right to Adequate Food, para. 36.

<sup>103</sup> *Ibid.*, para. 37.

<sup>104</sup> UN Committee on Economic, Social and Cultural Rights, General Comment no. 2 (1990), para. 6.

<sup>105</sup> *Ibid.*, para. 7(d).

## The International Convention on the Rights of the Child

66. The Convention on the Rights of the Child,<sup>106</sup> contains articles which are of interest in the present context. Articles 2 through 5 of the Convention deal with States Parties' obligations, and are in this respect quite specific. Article 2 specifies that States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind. This is thus different from Article 2(1) of the International Covenant on Economic, Social and Cultural Rights, which does not specify any jurisdictional limitations for obligations, but it is in line with the International Covenant on Civil and Political Rights. However, article 4 is highly significant. This article which deals with the content of obligations, states that

States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention. *With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum of their available resources and, where needed, within the framework of international cooperation.* (Emphasis added).

67. This point is also reiterated in article 24, which deals with the right to health in a comprehensive manner. Article 24 (4) states that the States Parties shall promote and encourage international co-operation for the fulfilment of the right in that article. However, the article is rather broad in its scope, even if it is considered the article guaranteeing the right to health. It does, nevertheless encompass issues such as disease and malnutrition, and the provision of adequate nutritious foods and clean drinking water, and taking into consideration the risks of environmental pollution.<sup>107</sup> Thus, this article guarantees a right to food in addition to the right to health care. The specific mentioning of clean drinking water and risks of pollution are also important aspects in terms of extra-national obligations, as one of the first instances of acknowledged extra-national obligations concerned the pollution of rivers in one country affecting another state.<sup>108</sup>

68. Thus the two articles of the Convention of the Rights of the Child confirm that economic and social rights for children are rendered meaningless without international cooperation.<sup>109</sup>

## Customary International Law

69. There are a number of controversial areas of customary international law in regards to human rights which will not be dealt with in this paper. But in short, due to the recent inclusion of human rights law in international law, it is difficult to use the traditional 'test' on the existence of customary rules in this field.<sup>110</sup> Nevertheless, there seems to be a general consensus that at least certain parts of international human rights law have gained status as customary international law, and as such are binding upon all states.<sup>111</sup> Some commentators will claim that all of the Universal Declaration of Human Rights represents international customary law<sup>112</sup>, while others

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<sup>106</sup> Adopted by the General Assembly on 20 November 1989, entered into force on 2 September 1990.

<sup>107</sup> The Convention on the Rights of the Child, Article 24 (2)(c).

<sup>108</sup> The Trail-smelter case.

<sup>109</sup> Van Bueren, Geraldine *The International Law on the Rights of the Child*, The Hague, Martinus Nijhoff Publishers, 1998, p. 296.

<sup>110</sup> It is common to require that a norm should fulfil the following criteria for them being established as customary international law: a consistent state practice of a period of time followed by an *opinio juris*. See generally, Higgins, Rosalyn *Problems and Process: International Law and How we Use it*, 1994, Oxford, Clarendon Press.

<sup>111</sup> Meron, Theodor *Human Rights and Humanitarian Norms as Customary Law*, Oxford, Clarendon Press, 1989, p. 80.

<sup>112</sup> This view has, for instance, been advocated by Prof. Sohn in that he states "The Declaration, as an authoritative listing of human rights, has become a basic component of international customary law, binding on all states, not only on members of the United Nations", Sohn, L., "The New International Law: Protection of the Rights of Individuals Rather than States", 32, *American University Law Review*, no.1, 1982, p. 17, quoted in Meron, *supra note* 111, p. 82.

take a more cautious attitude, and will only include a few of the rights or certain elements of the rights contained in the Universal Declaration.<sup>113</sup>

70. Without going into detail as to which human rights have this status, one can clearly ascertain that there are certain rights that have this status, and that all states are under an obligation to respect these rights. The question becomes whether this obligation is only related to the state's own population, or whether indeed a state has obligations in relationship to other states' subjects as well.
71. Due to the relative restricted nature of the content of customary international norms in the field of human rights, some commentators imply that they carry mainly negative obligations. By this it is meant that states' obligations pertaining to customary international human rights law will be regarded as obligations not to interfere, not to violate – or rather that these obligations will be fulfilled if the state refrains from doing something. To illustrate, the prohibition of torture is a recognised rule of customary international law by which states are under an obligation to refrain from torturous practices. The more positive obligation to train police personnel not to carry out torture, or to ensure that torture victims receive adequate treatment, may not be part of the customary element of the right. Similarly, the right to food may have customary law elements to it in that states are under an obligation not to deliberately starve people by removing their food (this will eventually lead to death and a violation of the right to life as well). However, the more positive elements of these rights, such as the obligation to ensure that people have access to food in quantities and qualities that are sufficient for their mental and physical development in a manner that is culturally acceptable<sup>114</sup>, may not be of a customary nature. Thus the wider content of these rights – beyond the customary elements – may be seen to be of a positive nature, and will be of firmer obligations based on treaty law to which only the states that have ratified the treaties can be held accountable.
72. Thus in terms of extra-national obligations based on customary international law, it would be fair to assume that the content of the obligation would be of a negative nature – states should refrain from actions in their international or extra-national operations that will fail to respect the human rights of people in other states. To illustrate, a state's customary international law obligation in an extra-national setting may be not to support groups or foreign government projects/programmes that will actively deprive people of access to food to the extent that it jeopardises their human rights to adequate food.
73. As customary human rights law develops, the national boundaries for obligations pertaining to these norms will be weakened. We have seen this in the application of universal jurisdiction for certain violations of human rights, particularly in terms of torture, extra judicial killings, and crimes against humanity.<sup>115</sup> It is pertinent to assume that in a globalised world, where individual citizens' lives are heavily influenced by operations by actors beyond one's national borders, the obligation to respect customary international human rights law in extra-national operations will be considerably strengthened. It will be increasingly recognised that not only are there governments that are unwilling to ameliorate the human rights effects of foreign actors within their own borders, but also that they are unable to do so, due to political and economic inequalities, in the international community as well.
74. In terms of extra-national obligations, the principle would be that states would have a duty to act in accordance with customary international human rights law in their international operations to

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<sup>113</sup> Schachter, Oscar, "International Human Rights", 1982, *Hague Academy of International Law, Recenils des Cours*, p. 334/335.

<sup>114</sup> UN Committee on Economic, Social and Cultural Rights, General Comment No. 12 *The Right to Adequate Food*, May 1999, para. 11.

<sup>115</sup> Pinochet case, Filartiga, Eichmann, etc.

an extent such that people in a foreign state did not suffer as a result of the first state's action. In fact principles of diplomatic protection and state responsibility could be used as analogy in this setting. It is a recognised principle that states shall refrain from harm to another state.<sup>116</sup> It is another principle that if a state harms another state's national, this is in international law terms seen to be harm to the second state.<sup>117</sup> However, if one state harms the national of another state when this national still is in his or her own state, the issues of diplomatic protection or state responsibility does not seem to be carried very far. If an agent of a state travels to another state and assassinates one of that state's nationals, a case of responsibility will quite obviously be triggered. However, if the first state gives an export licence for torture equipment to be sold to the second state, and citizens of the second state die from torture, the responsibility is not as clear.<sup>118</sup> The customary norm is a prohibition of torture, but the implementation of this prohibition has so far been seen to be of a rather strict internal operation (apart from cases such as the Pinochet case, but in this case, it was the prosecution that was abroad, not the effects of the state's actions).<sup>119</sup> In the torture equipment example, one could easily argue that the importer state is to blame, as it is this state that chooses to use it. But it is also a valid argument that by making torture equipment available, the first State is at least an accomplice in the crime of torture, and should carry part of the responsibility. Similarly, if a state was asked to grant credit guarantees for investment in another state, and this guarantee would only be granted on the condition that trade unions were outlawed in the industry in which investment was sought, human rights issues are at play, but rarely invoked. In this scenario, the deliberate act of the credit guaranteeing state would infringe upon the rights of the population in the receiver state.

75. The second level of obligations is also of relevance. Although international customary law generally requires non-interference, or non action, the level to protect as discussed above, will be of significance in cases where third parties over whom a foreign state has jurisdiction are responsible for human rights infringements. This would for example be the case if companies over which a state had jurisdiction were responsible for human rights violations in terms of the right to health, right to food, the right to work, right to housing, etc. Forced evictions on the grounds of industrial development is rather common. If a foreign company's investment in a given state implies that the people living on the land where a new plant will be built, and the people on this land is forcibly evicted without due compensation or restoration of property, the foreign company's state (the state in which the company is legally incorporated) will have an obligation to regulate such a company's practices to avoid the human rights violations of the right not to be subjected to forced evictions without adequate compensation that the people will be subjected to. Obviously the foreign state cannot control every investment and activity that such companies are involved in, and therefore this may most practically be done through regulation or legislation – thus observing the obligation to protect through the regulation of third parties.
76. Thus, the issue of what the obligation may be in terms of customary international law, may be concluded that this is mainly concerned with a negative obligation – to ensure that human rights is respected or protected. Another question that arises, is the content of customary international law in this field – which rights, or which elements of rights do now fulfil the criteria of customary international law?

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<sup>116</sup>*The Trail Smelter Case.*

<sup>117</sup> Shaw, Malcolm N. *International Law*, Fourth Ed., Cambridge, Cambridge Univ. Press, 1997, p. 562

<sup>118</sup> Gibney, Tomasevski and Vedsted-Hansen, *supra* note 1, p. 271/72.

<sup>119</sup> There is now a new take on this case, however, in that there is now a possibility that General Pinochet will be indicted in the United States for his involvement in the murder of Orlando Letelier and a colleague in Washington DC in 1976. Letelier was a former Chilean Ambassador to the United States and a prominent opponent of Pinochet. See Kirgis, Fredric L. *Possible indictment of Pinochet in the United States.* *ASIL Insights*, March 2000. Can be on the ASIL website at <http://www.asil.org/insights.htm>.

77. There has been much discussion as to this, and many authors' base their comments on the Universal Declaration of Human Rights and discuss to what extent these rights have gained status as customary international law. Even though the Universal Declaration of Human Rights at the time of its adoption did not impose legally binding obligations in the field of human rights, its legal significance may now have changed. Today, it is generally accepted that the Universal Declaration, either in whole or in parts, has become part of customary international law or general principles of international law, which impose legal obligations upon all states and other subjects of international law. In commenting on this argument, Oscar Schachter lists the following components as important in the determination of customary status:

- the incorporation of human rights provisions in many national constitutions and laws,
- frequent references in UN resolutions and declarations to the 'duty' of all States to observe faithfully the Universal Declaration,
- Resolutions of the UN and other international bodies condemning specific human rights violations as violations of international law,
- statements by national officials criticising other states for serious human rights violations,
- a dictum of the International Court of Justice that obligations *erga omnes* in international law include those derived 'from the principles and rules concerning the basic rights of the human person'. (*Barcelona Traction Judgement*, 1970), and
- some decisions in various national courts that refer to the Universal Declaration as a source of standards for judicial decision.<sup>120</sup>

78. There is no doubt that all these factors have occurred and are still frequently occurring for several of the rights provided for by the Universal Declaration. Thus, in spite of a lack of conforming state practice, the judgements of the International Court of Justice and the opinions of several human rights scholars agree that the Universal Declaration has, to a certain extent, obtained the status of customary international law. Rodley refers to the various decisions of the ICJ and states that "...the apparently unanimous view of the Court is that the Universal Declaration of Human Rights is a document of sufficient legal status to justify its invocation by the courts in the context of state obligations under general international law".<sup>121</sup> Nevertheless, there is still disagreement on which of the rights have gained such a status.

79. Commenting on his own list of factors, Schachter contends that it is doubtful that all provisions of the Universal Declaration have obtained the status of customary international law.<sup>122</sup> There are provisions in the Declaration that are clearly not matched by states' practice, such as the right to free expression, right to assembly, equal rights between men and women, the right to rest and leisure etc., and thus cannot be included in a list of rights that have become custom in international law.<sup>123</sup> However, he claims that there are rights that have nearly universal recognition as human rights and are respected (or at least protected by national law), such as freedom from torture, from arbitrary killing, slavery, systematic racial discrimination etc., and should be considered as belonging to the sphere of customary international law.<sup>124</sup> In addition to these rights listed in the Universal Declaration, he adds genocide, which is codified through the Genocide Convention, and will, as part of customary international law, also apply to non-signatory states.

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<sup>120</sup> Schachter, 1982, p 334/335.

<sup>121</sup> Rodley, 1989, p 326.

<sup>122</sup> Schachter, 1982, p 336.

<sup>123</sup> *Ibid.*

<sup>124</sup> *Ibid.*

80. The Restatement of the Foreign Relations Law of the United States adds a more general point to the list of rights possibly guaranteed by customary law: “a consistent pattern of gross violations of internationally recognised human rights”.<sup>125</sup>
81. Although showing a great deal of caution,<sup>126</sup> Meron adds the following rights to the list: due process guarantees, the right to self-determination, the right to humane treatment of detainees, prohibition of retroactive penal measures. Other commentators have added equality before the law and non-discrimination.
82. The striking point of all these listings is the complete lack of economic, social and cultural rights. Only Schachter poses the question whether the right to subsistence or at least the right to food should be included. He states that “a strong case can be made for the proposition that it is a violation of basic rights for a State to deprive persons in its territory of needed food or to condone or encourage deprivation by private persons”.<sup>127</sup>
83. Alston and Simma criticise this approach as the various lists of rights that may have gained the status of customary international law concentrate exclusively on civil and political rights, and reflecting a possible Western bias of those who have engaged in the debate.<sup>128</sup> It is, however, worth noting that the practice of the European Community in regards to the human rights clauses, now covering more than 120 third states, considers that *all* parts of the Universal Declaration represent general international law, by which it is bound.<sup>129</sup> This would include economic and social rights, as well as the civil and political rights mentioned by the commentators here cited.
84. The rights that have been identified above may be determined by an ideological and individual bias. As Meron stated “only an overconfident observer would attempt to identify all the customary norms...”<sup>130</sup> So rather than attempting to determine which right has achieved customary law status, there may be elements of the various rights that may be of a customary nature, rather than the whole right as such. It is relevant to discuss the core content of the rights, and link that to the various levels of obligations, to arrive at a qualitatively different approach to the content of customary human rights law. Thus, most rights will have a minimum core that there will be a customary norm not to violate. For example, it is often claimed that there is a customary norm prohibiting torture. However, does this cover all aspects of what may be labelled torture? It would clearly cover the use of excessive physically abusive methods in prison, such as burning people, beating their heads, etc. But could it cover caning in schools or in prisons? There might be convention provisions that prohibit those states that have ratified the convention to allow caning in schools, without this making it into a customary rule which will cover all subjects of international law. Similarly, there may be a customary norm not to use starvation as a method of punishment, or political gain. However, the right to food also includes that the food available shall be culturally acceptable<sup>131</sup>, something which might not be of a customary character binding on those who have not ratified the various conventions that include the right to food.
85. Thus I will argue that most rights contained in the Universal Declaration of Human Rights have a customary core, while other aspects may not have gained such a status. This core will often relate to the obligation to ‘respect’, but not necessarily in all situations. If one looks at the examples listed above, Meron suggests that due process guarantees may have gained customary law status, which, in

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<sup>125</sup> Restatement of the Law Third, Restatement of the Foreign Relations Law of the United States Para.702.

<sup>126</sup> Meron, 1989, p 95.

<sup>127</sup> Schachter, 1982, p 337.

<sup>128</sup> Simma and Alston, 1992, p 95.

<sup>129</sup> Brandtner and Rosas, 1998; Rosas, 1999.

<sup>130</sup> Meron, 1989, p 95.

<sup>131</sup> *Report on the right to adequate food as a human right*, by Mr. Asbjørn Eide, Special Rapporteur. UN doc., E/CN.4/Sub.2/1987/23, p 27.

many circumstances, requires positive action from the state in terms of setting up an independent judicial system with qualified lawyers and judges and a functioning police force. In terms of other rights, a customary core of the right to health may be not to deliberately spread diseases, for the right to housing – not to evict people from their houses without alternative shelter available, etc.

86. There are two articles in the Universal Declaration that mention international co-operation or international conditions, namely articles 22<sup>132</sup> and 28.<sup>133</sup> The first of these two articles serves as an introduction, and an umbrella article for the economic and social rights, as provided for in the UDHR.<sup>134</sup> In the discussions on this article, the controversial element was the inclusion of ‘social security’ while little attention was given to the inclusion of ‘international co-operation’.<sup>135</sup> This did not seem to cause much debate among the drafting committee members, or the delegations in the Human Rights Commission and Third Committee. According to Andreassen, the “sole reference to the important second component of the article was a statement by Eleanor Roosevelt, noting that the essential elements of the articles were “the two phrases ‘through national effort and international co-operation’ and ‘in accordance with the organization and resources of each state.’”<sup>136</sup> Thus, the meaning of ‘international co-operation’ was not discussed in any detail.<sup>137</sup> Likewise, the practical obligation interpretation of article 28 was not discussed during the drafting of that article.<sup>138</sup> The main focus on the discussions in the drafting stage of this article, seemed to be whether or not the fulfilment of all the rights in the UDHR would result in a ‘good’ international order,<sup>139</sup> or whether the fulfilment of the rights could happen and the international order would still not be ‘good’.<sup>140</sup> Thus, from the drafting history of the two Articles, there is not much guidance as to the concrete interpretation, and to the obligations that may stem from them. However, as held by Andreassen,
87. In the 50 years since the adoption of the Declaration, the importance of international cooperation in addressing the implementation of social and economic rights world-wide – for example, in relation to the problem of poverty – has been increasingly recognized. On the other hand, the obligation to contribute to fulfilling economic, social and cultural rights beyond national borders has so far been resolved neither in international law nor in practical terms.<sup>141</sup>
88. This point may be well taken, but it does not reflect the earlier distinction between levels of obligations. It may be possible to argue that Article 22 (and Article 28) does not constitute a firm international law obligation to fulfil economic, social and cultural rights, but that there may be an obligation to *respect and protect* economic, social and cultural rights beyond national borders. There are at least two arguments that would support such a proposition. First, that the legal status of the UDHR has changed generally in that much of it is not considered international customary law; and second, that the negative obligation to respect, and the obligation to protect, requires much less action on part of the state, than the positive obligation to fulfil. It will thus correspond with the general obligation stemming from customary international law, that the state should refrain from

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<sup>132</sup> Article 22 reads: Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of economic, social and cultural rights indispensable for his dignity and the free development of his personality.

<sup>133</sup> Article 28 reads: Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.

<sup>134</sup> Andreassen, Bård-Anders “Article 22” in Alfredsson, Gudmundur and Asbjørn Eide *The Universal Declaration of Human Rights: A Common Standard of Achievement*, The Hague, Martinus Nijhoff Publishers, 1999 p. 453-488.

<sup>135</sup> *Ibid.*, p. 475.

<sup>136</sup> *Ibid.*, p. 475-76. Footnote omitted.

<sup>137</sup> *Ibid.*

<sup>138</sup> Eide, Asbjørn, “Article 28” in Alfredsson and Eide *op.cit.*, p. 597-632.

<sup>139</sup> The word ‘good’ has been included in the first proposal of this article by Mr. Malik from Lebanon, but was subsequently deleted upon a proposal by the Soviet Union, accepted by a number of other delegations. For the drafting history of this Article, see Eide, *Ibid.*

<sup>140</sup> *Ibid.*, p. 599-600.

<sup>141</sup> Andreassen, in Alfredsson and Eide, *op. cit.*, p. 476.

actions that may contravene the “realization of...economic, social and cultural rights...” or hamper a “social and international order in which the rights and freedoms set forth in this Declaration can be fully realized”. Indeed, if the UDHR’s status as representing customary international law were to be taken seriously, this interpretation of the two articles seem to represent a minimum of obligations without rendering the two provisions without meaning.

89. The extra-national obligations for states would thus be - in their extra-national activities - to respect the elements of each individual human right that has this customary international law status.

## General Principles of Law

90. The distinction between customary international law and general principles of law, is not necessarily firm. This is particularly the case if general principles of international law are seen to contain *international* aspects, and not confined to the limited elevation of principles from national legislation onto an international level. Several commentators have argued that the practices, operations and statements of international organisations are also parts of what constitutes general international law principles.<sup>142</sup> Some authors have questioned whether the detailed discussion of whether parts of or all of the Universal Declaration is now customary law is helpful, or whether it would be more useful to discuss the Universal Declaration’s position as an expression of general principles of international law.<sup>143</sup> This is particularly a result of the recognition that in the field of human rights, it is hard to use the conventional test of customary international law as reflected in state practice.
91. The Universal Declaration of Human Rights has been referred to in innumerable documents passed by the United Nations. It is also referred to in national constitutions and legislation, and by other organisations. The European Communities refer systematically to the Universal Declaration in the human rights clauses contained in bilateral treaties with third countries. Brandtner and Rosas state that “The basic term of reference for the human rights clause is the Universal Declaration of Human Rights...”<sup>144</sup> These references to the Universal Declaration by a variety of international actors imply an acceptance of this document as representing general international law.<sup>145</sup> This may most notably have been done by the European Community in that it considers all parts of the Universal Declaration to represent general international law.<sup>146</sup>
92. In terms of extra-national obligations, this status as customary law or general principles of law would imply an obligation for states to make sure that they did not violate the core content of the rights contained in the Universal Declaration of Human Rights. For example, one can look at the right to education. If a state is supporting a dam building project in another given country, and this projects involves the forced resettlement of people, due to their land being flooded by water, the first state would be under an obligation to respect the rights of the resettled people, including the right to education. The primary obligation for the right to education obviously lies with the government in question. However, the state that supports the project should, in a situation like this, ensure that in the plans, appropriate attention is paid to the education situation, and that necessary provisions are made through the project or through other governmental policies that the future educational opportunities are equally good in the new place of living, as they were where the resettled people moved from. Thus, the obligation to respect in this situation will imply that the foreign state that offers support to this project cannot ‘wash its hands’ and leave the full responsibility to the government where the project is being carried out. Based on this discussion, it seems to be possible to draw three preliminary conclusions. First, the Universal Declaration nowadays does impose

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<sup>142</sup> Simma and Alston, 1992; and Seyersted, 1967.

<sup>143</sup> Simma and Alston, 1992; Rosas, 1999.

<sup>144</sup> Brandtner and Rosas, 1998, p 475.

<sup>145</sup> *Ibid.*

<sup>146</sup> Rosas, 1999.

limited legal obligations on states and other subjects of international law. Given that the Charter of the United Nations does undoubtedly impose the obligation to respect and to promote human rights, that the Universal Declaration is seen as interpreting or explaining what is meant by human rights in the Charter, and the important position that the Universal Declaration has obtained in the international work for human rights protection throughout its fifty years' history, this interpretation should be valid - at least for a number of rights, if not all of them. Second, most of the norms that have gained the status of customary international human rights law or general principles of international human rights law are found in the Universal Declaration on Human Rights. Thirdly, to the extent that the Universal Declaration is part of customary international law or general principles of law states will have an obligation not to violate it and to protect it in their extra-national activities.

## Soft Law

93. The final section under the legal basis for obligations concerns soft-law, a term that includes decisions of international bodies UN organs such as the Convention-based Committees.<sup>147</sup> In their work on the various human rights conventions and covenants, these Committees produce authoritative interpretations of the substantive content of rights, and the procedural and substantive obligations of the State Parties. In this regard, the Committees assist in clarifying the understanding of international human rights law within their specific areas of expertise.
94. In terms of extra-national obligations, the Committee of Economic, Social and Cultural Rights has issued several interesting statements. For instance, in May 1999, the UN Committee on Economic, Social and Cultural Rights, passed General Comments on 'The Right to Adequate Food, as recognised in the International Covenant on Economic, Social and Cultural Rights' Article 11.<sup>148</sup> In this General Comment, The Committee stated that

. . . States Parties should recognise the essential role of international co-operation and comply with their commitment to take joint and separate action to achieve the full realisation of the right to adequate food. In implementing this commitment, State parties should take steps to respect the enjoyment of the right to food in other countries, to protect that right, to facilitate access to food and to provide the necessary aid when required. <sup>149</sup>
95. In the most recent General Comment from the same UN Committee – the General Comment on the Right to Health, the statements of extra-national obligations seem to be even clearer. The Committee here states that
96. To comply with their international obligations in relation to article 12, States parties have to respect the enjoyment of the right to health in other countries, and to prevent third parties from violating the right in other countries, if they are able to influence these third parties by way of legal or political means, in accordance with the Charter of the United Nations and applicable international law. Depending on the availability of resources, States should facilitate access to

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<sup>147</sup> The implementation of the following human rights conventions and covenants are supervised by expert Committees: The International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of All forms of Racial Discrimination, the Convention on the Elimination of Discrimination against Women, the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and the Convention on the Rights of the Child.

<sup>148</sup> UN Committee On Economic, Social and Cultural Rights, General Comment 12 (UN Doc E/C.12/1999/5), 12 May 1999.

<sup>149</sup> *Ibid.*, para. 36. The legal basis for this statement is referred to as Article 56 of the UN Charter, the specific provisions contained in Articles 11, 2.1 and 23 of the International Covenant on Economic, Social and Cultural Rights, and the Rome Declaration of the World Food Summit. (*ibid.*)

essential health facilities, goods and services in other countries, wherever possible and provide the necessary aid when required.<sup>150</sup>

97. This is a clear enhancement of international obligations of states compared to some earlier instruments dealing with economic and social rights and the obligations pertaining to these. For example, in the *Maastricht Guidelines*<sup>151</sup>, adopted by a group of Experts in 1997, the section on extra-national obligations is very weak. In effect, the obligations are generally seen to be of a national character.<sup>152</sup>

98. However, addressing the role of International Financial Institutions, the UN Committee on Economic, Social and Cultural Rights General Comment no. 2 dealing with structural adjustment programmes, held that during

. . . adjustment programmes endeavours to protect the most basic economic, social and cultural rights become more, rather than less, urgent. States parties to the Covenant, as well as the relevant United Nations agencies, should thus make a particular effort to ensure that such protection is, to the maximum extent possible, built-in to programmes and policies designed to promote adjustment”.<sup>153</sup>

99. The Committee has also regularly looked carefully at the passage in Article 2(1) requiring *international co-operation and assistance*.<sup>154</sup> This is evidenced by the Committee’s guidelines on reporting in which it asks states to report on their international assistance and co-operation. In the reports to the Committee, states regularly refer to their development assistance as donor countries or recipients. For instance, states like Guyana and the Sudan have linked the human rights assistance from abroad to its ability to implement economic, social and cultural rights.<sup>155</sup> Honduras has reported how foreign assistance has hampered the implementation of economic and social rights, in holding that the State of Honduras “is witnessing in fact the full and telling damage inflicted on the exercise of these rights by the successive “structural adjustment of the economy”, which have had a serious impact on purchasing power, especially of the less-advantaged economic groups, as a result of the higher prices of basic consumer goods”.<sup>156</sup> Israel has commented both on the way it supports implementation of economic, social and cultural rights abroad through their development assistance,<sup>157</sup> while at the same time recording the impact of the foreign assistance they themselves

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<sup>150</sup> UN Committee on Economic, Social and Cultural Rights, General Comment no. 14, *The Right to Health*, May 2000, para. 39.

<sup>151</sup> *The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*, Adopted by a group of thirty experts in Maastricht from 22 - 26<sup>th</sup> January 1997. The objective of the meeting was to ‘elaborate on the Limburg Principles as regards the nature and scope of violations of economic, social and cultural rights and appropriate responses and remedies’ Introduction to the Maastricht Guidelines, as published by the International Commission of Jurists, November 1997, p. 81. (The *Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights*, were adopted by a group of distinguished experts in international law, in Maastricht on 2-6<sup>th</sup> June, 1986 (published by the International Commission of Jurists, November 1997, p. 65).

<sup>152</sup> The Maastricht Guidelines, para. 16 reads “The violations referred to in section Ii are in principle imputable to the State within whose the jurisdiction they occur. As a consequence, the State responsible must establish mechanisms to correct such violations, including monitoring investigation, prosecution, and remedies for victims”.

<sup>153</sup> General Comment No. 2 (1990), “International technical assistance measures” (art. 22 of the Covenant), E/1990/23, pp. 86-88.

<sup>154</sup> For a discussion as to the interpretation of this passage, see above.

<sup>155</sup> “Guyana has undertaken, through international assistance and cooperation, to improve the economic and social conditions of its citizens” (E/1990/5/Add.27, para. 13); “The Sudan is making use of all its approved cooperation programmes with the United Nations and its various agencies to lay the foundations for the realization of economic, social and cultural rights, involving the technical support provided by...” E/1990/5/Add.41, para. 11).

<sup>156</sup> E/1990/5/Add.40, para.6.

<sup>157</sup> “The Department of International Cooperation of the Ministry of Foreign Affairs (DIC) is devoted to promoting assistance programmes in the fields of training, research and consultations. Remaining committed to the universal goal of poverty reduction, the focus has been on the enrichment of human resources and institution-building, to enable individuals to participate in the development of their own society...” (E/1990/5/Add 39(1), para. 56).

have received.<sup>158</sup> Japan has confirmed that it “takes the basic position that human rights are a universal value and a legitimate international concern common among all human beings. Japan believes that development assistance should contribute to the promotion and protection of human rights”.<sup>159</sup> Similarly, the Committee members have in more recent years started to bring the extra-national elements of states’ actions into their questioning of governments. For example, there have been questions to Switzerland’s as to “what proportion of the Confederation’s budget was allocated to such [international] cooperation, and for what forms of assistance it was earmarked”,<sup>160</sup> Finland has been asked whether it took account of its “international human rights obligations, such as those stemming from the Covenant, when it participated in the work of international organizations, and whether such obligations were borne in mind by its representatives in organizations such as the World Trade Organization”,<sup>161</sup> and Italy has been asked whether the Italian Government took any steps to ensure that Italy’s representative in the World Bank took the Covenant into account in carrying out its responsibilities. The matter was especially pertinent when the World Bank was considering a loan or other programme in relation to a recipient State which has also ratified the Covenant”.<sup>162</sup>

100. Thus, the Committee on Economic, Social and Cultural Rights is increasing its emphasis on the extra-national obligations of states, both in terms of what they ask the states to report on, and also in terms of their specific questioning of states extra-national behaviour.
101. On a more general level, the Vienna Declaration and Programme of Action Part I, paragraph 13 confirms that “There is a need for States and international organisations, in co-operation with non-governmental organisations, to create favourable conditions at the national, regional and international levels to ensure the full and effective enjoyment of human rights”.
102. Thus, in terms of customary international law, treaty law and in a variety of soft law expressions, the role of the state beyond its national borders in protecting human rights is clearly recognised. It is clearly quite a paradox that so-called international human rights should only have a national dimension.

## Case law

103. In the Trail Smelter case the state’s responsibility for negative effect on another state’s territory is quite clearly established.<sup>163</sup> However, in terms of human rights case law, this is so far a rather evolving area, and the international jurisprudence is by no means consistent. It seems that the main issue that the Courts or Committees have problems with is to determine the direct link between state actions and the resulting human rights violations in another country. However, there are some interesting decisions, which will illustrate the different approaches taken, and we will mention a few of those.
104. In the *Loizidou vs. Turkey* case, the European Court of Human Rights clearly stated that responsibility for one’s own acts can reach outside the jurisdiction. In this case, which concerns the confiscation of property in the Turkey occupied areas of Northern Cyprus, the Court held that the

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<sup>158</sup> “Of the international assistance that Israel receives, only a small portion is granted in order to meet social needs and even then, only for the absorption of immigrants”. (E/1990/5/Add. 39(1), para. 60)

<sup>159</sup> E/1990/6/Add.21 para. 10.

<sup>160</sup> E/C.12/1998/SR.37, para. 27.

<sup>161</sup> E/C.12/2000/SR.61, para. 66.

<sup>162</sup> E/C.12/2000/SR.6 para. 40.

<sup>163</sup> Trail Smelter Case (Us vs. Canada), 3 R.I.A.A. 1905 (1941), quoted in Gibney, Mark; Katarina Tomasevski and Jens Vedsted-Hansen “Transnational State responsibility for Violations of Human Rights”, 12, *Harvard Human Rights Journal*, Spring 1999, p. 273.

responsibility of Contracting Parties can be involved because of acts of their authorities, whether performed within or outside national boundaries, which produce effects outside their own territory.<sup>164</sup>

105. Similarly, in cases concerning extradition of people to countries where they may face torture or capital punishment, the Court has consistently held that this would be a violation of article 3 of the Convention. This is *inter alia* held in the Soering vs. United Kingdom case.<sup>165</sup> A similar, although more limited, application of this principle has been acknowledged by the UN Human Rights Committee in the Ng. Vs. Canada case,<sup>166</sup> where the applicant had been extradited from Canada to the United States, to stand trial in California, where he was likely to face the death penalty by gas asphyxiation. The Committee held that this would be a violation of article 7 of the International Covenant on Civil and Political Rights, as the execution of a capital punishment sentence must be 'carried out in such a way as to cause the least possible physical and mental suffering'.<sup>167</sup> Thus, the Human Rights Committee held that even if capital punishment is not prohibited by the covenant, the likely punishment that this applicant would face would be in contravention of the Covenant, and therefore, Canada's extradition was a violation of the Covenant.<sup>168</sup>
106. There is also some recognition that states have a responsibility to control criminals/terrorist on their territory who may cause harm in another state. This has been confirmed in the Lawless vs. Ireland case,<sup>169</sup> and the McCann vs. United Kingdom case.<sup>170</sup> In the latter case, which dealt with the use of special SAS forces to prevent terrorist attacks in Gibraltar, which led to three people being killed, the Court held that the government is required to have regard to their duty to protect the lives of the people in Gibraltar including their own military personnel...<sup>171</sup>
107. However, in other cases the problem of demonstrating a close degree of proximity for the violation has been a ground for dismissal. For instance, in the case of Puccini vs. Italy,<sup>172</sup> which dealt with the sale of anti-personnel mines, the European Commission on Human Rights found the case inadmissible. Thus, it can be seen that the scope of states' extra-national obligations and responsibility is still an underdeveloped area of international jurisprudence.
108. This part of the paper has gone through the various sources of obligations in international human rights law with the aim of identifying possible extra-national obligations for states. This should be read in light of present-day reality of high level interaction among states, on a variety of levels, the inequality among states in terms of control of external forces, and the developments in international law generally and international human rights law in particular when it comes to a more sophisticated understanding of obligation subjects, and the differentiation of obligation levels. Thus, the traditional approach to human rights obligations that it concerns the state that has ratified human rights treaties and their subjects is in the present day too simplistic. A focus on the *effect* of actions on the human rights enjoyment, rather than the identity of the

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<sup>164</sup> The European Court of Human Rights, Loizidou judgement of 23 March 1995, Series A. no. 310, p. 24, para. 62.

<sup>165</sup> The European Court of Human Rights, Soering judgement of 7 July 1989, Series A. no. 161.

<sup>166</sup> Complaint No. 469/1991, Human Rights Committee, Views of the Committee, Nov. 5, 1993, UN Doc. A/49/40, Vol. II.

<sup>167</sup> *Ibid.*, para. 16.4 It should be noted that the Committee found that this case was in violation of article 7 in that the mode with which the person would be subjected to capital punishment would constitute cruel and inhuman treatment. However, the Committee did not find a violation of Art. 6, which guarantees the right to life, as "The Committee notes that article 6, paragraph 1, must be read together with article 6, paragraph 2, which does not prohibit the imposition of the death penalty for the most serious crimes", *Ibid.* at para. 15.3.

<sup>168</sup> *Ibid.*, para. 17.

<sup>169</sup> European Commission on Human Rights, *Lawless v. Ireland*, Comm. Report 19.12.59, Eur. Court H.R., series B., no. 1, pp. 237-241.

<sup>170</sup> McCann and Others Judgement, 27 September 1995, Series A no. 324.

<sup>171</sup> *Ibid.*, para. 192.

<sup>172</sup> European Commission of Human Rights, Commission's report of 6 September 1994 on the application (no. 20208/92). This decision was later upheld by the Court, see Court decision, 13 September, 1995.

perpetrators as the defining point, is gaining more support. Credibility of international human rights law is dependent upon a more open-minded approach to obligation holders. Thus, based on the consideration of the sources of law in light of the state of international human rights law in general, the conclusion may be drawn that states are under an obligation – based on treaty law, customary international law, general principles of law, and compelling expressions of soft law – to take human rights into account. The final part of the paper will address areas of states extra-national activities that may be affected by these obligations.

## **AREAS OF EXTRA-NATIONAL ACTIVITIES WHERE ECONOMIC, SOCIAL AND CULTURAL RIGHTS BECOME RELEVANT**

### **Introduction**

109. In this final part of the paper, I want to discuss briefly the areas in which states' extra-national activities may influence the enjoyment of economic, social and cultural rights in other states, and where the obligations identified above thus become relevant. It should be emphasised that this is intended as a brief introduction to a large and complex area of international activities and co-operation, and the propositions are intended as food for thought more than an exhaustive treatment of the materials.

### **Trade**

110. The most common inter-action among states, and extra-national activities that all states engage in, concerns trade. In the last decades, much of international law activities have concerned the drafting and adoption of trade treaties on bi- and multi-lateral levels. Most prominent of these are obviously the GATT agreements and the establishment of the World Trade Organisation. Common for most of the international treaties in regards to trade has been to liberalise markets, to open up for trade, and to reduce trade barriers, such as custom duties and non-tariff barriers.

111. There is no doubt that international trade, and the rules and regulations regarding them will affect peoples' lives within states, and thus their ability to enjoy economic, social and cultural rights, and also violations of these human rights. Based on the obligations identified above, states are under an obligation to ensure that their trade relations with other states do not violate economic, social and cultural rights of the people in those states. Or put differently, when engaging in, or permitting, trade with another state, the effects of those trade relationships should be evaluated from a human rights perspective to ensure that people do not suffer as a result of these activities. This may imply issues such as working conditions for the workers in factories or on plantations. If trade relations solidifies or contribute to the development of conditions whereby the economic and social rights of workers are being violated, states may be in breach of their obligations to regulate the conduct of third parties (violation of the obligation to protect), if they fail to regulate international business over which they have jurisdiction. An example here could be the access to medicines that may treat HIV/AIDS patients in poorer parts of the world. The fact that the pharmaceutical community possess the knowledge and means necessary to treat people with HIV/AIDS, but that it is not made available to these people due to their lack of financial resources, and the result is that millions die prematurely from the disease, may represent a failure on part of states to observe their obligation to protect and fulfil human rights. The United Nations Commission on Human Rights has confirmed this in a recent resolution calling upon States

. . . at the international level, to take steps, individually and/or through international cooperation, in accordance with applicable international law, including international agreements acceded to, such as: To facilitate, wherever possible, access in other countries to essential preventive, curative or palliative

pharmaceuticals or medical technologies used to treat pandemics such as HIV/AIDS or the most common opportunistic infections that accompany them, as well as to extend the necessary cooperation, wherever possible, especially in times of emergency.<sup>173</sup>

112. Thus human rights violations as a result of the failure to regulate the conduct of transnational corporations over which the state has jurisdiction may represent a breach of the obligation to protect human rights of people in other states.
113. A positive example that could be mentioned here is the reluctance by the UK government to go ahead with plans to grant export licenses to firms involved in the building of a dam project in Turkey. According to reports in *The Observer*, the government “is to abandon its support for the controversial Ilisu dam in Turkey after an official report that it commissioned on the environmental and human rights impact of the project found that it had failed to meet international standards”.<sup>174</sup> According to this commissioned report, “the dam would lead to the displacement of more than 70,000 Kurds in the south-east of the country and the destruction of the archaeologically significant town of Hasankeyf”.<sup>175</sup> The UK government considered the human rights effects to be decisive, and said that major changes to the project would need to be made by the Turkish government before export guarantees could be granted.<sup>176</sup> This example shows that the UK government recognises the need to look to and adhere to international standards in their extra-national operations.

## Development Assistance

114. The extra-national activities of richer states often consist of development assistance to other, poorer countries. In an increasingly globalised world, there is an increased debate as to whether there is a right for people in developing countries to receive development assistance, and whether this obligation is of a moral or a legal nature.<sup>177</sup> The concept of a right to development, as established in the discourse of the 1970s and 1980s and solidified through the adoption of the Declaration on the Right to Development in 1986,<sup>178</sup> directly link development with human rights, and have by some been interpreted to imply a right to receive development assistance.<sup>179</sup> The Declaration, which is to be considered soft-law, establishes that
115. The Right to development is an inalienable human right by virtue of which every human person, and all peoples are entitled to participate in, contribute to, and enjoy economic, social cultural and political development, in which all human rights and fundamental freedoms can be fully realized.<sup>180</sup>
116. The Declaration also makes references to the international aspects of this right, in referring to the purposes and principles of the UN Charter, recognising that development is a process which “aims at the constant improvement of the well-being of the entire population and of all individuals”<sup>181</sup>, and refers to Article 28 of the Universal Declaration of Human Rights.<sup>182</sup> Thus, there are indications in soft law that there may be a right to development assistance, although it has not been widely recognised.

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<sup>173</sup> E/CN.4/RES/2001/33, para. 4.

<sup>174</sup> *The observer*, Sunday July 1, 2001.

<sup>175</sup> *Ibid.*

<sup>176</sup> *Ibid.*

<sup>177</sup> Ref.

<sup>178</sup> UN General Assembly Resolution 41/128 of 4 December 1986.

<sup>179</sup> Ref.

<sup>180</sup> Article 1, Declaration on the Right to Development.

<sup>181</sup> Declaration on the Right to development, Preamble, para. 2.

<sup>182</sup> *Ibid.*, para. 3.

117. Another aspect of human rights in regards to development assistance in an extra-national perspective, is the question whether there is a right to receive the assistance granted in accordance with human rights. Or in other words, is there a duty upon the state providing development assistance to ensure that this assistance respects, protects, and possibly fulfils human rights? Based on the above discussion on the implications of Article 2(1) of the International Covenant on Economic, Social and Cultural Rights, that states are to take steps, through international co-operation and assistance, one can quite safely conclude that at least the states that have ratified the Covenant is under an obligation to ensure that their assistance does not violate economic and social rights. It is also possible to go further and to say that these states will have the positive obligation to promote economic, social and cultural rights through their development assistance.
118. As an example of this, one could discuss reports of the UK's government backing of a plan in India of a scheme where there is fear that millions of people will be displaced from rural areas.<sup>183</sup> According to a consulting firm, Andhra Pradesh (the relevant Indian state) would "introduce GM crops and giant US prairie-style farms to produce food for export".<sup>184</sup> Although not directly involved in the GM project itself, British development assistance has been used to improve the region's infrastructure of implement the project.<sup>185</sup> According to a DFID report on the plans (so-called Vision 2020), "There is nothing about providing alternative income for those displaced" (and estimated 20 million people over 20 years), and there were raised concerns over "negative consequences on food security".<sup>186</sup>
119. In this example, it is clear that development assistance provided by the UK government would contribute to human rights violations of a large number of people in India. This would be contrary to Britain's obligations under the Covenant, and these concerns should be addressed in the development assistance plans. This does not need to imply that assistance could not be granted to the Indian state, but rather that these concerns need to be taken seriously, and that alternative measures are included to ensure that human rights violations are not directly results of the assistance granted by the UK.
120. Thus, governments that have ratified the ICESCR are under an obligation to take the human rights effects of their development assistance into account with a view to ensure that their obligations to respect, protect and fulfil are adhered to. The customary international human rights law provisions will bind states that have not ratified this covenant, to the extent that they should not violate human rights through their development assistance. Thus, as an example, assuming that the United States' government was involved in the above mentioned projects in India, where 20 million people may be displaced and lose their livelihood, what would the position be? The United States has not ratified the ICESCR, and it is therefore not possible to argue that the government is under an obligation to fulfil the Covenant provisions. Nevertheless, the US is under an obligation to observe their international customary law obligations, which would imply an obligation not to violate fundamental human rights. In the Indian example, the displacement of this large number of people without provisions for their future livelihood, would easily risk violations of the right to food, health and the right to life. It is predicted that many of these people who are small farmers and labourers will be forced to migrate to the cities in search of work.<sup>187</sup> This will for most of them result in deterioration in their nutritional and health standards, and endanger the life of these already vulnerable people. This would thus result in violations of the core content of these rights,<sup>188</sup> or in other words, the

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<sup>183</sup> "This is the Path to Disaster" *The Guardian*, Saturday, July 7, 2001.

<sup>184</sup> *Ibid.*

<sup>185</sup> *Ibid.*

<sup>186</sup> *Ibid.*

<sup>187</sup> *The guardian* Clare Short in Indian GM crops row, 7 July 2001.

<sup>188</sup> As discussed above ...

customary content of the rights. States that have not ratified the Covenant would therefore be in breach of their extra-national obligations if supporting such a project.

### **Participation in International Organisations, including the Bretton Woods Institutions**

121. A major part of states extra-national activities are undertaken through the intergovernmental organisations, such as the United Nations and its Specialised Agencies. In their operations through these agencies, states are legally obligated to carry out the mandate of the organisation, but at the same time to do this within the general framework of international law. Thus, the work that states decide that intergovernmental organisations should do, needs to be in accordance with the provisions of international law, and in particular the United Nations Charter. The United Nations Charter, does – as has been established above – include the promotion of respect for human rights as one of its main purposes.<sup>189</sup> Article 103 of the United Nations Charter, states that
122. In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.
123. Therefore, states will be under an international law obligation to observe the treaties establishing the international organisations through which they carry out their extra-national obligations, but this will have to be done with a view to respecting the obligations they have as members of the United Nations. This would imply that states, in institutions such as the World Bank, the World Health Organisation, UNICEF and the IMF, would be under an obligation to take account of the human rights effects of their decisions and their voting behaviour. We have already seen that the Committee on Economic, Social and Cultural Rights ask governments whether they pay attention to the possible negative effects on economic, social and cultural rights of the decisions that they take as members of these – and other – organisations.

### **Security co-operation**

124. A very sensitive topic, and not sufficiently researched, is the question of states security or military co-operation. Much of states extra-national operations, and financial support, is in regards to military and security co-operation. Little attention has been paid to the human rights effect of this co-operation.
125. Foreign states military operations and co-operation may directly harm the local population. This can be the result of nuclear testing, or testing of other weapons. It can result from valuable land being taken for military purposes without adequate compensation. Or it can result from the spreading of diseases, etc. In a recent example of the operations of the British Army in Kenya, it is reported that “British munitions will have been responsible for a significant proportion, and possibly all, deaths and injuries caused by UXO (unexploded ordnance)”.<sup>190</sup> The British Army has been using in training areas in Northern Kenya for a number of years, and many individuals have been maimed or killed by unexploded live ammunition that has been left in the area. The report confirms that much of this ammunition can be traced back to the British army through the type, or production numbers on the devices.<sup>191</sup> Thus, in this situation, many people, including a large number of children have suffered in terms of their right to health and right to

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<sup>189</sup> UN Charter, Article 1(3).

<sup>190</sup> Deadly munitions legacy: The Archer's Post Range report. Accessed in *The Observer*, Sunday, July 1, 2001. [www.observer.co.uk/politics/story/0,6903,515362,00.html](http://www.observer.co.uk/politics/story/0,6903,515362,00.html) accessed on 13 July 2001.

<sup>191</sup> *Ibid.*

life, as a direct result of the British Army's failure to clean up unexploded munitions. According to the report, "it is an indisputable fact that a proportion of all ammunition fired will not function correctly and will fail to detonate. Estimates of the percentage of these failure rates vary, but an accepted working figure is 15%".<sup>192</sup> Thus in this situation, and in similar situations where foreign armies are engaged in military activities, the state is under an obligation to ensure that civilians in this other state is not harmed by the activities. In the above example, it would be pertinent to call for the British military to clean up the UXO's to avoid that civilian Kenyans are harmed.

126. There are certainly other scenarios in military co-operation that may bring about human rights concerns. The support by foreign states to oppressive regimes may be cause for concern; the spending of aid money on expensive military equipment, the export of weaponry aimed at controlling opposition groups, rather than for defensive use may also be reasons for alarm. The main point in this discussion is that states should, when engaging in any kind of military operation abroad, or in security co-operation, consider the human rights effect there activities may have on the population in the other country, and in case of negative effect seek to address these effects before causing harm, or being part of harmful activities.

### **Concluding remarks**

127. This part has attempted to bring in some concrete examples as to how extra-national obligations of states may manifest themselves. The sections above should merely serve as examples of what kind of issues may be relevant, rather than being seen as a complete analysis of this very complex matter. Much more research needs to be carried out in this field, before any firm conclusions can be drawn as to the practical implications of the obligations in the various fields of international interaction among states. One conclusion that can be drawn is that the human rights effects of the activities of states need to become a regular feature in any extra-national activity, and in case of threats to individuals enjoyment of economic, social and cultural rights (as well as civil and political rights), a review of the proposed activity needs to be undertaken. Human Rights in general, and economic, social and cultural rights in particular, are heavily influenced by the activities of other states, and should be given special attention, due to the already established obligations based on international human rights law.

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<sup>192</sup>*Ibid.*