The Transnational scope and application of the International Covenant on Economic, Social and Cultural Rights

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DECLARATION

I certify that the attached is all my own work. I understand that I may be penalised if I use the words of others without acknowledgement.

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1. INTRODUCTION

1.1 Background

> "[I]n a globalizing world the increasing interconnectedness of nations and peoples has made the differences between them more glaring. A girl born in Japan today may have a 50% chance of seeing the 22nd century – while a newborn in Afghanistan has a 1 in 4 chance of dying before the age of 5. And the richest 5% of the world's people have incomes 114 times those of the poorest 5%. Every day more than 30,000 children around the world die of preventable diseases, and nearly 14,000 people are affected with HIV/AIDS.…In Sun-Saharan Africa human development has actually regressed in recent years, and the lives of its very poor people are getting worse. The share of people living on $1 a day was about the same at the end of the 1990s – 47% - as at the start".[1]

The full enjoyment of economic, social and cultural rights still remains illusory for a significant portion of humanity 27 years after the entry into force of the International Covenant on Economic, Social and Cultural rights[2] (hereinafter the ICESCR). The Covenant was drafted in combination with its sister Covenant, the International Covenant on Civil and Political rights[3] (hereinafter the ICCPR), with the object of creating binding legal obligations for States to bring about the full realization of all human rights. A new world order based on the freedom from want and from fear is envisioned in both Covenants. Within the ICESCR this is to be achieved by States both individually and in the context of international cooperation.

Meaningful international cooperation amongst States towards the realisation the of economic, social and cultural rights of all persons has not always been fully forthcoming however. States have been criticised for what has been labelled their increasingly "schizophrenic" behaviour, while they ratify legally binding international human rights instruments, they sign trade, financial and monetary agreements the clauses of which endanger the very rights the States committed

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[1] UNDP, Human Development Report, 2002 p. 13.
[2] International Covenant on Economic, Social and Cultural Rights, Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 3 January 1976, 993 U.N.T.S. 3.
[3] International Covenant on Civil and Political Rights, Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976, 999 U.N.T.S. 171.

themselves to protecting and respecting.[4] The incoherence between States policies with regard to human rights and the adverse impact of the other aspects of their external activities, such as trade rules, structural adjustment policies, large scale and harmful development cooperation projects on human rights, is constantly and increasingly being highlighted.[5] There are gross and grotesque disparities in resource allocation between countries, and States that can afford to be generous frequently do not live up to their international obligations.[6] The rate of official development assistance from DAC countries to developing countries and multilateral organisations has fallen from an average of 0.33 per cent of GNI in the 1990's ($54,813 million), to 0.22 per cent of GNI in 2001 ($52,336 million).[7] However the need for international assistance and meaningful cooperation for the realisation of economic, social and cultural rights is as pertinent and urgent today as it was when the Covenant was drafted.

The central question in this paper is, do the terms of the ICESCR create transnational legal obligations for States relating to the human rights effects of their external activities, and if so, what is the nature and scope of States' transnational obligations? The normative starting point on the question of the transnational scope of the ICESCR is article 2(1) of the Covenant. This provision has been described as the "linchpin" of the Covenant in that it describes the duties incumbent upon States parties in the realization of the rights in the Covenant.[8] The article reads as follows:

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

[4] International Federation for Human Rights, 2001, "Open Letter: FIDH Urges G8 countries to ensure the integration of human rights into export credit agency guidelines", at www.fidh.org, last accessed 7/7/2003.
[5] Oxfam, 2003, "EU Hypocrisy unmasked: why EU trade policy hurts development".
[6] Chapman & Russell, 2002, in Chapman and Russell, 2002, (eds.), p. 11.
[7] OECD, 2002, Development Cooperation report, Statistical Annex, www.oecd.org last accessed 7/7/2003.
[8] Craven, 1995, p. 106.

The question of the transnational scope of a human rights convention may seem somewhat unusual. The primary focus of international human rights law is on the domestic obligations of the State as the primary duty holder towards the persons residing within its territory. The State is the primary duty holder because the world is arranged along the lines of sovereign, and in theory equal States with primary responsibility to govern their own polity.[9] The State is the primary subject of international law which, "besides controlling territory in a stable and permanent way, exercise[s] the principle lawmaking and executive 'functions' proper of any legal order".[10] States therefore possess full legal capacity having the ability to be vested with rights, powers and obligations. In examining the transnational scope of the Covenant it is not purported to depart from this basic principle.

However, the terms of the ICESCR require States to realise economic, social and cultural rights not only individually, but also through international assistance and cooperation. The Limburg Principles provide, "international assistance and cooperation must be directed towards the establishment of a social and international order in which the rights and freedoms set forth in the Covenant can be fully realised".**[11]** Kunnemann asserts, "[a] key element to every systematic treatment of obligations under the ICESCR will have to be a renewed understanding of the term cooperation. In recent years the term has been reduced to and identified with development aid. It is necessary to return to the original meaning of cooperation as 'working together' in the realisation of human rights for each person".[12]

Given the commitment of States to bring about economic, social and cultural rights for all persons on the basis of international cooperation and assistance, the question therefore arises whether States exercising transnational authority are obliged to respect the rights of the persons affected by their external activities, on account of the fact that those States are parties to human rights treaties, in this case the ICESCR? Faced with the challenges of globalisation there is a growing interest within the international human rights community in transnational human rights obligations. In 1991 the Special Rapporteur for the realisation of economic, social and cultural

[9] Cassese, 2001, p. 46.
[10] Cassese, 2001, p. 106.
[11] The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, E/CN.4/1987/17, Annex, para. 30
[12] Kunnemann, 2003, p. 7.

rights of the then Sub-Commission for the Prevention of Discrimination and Protection of Minorities commented, "[t]he increasing integration and internationalisation of the global economy, as well as political and social structures and processes, increase the importance of international cooperation and responsibility. Never before have the actions of State "X" had as much real or potential impact upon State "Y" than at present….the relevance [of this fact] to the realisation of economic, social and cultural rights within the human rights framework, must be consistently addressed".[13] Skogly and Gibney assert that

> "the actual effect of transnational operations by states may be more common and visible in the area of economic and social rights. This effect may be explained by the nature of states' transnational activities at the beginning of the twenty-first century. States are commonly involved in international security issues, in development assistance, in trade relations, and in work with intergovernmental organizations, all of which promote international economic and social development. Thus, they are involved in activities that influence people's financial and material resources, through employment opportunities…through the advancement of liberalized trade, agricultural developments and advancement, educational opportunities, and also through arms sales, which can greatly influence the resources available for economic and social development necessary for the improvement in levels of human rights enjoyment".[14]

Despite the increased interest in this issue there are relatively few systematic attempts to deal with transnational human rights obligations, in particular focusing solely on economic, social and cultural rights.[15] However it is worth noting that the UN Committee on Economic, Social and

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[13] E/CN.4/Sub.2/1991/17, "Realization of economic, social and cultural rights, Second progress report" prepared by Mr. Danilo Türk, Special Rapporteur para. 52 (h).

[14] Skogly & Gibney, 2002, p. 78. These commentators point to the recent White Paper of the Norwegian government calling for a strenghthening of internationally recognized human rights beyond its own borders in which it states, "Human rights are for all individuals, whether or not they live in Norway or in other parts of the world. This universality principle gives a moral and legal imperative for all to contribute to global human rights protection". They also point to Swedish Government White Paper from 1998 which emphasises that an integrated human rights policy shall be an integral part of the entirety of Swedish foreign policy, including development assistance, trade relations, military and security cooperation, voting in intergovernmental organizations, and refugee policy.

[15] Those that do exist include: Craven, 1995, pp. 144-150; Gibney, Tomasevski & Vedsted-Hansen, 1999, pp. 267-295; Skogly & Gibney, 2002, pp. 781-798; Kunnemann, 2003, pp. 1-16. However different terminology is used by the various commentators. Craven uses the term "international obligations"; Gibney, Tomasevski & Vedsted-Hansen use the term "transnational obligations"; Skogly & Gibney also use the term "transnational obligations". Finally Kunnemann uses the term "extraterritorial obligations", however within "extraterritorial obligations" he

Cultural Rights has recently received a parallel report from Food Information Action Network that focuses on Germany's "international obligations" under the Covenant, and on the adverse impact of Germany's external activities both bilaterally and through the medium of international organisations on the right to food in other countries.[16]

Human Rights law concerns all human beings who are born free and equal, in dignity and in rights. Human rights are a proclamation and interpretation of universal values and concern matters between the State and its own population, rather than the traditional conception of international law as concerning solely inter-state relations.[17] Article 2 of the Universal Declaration of Human Rights provides, "Everybody is entitled to all the rights and freedoms set forth in this Declaration…no distinction shall be made on the basis of the political, jurisdictional or international status of a country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty". Therefore human rights are guaranteed to all persons regardless of their status within a particular territory, or the status of the particular territory itself. As an expression of universal values human rights should not be unduly circumscribed by questions of territory and jurisdiction.

The central question examined in chapter two of this paper is, can article 2(1) the ICESCR can be interpreted to give rise to transnational legal obligations for State A, towards the persons residing outside its territory whose economic, social and cultural rights have been, or have the possibility of being adversely affected by the external activities of State A? The question of the Covenants transnational scope is examined by reference to the interpretative principles of the law of treaties. Moreover, in chapter two it is asked, what approach does the Human Rights Committee and the European Court of Human Rights take in relation to the application of the ICCPR and the European Convention on Human Rights[18] (hereinafter the ECHR) beyond the national territory of the State, and what is the relevance of this jurisprudence for the transnational interpretation of the ICESCR?

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distinguishes between "external obligations" and "international obligations". In this paper the phrase "transnational obligations" is used. However the distinction between what Kunnemann labels "external obligations" and "international obligations" will be explored in Chapter 4.

[16] Windfuhr, 2001.

[17] Rosas, 1995, pp. 62-63.

[18] European Convention on Human Rights and Fundamental Freedoms, (ETS No. 5), entered into force Sept. 3, 1953, 213 U.N.T.S. 222.

The central questions examined in chapter three are, what approach does the Committee on Economic, Social and Cultural rights adopt in relation to the transnational scope of the ICESCR? Furthermore, what is the nature and scope of the transnational obligations under the Covenant in light of States threefold categorisation of obligations, to respect, protect and fulfil the economic, social and cultural rights of all persons?

In chapter four the nature and scope of transnational obligations is further examined. In particular it is asked, what range of external activities that States are involved in do transnational obligations apply to? Moreover, what are the implications for monitoring States Parties compliance with their transnational obligations for the Committee on Economic, Social and Cultural rights, in relation to the examination of State party reports, and the terms of the draft optional protocol?

Finally, in chapter five practical examples of the external activities States engage in that have resulted in violations of economic, social and cultural rights are provided. The central question of chapter five is, what is the relevance of States transnational obligations to State practice both at a bilateral and multilateral level?

1.2 Method and materials

This paper adopts a legal dogmatic methodology by examining the interpretation of a central norm contained in article 2 (1) of the ICESCR with reference to different legal sources. The rules of interpretation under the Vienna Convention on the Law of Treaties are examined, as well as the soft law, non-binding interpretative work of the Committee on Economic, Social and Cultural rights. In addition relevant jurisprudence in relation to the question of the transnational application of human rights conventions generally is also examined. The research for the fifth chapter was carried out partly from internet sources, in particular in relation to the adverse impact of development cooperation activities, and information relating to the structure and activities of the international financial institutions.

2. THE TRANSNATIONAL SCOPE OF THE ICESCR.

2.1 The transnational scope of article 2(1) of the ICESCR with reference to the interpretative principles of the law of treaties

2.1.1 The interpretation of article 2(1)

As previously mentioned the normative starting point on the question of the transnational scope of the ICESCR is article 2(1) of the Covenant. To reiterate the article reads as follows:

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

However article 2(1) is not the only provision in the Covenant that expresses the requirement that States cooperate internationally for the achievement of economic, social and cultural rights. These words are reiterated in article 11 in relation to the right to an adequate standard of living, in which States parties are obliged to "take all appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent". In recognition of the fundamental right of everyone to be free from hunger, article 11 also provides States shall take steps, "individually and through international co-operation", to ensure this fundamental right. Article 23 further elaborates that international action for the achievement of the rights recognized in the Covenant includes, "such methods as the conclusion of conventions, the adoption of recommendations, the furnishing of technical assistance and the holding of regional meetings for the purpose of consultation and study organized in conjunction with the Governments concerned". Therefore, the concept of international cooperation and assistance is referred to throughout the body of the Covenant and is not isolated to the terms of article 2(1).

The interpretation of article 2(1) is foundational however, as it is determinative of the nature of the general legal obligations undertaken by States parties to the Covenant as a whole. In the words of the Committee on Economic, Social and Cultural Rights in its general comment number 3, "article 2 is of particular importance to a full understanding of the Covenant and must be seen as having a dynamic relationship with all of the other provisions of the Covenant".[19]

2.1.2 The territorial application of an international treaty

The Vienna Convention on the Law of Treaties[20] (hereinafter referred to as the VCLT) reflects to a large extent customary international law on the question of the interpretation of international treaty law.[21] Its principles of interpretation are therefore of central relevance in any examination of the interpretation of an international treaty.[22]

With regard to the territorial applicability of an international treaty Article 29 of the VCLT provides:

> "Unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its *entire* territory", (emphasis added).

Article 29 creates the general rule that a treaty will be interpreted to apply to the entire territory of the State, unless a contrary intention can be established, by reference to the text, or by other means. However article 29 does not provide that a treaty is binding upon each State party *only* in respect of its entire territory. As Widdows observes, "it leaves open the question of the extent to which States bind themselves in respect of activity outside their territory when the question is not explicitly raised in the relevant treaty".[23] The International Law Commission in the drafting the

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[19] General Comment 3, "The nature of States parties obligations", Article 2(1), E/1991/23, para. 1.
[20] Vienna Convention on the Law of Treaties, signed at Vienna, 23 May 1969, entered into force, 27 January 1980, 1155 U.N.T.S. 331.
[21] Bernhardt R., 1999, p. 13.
[22] In *Golder v. United Kingdom*, 1975, Application no. 00004451/70, the European Court of Human Rights accepted the Court "should be guided by Article 31 to 33 of the Vienna Convention of 23 May 1969 on the Law of Treaties…[these articles] enunciate in essence generally accepted principles of international law to which the Court has already referred on occasion.", para. 19.
[23] Widdows K., 1986, p. 724.

VCLT asserted that the "territorial scope of a treaty depends on the intention of the parties and that it is only necessary in the present articles to formulate the general rule which should apply in the absence of any specific provision or indication in the treaty as to its territorial scope".[24] The VCLT was drafted in the midst of decolonisation, and at the height of awareness that some states had other territories than the metropolitan territory.

However, during the drafting of the VCLT a number of governments offered the International Law Commission their views on whether an international treaty can be interpreted to apply beyond the territory of the State. The Netherlands delegation believed that article 29 should take account of the operation of treaties outside the territory of the States, and proposed the following text, "[t]he scope of a treaty extends to the entire territory of each Party and beyond it as far as the jurisdiction of the State extends under international law unless the contrary appears from the treaty".[25] The United States suggested as an appropriate formula, "[a] treaty also applies beyond the territory of each Party whenever such wider application is clearly intended".[26]

The Special Rapporteur of the International Law Commission replied to these observations by noting that the Commission had regarded the article as concerned essentially with the application of treaties to the territory of States parties and not beyond that. While he did not feel that his formulation seemed open to the construction that it would implicitly exclude the application of a treaty beyond the territory of a State, he suggested the following additional paragraph for clarification, "[a] treaty may also apply in areas outside the territories of any of the parties in relation to matters which are within their competence with respect to those areas if it appears from the treaty that such application is intended".[27]

On this point however, the majority of drafters favoured leaving the article as it now appears in the VCLT without explicitly dealing with the question of whether a treaty can be interpreted to apply beyond the national territory of the State. It seems clear from the drafting debate

[24] [1964] 2 Yearbook of the I.L.C. , p. 179.
[25] [1966] 2 Yearbook of the I.L.C, p. 64.
[26] Ibid. Finland and Greece offered similar comments.
[27] Ibid.

surrounding article 29 that it was never the intention of the drafters of the VCLT to exclude the possibility of applying a treaty beyond the national territory of a State. Article 29 of the VCLT therefore clearly does not preclude the transnational scope of the provisions of an international treaty where such an interpretation is in accordance with the other principles of interpretation contained in the VCLT.

2.1.3 The natural and ordinary meaning of the wording of article 2(1)

The starting point of treaty interpretation is that a treaty should be interpreted in good faith. In accordance with article 31(1) of the VCLT the ordinary meaning of the relevant text must be interpreted in the context of the object and purpose of a treaty. According to Brownlie a corollary of the principle of ordinary meaning is the principle of integration, the meaning must emerge in the context of the treaty as a whole in light of its objects and purposes.[28]

Therefore in interpreting article 2(1) of the Covenant the natural and ordinary meaning of the words "individually and through international assistance and cooperation especially economic and technical" must be assessed in light of the object and purpose of the Covenant taken as a whole. The Covenant, together with the Universal Declaration and the ICCPR, was intended to form the basis of a new world order based on the values of freedom, justice and world peace following World War II.[29] The preamble of the Covenant states, "in accordance with the Universal Declaration on Human Rights, the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights, as well as his civil and political rights". The object and purpose of the Covenant is to create legally binding obligations for States to realise progressively the economic, social and cultural rights of all persons born free and equal in dignity and in rights. More generally, Craven asserts that the object and purpose of the Covenant, as a human rights treaty, "means that its terms are to be interpreted in a manner favourable to the individual and….in particular, limitations and restrictions on rights are to be construed narrowly".[30] In

[28] Brownlie, 1998, p. 634.
[29] Craven, 1995, p. 1.
[30] Ibid. p. 3.

particular on the question of whether a human rights convention can be applied beyond the national territory of a State Meron asserts, "[i]n view of the purposes and objects of human rights treaties, there is no a priori reason to limit a state's obligation to respect human rights to its national territory".[31] References to international cooperation appear throughout the Covenant as a whole and are not merely isolated to the general obligations contained in article 2(1). The meaning of international assistance and cooperation is somewhat elaborated upon in article 22[32] and article 23[33], however there is no indication that these articles are to provide a finite definition of the concept of international assistance and cooperation.

In this context, in accordance with the natural and ordinary meaning of the wording of the provision, clearly States are required to act not only alone, but in community with other States to assist and cooperate in the progressive realisation of the rights contained in the Covenant. At a minimal level this implies States are not permitted to take steps that adversely impact upon the economic, social and cultural rights of persons outside of their territory. Such steps would clearly be in direct contradiction of their commitment to assist and cooperate with other States in the realisation of the rights contained in the Covenant. However the natural, ordinary meaning of the words also implies a positive obligation to assist and cooperate in bringing about the full realization of economic social and cultural rights in community with other States. Craven asserts that "cooperation" is a wider term than "assistance", providing for mutual action directed towards a common goal.[34] Whereas "assistance" implies the provision or transfer of some good from one State to another.[35]

[31] Meron, 1995, p. 80.
[32] Article 22 provides, "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 effective progressive implementation of the present Covenant".
[33] Article 23 provides "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".
[34] Craven, 1995, p. 147.
[35] Ibid.

There is no territorial or jurisdictional clause contained in the ICESCR in contrast to its sister Covenant the ICCPR. This terminology is notably absent, not only from its general article 2(1) on the nature of obligations, but also from the rest of the Covenant.[36] The two international Covenants were drafted simultaneously, originally forming part of a unified international covenant, therefore differences in the language used can be considered significant.[37] In contrasting the texts of article 2(1) of the two Covenants Skogly and Gibney observe "[t]hese texts seem to indicate that the obligations upon the ratifying states are tied more firmly to national borders in terms of civil and political rights than for economic and social rights…it seems that a preliminary conclusion can be drawn that the drafters of the ICESCR have envisioned that the fulfilment of these rights has transnational dimensions as well as domestic ones".[38]

There is no indication that the measures taken "individually" refer to internal obligations and those "through international assistance and cooperation" to external obligations.[39] Both types of obligations, domestic and international can be undertaken either individually or through

[36] The only exception is article 14 on compulsory primary education which provides, "Each State Party to the present Covenant which, at the time of becoming a Party, has not been able *to secure in its metropolitan territory or other territories under its jurisdiction* compulsory primary education, free of charge, undertakes, within two years, to work out and adopt a detailed plan of actions for the progressive implementation, within a reasonable number of years, to be fixed in the plan, of the principle of compulsory education free of charge for all", (emphasis added).
[37] Craven, 1995, pp. 16-22 provides a history of the division of the unified International Covenant of Human Rights into two separate Covenants as follows, "In 1948, the Commission on Human Rights was requested by the General Assembly to give priority to the preparation of a draft Covenant on human rights and measures of implementation…. At its sixth session in 1950 the Commission continued with its consideration of the draft Covenant, but decided that as additional time was needed to discuss economic, social and cultural rights and consult the specialized agencies concerned, it would be best to adopt an initial draft Covenant limited to civil and political rights with a view to adopting further Covenants on other rights at a later stage. It therefore resolved to begin drafting a separate Covenant on economic, social and cultural rights at its next session in 1951….To resolve something which had become a matter of some contention, ECOSOC requested the General Assembly to make a policy decision as to the desirability of including articles on economic, social and cultural rights in the draft Covenant. After a long and acrimonious debate, the General Assembly declared *inter alia* that 'the enjoyment of civil and political freedoms and of economic, social and cultural rights are interconnected and interdependent'. As such the Commission was to include in the draft Covenant 'a clear expression of economic, social, and cultural rights in a manner which relates them to the civil and political freedoms proclaimed by the draft Covenant'. …Despite the General Assembly's instructions, the Commission continued to treat economic, social, and cultural rights as a distinct category of rights…Faced with the unwieldy prospect of having a 'covenant within a covenant' (in the sense of having two separate implementation systems), ECOSOC was forced to request the General Assembly to reconsider its decision and allow the draft Covenant be divided into two separate instruments. In the following year the General Assembly's Third Committee conducted an extended debate on the draft Covenant. After deciding not to take on the drafting of the Covenant itself, the Third Committee adopted a joint amendment, directing the Commission to draft two separate Covenants".
[38] Skogly & Gibney, 2002, p. 790.
[39] Kunnemann, 2003, p. 2.

international cooperation.[40] Moreover, there is no indication that international obligations to progressively realise the economic, social and cultural rights are secondary only to the domestic obligations. These rights are to be realised equally by both domestic and international measures. Therefore there is clearly a collective aspect to the duty holding under the ICESCR.

2.1.4 The "*travaux preparatoires*" of the ICESCR

According to article 32 of the VCLT the *travaux preparatoires* may be used as a supplementary means of interpretation that may be resorted to, in order to confirm an interpretation adopted under article 31, or to determine the meaning of a provision where the initial interpretation remains ambiguous.

An analysis of the drafting debates surrounding the Covenant reveals that at the first drafting stages in 1951/52 the suggestion to include the phrase "international assistance and co-operation", came *inter alia* from the US delegation.[41] This proposal was supported by a large number of delegations including the Danish delegation who stated that, "countries with insufficient resources should be able to obtain help under the technical assistance programmes or similar projects".[42] The Egyptian delegation asserted 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".[43] India similarly stated that "international cooperation [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".[44]

When both sets of rights were to be covered in one Covenant during the drafting period of this Covenant, it was debated whether to have a separate general clause on the obligations pertaining

[40] Ibid. Kunnemann uses the following example to illustrate this point, "The obligation of a neighbouring country upstream not to destroy my community's/country's food production by monopolising our joint river basin with dams is an extraterritorial obligation that can be undertaken individually. On the other hand, my state could need to co-operate internationally to meet its territorial obligations, for example in a state of emergency for securing domestic access to food through international assistance".
[41] E/CN.4/254/Rev.2.
[42] E/CN.4/SR.236.
[43] E/CN.4/SR.236.
[44] E/CN.4/SR.231.

to economic, social and cultural rights.[45] The first drafts of the article that has become article 2 of the ICESCR were draft article 19 of the unified international covenant. There was a clear distinction between civil and political rights, and economic, social and cultural rights with regard to the nature of the general obligations to be undertaken. The civil and political rights part of the 'unified' covenant referred to States obligations towards "individuals within its territory and subject to its jurisdiction". On the other hand draft article 19 did not include a territorial or jurisdictional clause. On the contrary, the representatives in the drafting process clearly recognised the need for international cooperation and assistance, and that wealthier States had a duty to assist less well-off States to realise economic social and cultural rights.[46]

During the drafting process therefore there appears to have been a general understanding that the full realization of economic, social and cultural rights in developing countries is to some extent dependent upon the provision of international assistance and cooperation. The drafting debates therefore confirm that it was recognised that economic, social and cultural rights can only be effectively realised, particularly in developing nations, through international cooperation and solidarity.

2.2 The transnational application of other international human rights conventions

2.2.1 A textual comparison between the various treaties

A textual analysis of a range of international and regional human rights instruments demonstrates that some, but not all human rights treaties contain a jurisdictional and, or territorial clause. Article 2 of the ECHR guarantees that contracting parties, "shall secure to everyone within their jurisdiction…" the rights contained in the Convention. The American Convention on Human Rights[47] similarly guarantees the rights and freedoms recognized by the Convention to "all persons subject to their jurisdiction". Article 2(1) of the ICCPR contains both a jurisdictional and

[45] Skogly, 2002, p. 18.
[46] Ibid.
[47] American Convention on Human Rights, entered into force 1978, O.A.S. Treaties series no. 36, 1144 U.N.T.S. 123.

territorial clause providing the rights contained therein shall be guaranteed to all persons "within its territory and subject to its jurisdiction".

The Convention on the Rights of the Child[48] (hereinafter the CRC) contains both civil and political rights, as well as economic, social and cultural rights. Article 2(1) provides, "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..", (emphasis added). However in article 4 the CRC provides, "[w]ith 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*" (emphasis added). The additional element that economic, social and cultural rights are to be achieved in the context of international cooperation has therefore been maintained and reinforced in this recent and most widely ratified multilateral human rights convention.

The American Declaration of the Rights and Freedoms of Man[49] similar to the ICESCR does not contain a jurisdictional or territorial clause. Article II provides, "All persons are equal before the law and have the rights and duties established in this Declaration, without distinction as to race, sex, language, creed or any other factor". In comparing jurisdictional provisions in similar human rights instruments the European Court of Human Rights in the *Bankovic*[50] case examined the *Coard*[51] case from the Inter-American Commission on Human Rights in which the Commission applied the Declaration as creating obligations for the United States beyond its national territory.[52] Significantly however the European Court of Human Rights in *Bankovic* in

[48] Convention on the Rights of the Child, Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989, entered into force Sept. 2, 1990, U.N. Doc. A/44/49 (1989).
[49] American Declaration of the Rights and Freedoms of Man, O.A.S. Res. XXX adopted by the ninth International Conference of American States, 1948.
[50] *Bankovic and Others v. Belgium and 16 other NATO States*,2002, Application 52207/99.
[51] *Coard v. United States*, Case 10.951, Inter-American Commission on Human Rights, 109/99 (1999).
[52] In the *Coard* case the Inter-American Commission of Human Rights examined complaints about the applicants' detention and treatment by United States' forces in the first days of the military operation in Grenada and commented on the extraterritorial application of the Declaration as follows in para. 37: "While the extraterritorial application of the American Declaration has not been placed at issue by the parties, the Commission finds it pertinent to note that, under certain circumstances, the exercise of its jurisdiction over acts with an extra-territorial locus will not only be consistent with, but required by, the norms which pertain. The fundamental rights of the individual are proclaimed in the Americas on the basis of the principles of equality and non-discrimination – 'without distinction as to race, nationality, creed or sex'. …*Given that individual rights inhere simply by virtue of a person's humanity*, each American State is obliged to uphold the protected of any person subject to its jurisdiction.

interpreting the territorial scope of the ECHR restrictively, distinguished the *Coard* case on the basis that Article II of the American Declaration "contains no explicit limitation of jurisdiction".[53] The European Court of Human Rights therefore sees a clear distinction between the types of obligations that exist in relation to those treaties with a jurisdictional limitation clause, and those that do not contain such a clause. This implies that those human rights treaties that do not have a jurisdictional and, or territorial limitation clause may be interpreted more easily to apply to activity occurring outside the national territory of a state.

2.2.2 The application of the ICCPR beyond the national territory of the State

The Human Rights Committee has interpreted the ICCPR to give rise to obligations beyond the territory of the State in a number of instances in both its advisory opinions under the optional protocol, and in its concluding observations on State party reports. As previously mentioned article 2(1) obliges States to recognise the rights contained therein to those persons "within its territory and subject to its jurisdiction".

There have been a number of individual complaints taken against Uruguay in relation to the issuance of passports. In the case of *Sophie Vidal Martins v. Uruguay*[54] the Committee found that article 12 (2) of the ICCPR had been violated where Uruguay refused to issue a passport to the author of the complaint who was resident in Mexico.[55] According to the Committee the issuance of a passport to a Uruguayan citizen is clearly a matter within the jurisdiction of the Uruguayan authorities even where the individual resides abroad.[56] The Committee asserted article 2(1), "cannot be interpreted as limiting the obligations of Uruguay under article 12(2) to citizens within its own territory".[57] Moreover, the Committee asserted, a passport is a means of enabling the individual to "leave any country, including his own" as required by article 12(2) and

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While this most commonly refers to persons within a state's territory, it may, under given circumstances, refer to conduct with an exterritorial locus where the person concerned is present in the territory of one state, but subject to the control of another state – usually through the acts of the latter's agents abroad. In principle, the inquiry turns not on the presumed victim's nationality or presence within a particular geographic area, but on whether, under the specific circumstances, the State observed the rights of a person subject to its authority and control" (emphasis added).

[53] *Bankovic*, para. 78.

[54] *Sophie Vidal Martins v. Uruguay*, CCPR/C/15/D/57/1979.

[55] See further Schenin, 2000, p. 127-134.

[56] *Sophie Vidal Martins v. Uruguay*, para. 7

[57] Ibid.

therefore its follows from the very nature of this right that in the case of a citizen resident abroad it imposes obligations both on the State of residence and on the State of nationality.[58] The Committee reiterated this view in the individual complaint of *Carlos Varela Nunez v. Uruguay.*[59]

The Uruguayan abduction cases namely *Lopez Burgos v. Uruguay*[60] and *Lilian Celiberti de Casariego v. Uruguay*[61], involved the abduction of Uruguayan citizens by the agents of Uruguay on the territory of Argentina and Brazil respectively. Again the Committee stated that on its interpretation of article 2(1) this provision "does not imply that the State party concerned cannot be held accountable for violations of rights under the Covenant, which its agents commit upon the territory of another State, whether with the acquiescence of the Government of that State or in opposition to it".[62] The Committee went on to state, "it would be unconscionable to so interpret the responsibility under article 2 of the Covenant, as to permit a State party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory".[63] Moreover the Committee asserted, "[t]he reference…to 'individuals subject to its jurisdiction'…is not to the place where the violation occurred, but rather to the *relationship between the individual and the State in relation to a violation of any of the rights set forth in the Covenant*, wherever they occurred".[64] Tomuschat in an individual opinion sought to clarify further the meaning of the phrase "within its territory and subject to its jurisdiction", he asserted,

> "To construe the words – within its territory pursuant to their strict literal meaning, as excluding any responsibility for conduct occurring beyond the national boundaries would, however, lead to utterly absurd results. The formula was intended to take care of objective difficulties which might impede the implementation of the Covenant to its citizens abroad, having at its disposal only the tools of diplomatic protection with their limited potential. ….it was the intention of the drafters, whose sovereign decision cannot be challenged, to restrict the territorial scope of the Covenant in view of such situations

[58] Ibid.
[59] *Carlos Varela Nunez v. Uruguay,* CCPR/C/19/D/108/1981.
[60] *Lopez Burgos v. Uruguay,* A/36/40.
[61] *Lilian Celiberti de Casariego v. Uruguay,* CCPR/C/13/D/56/1979.
[62] *Lopez Burgos,* para. 12.3.
[63] Ibid.
[64] Ibid. para. 12.2, (emphasis added).

where enforcing the Covenant would be likely to encounter exceptional obstacles. Never was it envisaged, however to grant to States unfettered discretionary power to carry out wilful and deliberate attacks against the freedom and personal integrity of their citizens living abroad".[65]

The sole reservation with the Uruguayan passport and abduction cases is that the Committee seemed to restrict State responsibility for violations that occur beyond the territory of a State to nationals of the State causing the harm outside its territory. Lawson comments, "[t]here is no legal reason, and no moral justification why States should be free to violate the rights of others than their own citizens when conducting operations abroad".[66]

However in the subsequent case of *Gueye et. al. v. France*[67] the Human Rights Committee applied the provisions of the ICCPR beyond the national territory of France to non-nationals. This case involved the pension rights of retired Senegalese members of the French Army of Senegalese nationality, residing in Senegal. The authors claimed to have been victims of a violation of article 26 of the ICCPR by France because of alleged racial discrimination in French legislation. The legislation in question provided for different treatment in the determination of the pensions of retired soldiers of Senegalese nationality who served in the French Army prior to the independence of Senegal in 1960. This category of retired soldiers were to receive pensions that were inferior to those enjoyed by retired French soldiers of French nationality. The Committee asserted, "the authors are not generally subject to French jurisdiction, except that they rely on French legislation *in relation to the amount of their pension rights*".[68] The Committee did not feel constrained in interpreting Frances obligations under the ICCPR to apply outside of its national territory to those persons whose rights were affected by French legislation applying outside of France, even though they no longer have French nationality. The Human Rights Committee in line with the previous *Lopez Burgos* case focused on the relationship between the individual and the State in relation to the violation of Covenant rights rather than the location in which the violation occurred.

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[65] *Lopez Burgos*, Communication No. R.12/52.
[66] Lawson, 2002, p. 287, in Kreijen, 2002.
[67] *Gueye et. al. v. France*, CCPR/C/35/D/196/1985.
[68] Ibid. para. 9.4 (emphasis added).

In its concluding observations the Human Rights Committee has reiterated that the ICCPR applies outside the national territory of the State under certain circumstance. In its concluding observations on the initial report of the United States the Committee asserted explicitly that it "does not share the view expressed by the Government that the Covenant lacks extraterritorial reach under all circumstances. Such a view is contrary to the consistent interpretation of the Committee on this subject, that, in special circumstances, persons may fall under the subject-matter jurisdiction of a State party even when outside that State's territory".[69] In its concluding observations on Iran the Committee condemned the fact that a death sentence had been pronounced, without trial, in respect of a foreign writer, Mr. Salman Rushdie, for having produced a literary work and that general appeals have been made or condoned for its execution, even outside the territory of Iran.[70] In relation to its concluding observations on the report of Israel the Committee expressed deep concern that Israel continues to deny its responsibility to fully apply the Covenant in the occupied territories. The Committee pointed to the fact that Israel operated effective jurisdiction over the territory with the longstanding presence of Israeli forces therein.[71]

As the sister Covenant to the ICESCR the jurisprudence of the Human Rights Committee in relation to the ICCPR provides a useful precedent on the question of the broader interpretation of an international multilateral human rights convention beyond the national territory of the State controlling or carrying out activities transnationally. Despite the fact that it has been drafted to contain both a territorial and jurisdictional limitation clause the Committee has taken a progressive interpretation of the Covenants broader application beyond the national territory of the State. The Committee recognises that States parties should not be free to violate human rights simply because they are operating outside of their national territory or the effects of their legislation are felt beyond the national territory, regardless of the nationality of those effected. Of particular interest in the context of the transnational scope of the ICESCR is the focus of the Committee in *Lopez Burgos* on the "relationship between the individual and the State in relation to a violation of any of the rights set forth in the Covenant, wherever they occurred".

[69] CCPR/C/79/Add.50, para. 284.
[70] CCPR/C/79/Add.25, para. 9.
[71] CCPR/C/79/Add.93, para. 10.

2.2.3 The application of the ECHR beyond the national territory of the State

The European Court of Human Rights takes a more restrictive approach to the question of extending the territorial scope of the ECHR beyond the national territory of the State than that adopted by the Human Rights Committee. In particular in the *Bankovic*[72] case the Court asserts that jurisdiction is primarily territorial, and exceptions to this principle are limited and should be narrowly construed. In its interpretation of article 1 the Court states:

> "As to the ordinary meaning of the relevant term in article 1 of the Convention the Court is satisfied, from the standpoint of public international law, the jurisdictional competence of a State is primarily territorial. While international law does not exclude a State's exercise of jurisdiction extra-territorially, the suggested bases of such jurisdiction (including nationality, flag, diplomatic and consular relations, effect, protection, passive personality and universality) are, as a general rule, defined and limited by the sovereign territorial rights of the other relevant States….In keeping with the essentially territorial notion of jurisdiction, the Court has accepted only in exceptional cases that acts of the Contracting States, performed, or producing effects, outside their territories can constitute an exercise of jurisdiction by them within the meaning of Article 1 of the Convention".[73]

The court also noted that the Convention is an essentially regional system that applies within the "legal space" of the Contracting States and that clearly the Federal Republic of Yugoslavia does not fall within this "legal space".[74] The Court stated "[t]he Convention was not designed to be applied throughout the world, even in respect of the conduct of the Contracting States".[75] In line with its previous judgements the Court used the notion of "effective control" as the decisive criterion for extra-territorial effect.[76] This implies effective control of the relevant territory and its inhabitants abroad as a consequence of military occupation or through the consent, invitation

[72] *Bankovic and Others v. Belgium and 16 other NATO States*, 2002, Application 52207/99.
[73] *Bankovic*, para. 59.
[74] Ibid. para. 80.
[75] Ibid.
[76] *Loizidou v. Turkey*, 1996, Application no. 00015318/89. See further Lawson, 2002 in Kreijen, 2002 (ed. in chief), pp. 281-297.

or acquiescence of the Government of that territory and exercises all or some of the public powers normally to be exercised by that Government.[77] Therefore the aerial bombardment did not in the Courts opinion amount to effective control of the territory of FRY.[78]

In contrast to the Human Rights Committee, the European Court of Human Rights places central significance on the principles of public international law in considering whether the activities in question come within the jurisdiction of the States parties to the ECHR.[79] However Scheinin asserts that the principles of public international law regarding territoriality and jurisdiction have limited relevance in the context of the application of the ECHR beyond the national territory of the State.[80] He makes the following distinction, "[w]hat the Court is discussing, is the *permissibility* of a State exercising jurisdiction beyond its own territory, not at all the legal *consequences* of the exercise of authority abroad, be it permissible or not".[81] However the question posed by the complainants in *Bankovic* was not whether the NATO countries were entitled to destroy a television station in Belgrade, the question was whether they had any human rights obligations if they decided to do so.[82] The principles of public international law were conceived of on the basis of the sovereign integrity of States and obligation of other States to respect that integrity. However these principles do not address the obligations of States where they are responsible for human rights violations outside of their territory, with or without the involvement of the State in whose territory such violations occur. Moreover, Scheinin asserts the "legal space" argument that comes from the regional nature of the ECHR is of limited relevance to the work of the Human Rights Committee. He suggests that, "the correct approach under the ICCPR is based on the universal nature of human rights, irrespective of whether the country where the alleged extraterritorial violation occur is a party to the ICCPR".[83]

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[77] *Bankovic* para. 71.
[78] Ibid. para. 75.
[79] Ibid. at para. 57 the Court stated, "the Court recalls that the principles underlying the Convention cannot be interpreted and applied in a vacuum. The Court must also take into account any relevant rules of international law when examining questions concerning its jurisdiction and, consequently, determine State responsibility in conformity with the governing principles of international law, although it must remain mindful of the Convention's special character as a human rights treaty (the above-cited Loizidou judegment (merits), at paras. 43 and 52). The Convention should be interpreted as far as possible in harmony with other principles of international law of which it forms part (*Al-Adsani v. the United Kingdom*,…".
[80] Scheinin, 2003, p. 6.
[81] Ibid.
[82] Ibid.
[83] Ibid.

Two different approaches, one more restrictive than the other, on the application of a human rights treaty beyond the national territory of the State have been presented. The European Court of Human Rights interprets the Convention in a manner that allows the territorial scope of the Convention to be stretched only under limited circumstances. The Human Rights Committee on the other hand focuses on the relationship between the State and the individual in relation to the violation in question wherever that violation occurs. These cases demonstrate that even where a human rights convention contains a territorial and, or jurisdictional clause, cases have arisen that have required the stretching of the territorial scope of those Conventions. From the perspective of the transnational scope of the ICESCR the progressive approach of the Human Rights Committee is obviously to be preferred. The ICCPR as the sister Covenant to the ICESCR with a similar international and universal scope, is also a more relevant authority for an interpretation of the ICESCR.

2.3 Concluding remarks:

The interpretation of the wording of article 2(1) of the ICESCR in accordance with the interpretative principles of the law of treaties demonstrates that there is a collective aspect to duty holding under the Covenant that requires States to refrain from violating the rights of persons in other countries and, in addition, to take positive steps towards the mutual goal of the full achievement of economic, social and cultural rights for all persons. It is submitted, the requirement of international cooperation and assistance, combined with the absence of a territorial and, or jurisdictional clause, gives rise to the conclusion that the Covenant can be interpreted to create transnational legal obligations for States parties to the ICESCR.

3. THE NATURE AND EXTENT OF STATES TRANSNATIONAL OBLIGATIONS UNDER THE ICESCR.

3.1 The interpretative work of the Committee on Economic Social and Cultural Rights in relation to the transnational scope of the Covenant

The Committee on Economic, Social and Cultural rights is the focal institution for the conceptual and normative development of economic, social and cultural rights as defined in the Covenant.[1] Both in its general comments and in its concluding observations the Committee has actively given normative content to the nature of States parties obligations under the ICESCR, and the scope of the rights contained therein. While the Committee's general comments are soft law, non-binding norms, they have served as an important reference point for the Committee in its examination of State party reports, and represent a growing jurisprudence on the normative content of economic, social and cultural rights. The central questions examined in this chapter are firstly, what approach does the Committee take in relation to the transnational obligations under the Covenant, and secondly, what is the nature and scope of States' transnational obligations under the Covenant in light of the interpretative work of the Committee?

In relation to the transnational scope of the Covenant the Committee has increasingly referred to States' "international obligations" under the Covenant. In General Comment number 3 the Committee specifies the nature of States' obligations under article 2(1) of the Covenant.[2] In relation to States' international obligations the Committee points out that the phrase "to the maximum of its available resources" was intended by the drafters of the Covenant to refer to both the resources existing within a State, and those available from the international community.[3] The Committee further emphasises that in accordance with articles 55[4] and 56[5] of the Charter of the

[1] Craven, 1995, p. 455.
[2] General Comment No. 3, "The Nature of States parties obligations", E/1991/23.
[3] Ibid. para. 13.
[4] Article 55 of the UN Charter provides: "With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote: a. higher standards of living, full employment, and conditions of economic and social progress and development; b. solutions of international economic, social, and health, and related problems; and international cultural and educational cooperation; and c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion".

United Nations and with the provisions of the Covenant "international cooperation for development and thus for the realization of economic, social and cultural rights is an obligation of all States", and that it is particularly incumbent on those States that are in a position to assist others in this regard.[6] Therefore in general comment number 3 the Committee confirms States have international obligations under the Covenant, however it is not very explicit about the exact content of those international obligations.

The Committee in four of its most recent general comments on the right to adequate food[7], the right to education[8], the right to the highest attainable standard of health[9], and the right to water[10], has included a specific paragraph outlining the international obligations of States with regard to these particular rights. Concerning the right to food, the right to health, and the right to water the Committee states in the spirit of Article 56 of the UN Charter, States parties should "recognize the essential role of international cooperation and comply with their commitment to take joint and separate action to achieve the full realization" of the rights involved.[11] In the general comment on the right to education the Committee emphasises that the States parties are under an "obligation…in relation to the provision of international assistance and cooperation for the full realization of the right to education".[12] The Committee has moved from simply asserting that international cooperation is an obligation of all States, to including a specific section within each of its general comments on States' international obligations.

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[5] Article 56 of the UN Charter provides: "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". However, Alston and Quinn observe, "the detailed legal implications of that obligation remain notoriously imprecise. Even when an attempt was made in the context of the 'Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among State in Accordance with the Charter of the United Nationas' to elaborate on the nature of 'the duty of State to cooperate with one another' little, if any, progress was made".
[6] General Comment 3, para. 14 (emphasis added).
[7] General Comment 12, "The right to adequate food", E/C.12/1999/5.
[8] General Comment 13, "The right to education", E/C.12.1999/10.
[9] General Comment 14, "The right to the highest attainable standard of health", E/C.12/2000/4.
[10] General Comment 15, "The right to water (arts. 11 and 12 of the ICESCR)", E/C.12/2002/11.
[11] Ibid. n. 90, para. 36; Ibid. n.92, para. 38, and Ibid. n. 93 para. 30 respectively.
[12] Ibid. n.91, para. 56.

3.2 The threefold categorisation of obligations.

In response to the limitations inherent in monitoring the "progressive realisation" standard contained in article 2(1) a "violations-based" approach for monitoring economic, social and cultural rights was taken up in the Maastricht guidelines.[13] These guidelines emphasise that, "[a]s in the case of civil and political rights, the failure by a State party to comply with a treaty obligation concerning economic, social and cultural rights is, under international law, a violation of that treaty".[14] The Maastricht guidelines define violations of economic, social and cultural rights in relation to three types of obligations for States, the obligation to respect, to protect, and to fulfil the enumerated rights. A violation of economic, social and cultural rights occurs when a State pursues, by action or omission, a policy or practice that deliberately contravenes or ignores its obligations under the Covenant.[15] The text elaborates on the nature of States obligations as follows:

> "The obligation to respect requires States to refrain from interfering with the enjoyment of economic, social and cultural rights. Thus, the right to housing is violated if the State engages in arbitrary forced evictions. The obligation to protect requires States to prevent violations of such rights by third parties. Thus, the failure to ensure that private employers comply with basic labour standards may amount to a violation of the right to work or the right to just and favourable conditions of work. The obligation to fulfil requires States to take appropriate legislative, administrative, budgetary, judicial and other measures towards the full realization of such rights. Thus, the failure of States to provide essential primary health care to those in need may amount to a violation".[16]

This categorisation of obligations provides the Committee with a detailed analytical framework in which a clearer understanding of States obligations in the context of economic, social and cultural rights can be seen to emerge. This framework also facilitates the Committee in taking a "violations-based" approach to State party reports and has succeeded to some extent in

[13] The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, E/C.12/2000/13; on a "violations based" approach to economic, social and cultural rights see further Chapman , 1996, pp. 23-66.
[14] The Maastricht Guidelines, para. 5.
[15] Ibid. para. 11.
[16] Ibid. para. 6.

countering some of the traditional assumptions that have tended to categorically distinguish economic, social and cultural rights from civil and political rights. Craven has observed that, "[t]he precise nature of the obligations in [the international] field may be usefully analysed by reference to the tripartite typology…It may be seen that the obligations to respect, protect, and ensure operate at the international level just as they do at the national level"[17]. In the context of States' transnational obligations the Committee has also explicitly applied this categorisation to States' international obligations in a number of its general comments.

3.3 Respect bound transnational obligations

3.3.1 Development cooperation and the right to housing

The obligation to respect in a transnational context requires State A to refrain from interfering with the enjoyment of economic, social and cultural rights of the persons residing in State B. The respect bound obligation is often described as a negative, cost free obligation, in that it requires the State to refrain or abstain from being a human rights violator.[18] The Committee has applied the respect bound obligation in a number of general comments in relation to States' transnational obligations.

In relation to development cooperation the Committee has emphasised that the United Nations agencies involved in the promotion of economic, social and cultural rights should do their utmost to ensure that their activities are fully consistent with the enjoyment of civil and political rights.[19] In particular the Committee has stated that "international agencies should scrupulously avoid involvement in projects which, for example, involve the use of forced labour in contravention of international standards, or promote or reinforce discrimination against individuals or groups contrary to the provisions of the Covenant, or involve large-scale evictions or displacement of persons without the provision of all appropriate protection and compensation".[20] Although the

[17] Craven, 1995, p. 147.
[18] Chapman & Russell, 2002 in Chapman & Russell, 2002, (eds.), p. 11.
[19] General Comment 2, "International technical assistance measures", E/1990/23.
[20] Ibid. para. 6.

Committee only refers to the agencies of the UN the same principle should be applied in the context of a bilateral development relationship between two States in light of States' international obligations to respect the economic, social and cultural rights of persons in other countries.

In relation to the right to housing the Committee in its general comment on forced evictions has also made reference to its general comment on international technical assistance measures[21]. The Committee asserted that it is aware "that various development projects financed by international agencies within the territories of State parties have resulted in forced evictions", and reiterated its view that international agencies should avoid involvement in development projects that involve large-scale evictions or displacement of persons without the provision of all appropriate protection and compensation.[22]

3.3.2 The right to food.

In relation to the right to food the obligation to respect existing access to adequate food requires States parties not to take any measures that result in preventing such access.[23] States' international obligations require that they "should recognize the essential role of international cooperation and comply with their commitment to take joint and separate action to achieve the full realization of the right to adequate food. In implementing this commitment States parties should take steps to *respect the right to food in other countries…*".[24] This includes the negative obligation that "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"[25]. Also in relation to the provision of food aid such aid should be provided "in ways that do not adversely affect local producers and local markets, and should be organized in ways that facilitate the return to food self-reliance of the beneficiaries".[26]

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[21] General Comment 7, "The right to adequate housing: forced evictions", E/1998/22.
[22] Ibid. para. 17.
[23] General Comment 12, "The right to adequate food", Article 11, E/C.12/1999/5, para. 15.
[24] Ibid. para. 36 (emphasis added).
[25] Ibid. para. 37.
[26] Ibid. para. 39.

The general comment on the right to food is significant as the first general comment in which the Committee explicitly applies the threefold categorisation of obligations in relation to States' international obligations. The Committee asserts the obligation to respect the right to food in other countries is required as a means of *implementing* States' international obligations. Therefore the Committee has moved from simply stating that international cooperation is an obligation under the Covenant, to the language of implementation of this obligation. The general comment is also significant in that it adopts a "violations-based" approach on the question of States' international obligations defining a violation as, "the failure of a State to take into account its international legal obligations regarding the right to food when entering into agreements with other States or with international organisations".[27]

However apart from the prohibition against food embargoes and the prohibition against the provision of food aid that adversely affects local markets, the Committee has not developed further on the content of States' obligations to respect the right to food in other countries as it has done in relation to internal domestic obligations. Kunnemann asserts for example that States breach minimum core obligations to respect the right to food if they destroy an individual's or community's food–producing resources through the effects of activities such as predatory mining, or oil exploration, to the extent that such activities destroy an individual's or community's physical access to essential food.[28] Therefore if State A directs a project on oil exploration or funds such a project in State B that leads to the destruction of persons' access to food producing resources in State B, can State A be said to be in violation of its obligation to respect the right to food in other countries? Food International Action Network (hereinafter F.I.A.N.) have submitted a parallel report to the Committee focusing on Germany's compliance with its international obligations in particular in relation to the right to food.[29] F.I.A.N has been critical of Germany for its failure to implement its obligation to respect the right to food in other countries in an adequate manner.[30] F.I.A.N.s investigation of the impact of surface gold mining on the right to adequate food in Ghana reveals severe problems with forced relocations without

[27] Ibid. para. 19.
[28] Kunnemann, 2002 in Chapman & Russell, 2002 (eds.) p. 179.
[29] Windfuhr, 2001.
[30] Ibid. para. 36.

adequate compensation and destruction of livelihoods.[31] The parallel report asserts, "[a]t least one of the mining operations receives loans from a development aid organisation of Germany, the DEG, which is responsible for supporting private investments in developing countries…So far the [German] government is very slow in reacting to the problem reported to it a year ago. No investigation has been started".[32] F.I.A.N. recommends that the German government regularly assess the impact of such projects on the right to adequate housing and adequate food. The international obligations of States to respect the right to food of persons in other countries potentially impacts upon a broad range of States' external activities. More precise guidance from the Committee on the ways in which States can violate their obligation to respect the right to food in other countries, and the steps States are required to take to comply with their international obligations is clearly needed to enhance the normative content of States' international obligations.

3.3.3 The right to health and the right to water

The threefold categorisation of obligations is similarly applied in the context of States' international obligations in the general comments on the right to health, and the right to water.[33] In its general comment on the right to health the Committee asserts, "[t]o 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…".[34] Notably there is a subtle shift in the language of the Committee from that of *"implementation"* of commitments as in the general comment on the right to food, to that of *"compliance"* with an international obligation. This may imply a stronger, more mandatory approach by the Committee on the question of international obligations. Moreover, the general comment describes a violation of article 12 through acts of commission to include, "the adoption of legislation or policies which are manifestly incompatible with pre-existing domestic or *international legal obligations* in relation to the right to health".[35] However as in the general comment on the right to food, the general comment on the right to

[31] F.I.A.N., 2000, "The Impact of Gold-Mining in the Western and Ashanti Region of Ghana and the Planned Construction of a new Dam-Project in the Bui National Park".
[32] Ibid. n. 112 para. 36.
[33] General Comment 14, "The right to the highest attainable standard of health", E/C.12/2000/4; General Comment 15, "The right to water", E/C.12/2002/11.
[34] General comment 14, para. 39.
[35] General Comment 14, para. 48 (emphasis added).

health does not provide any detail on the exact content of the obligation to respect the right to health in other countries.

Finally the threefold typology of obligations has been explicitly applied in the general comment on the right to water. This most recent general comment is by far the most detailed articulation of States' international obligations under the Covenant provided by Committee to date.[36] The Committee asserts,

> "To comply with their international obligations in relation to the right to water, States parties have to respect the enjoyment of the right in other countries. International cooperation requires States parties to refrain from actions that interfere, directly or indirectly, with the enjoyment of the right to water in other countries. Any activities undertaken within the State party's jurisdiction should not deprive another country of the ability to realize the right to water for persons in its jurisdiction".[37]

The Committee also prohibits the imposition of embargoes or similar measures and asserts water should never be used as an instrument of political and economic pressure.[38] In this most recent general comment the Committee directly links the concept of "international cooperation" with the requirement that States respect the right to water in other countries. Moreover, the Committee broadens the scope of the States' international obligations to ensure that both its direct and indirect actions do not lead to a deprivation of the right to water in other countries.

3.4 Protect bound transnational obligations

The obligation to protect in a transnational context requires State A to prevent and respond to violations of economic, social and cultural rights by third parties over which State A exercises jurisdiction from occurring within the territory of State B. In its general comment on the right to health the Committee took the opportunity to elaborate on the content of the obligation to protect in the context of States' transnational obligations. The Committee asserts, "[t]o comply with their

[36] General Comment 15, "The right to water", E/C.12/2002/11.
[37] Ibid. para. 31.
[38] ibid. para. 32.

international obligations in relation to article 12, States parties have 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".[39] The Committee reiterated this obligation in stronger terms in its later general comment on the right to water in which it asserts, "[s]teps should be taken by States parties to prevent their own citizens and companies from violating the right to water of individuals and communities in other countries. Where States parties can take steps to influence other third parties to respect the right, through legal or political means, such steps should be taken in accordance with the Charter of the United Nations and applicable international law".[40]

The obligation to protect can be broken into two distinct sub-obligations, the obligation to *prevent* the harmful acts of the individual subject to your jurisdiction, and the obligation, when a harmful act has occurred to *punish* those responsible or provide reparation to the victim of the harm.[41] Within the sub-obligation to prevent and to punish two distinct issues are seen to emerge, the first is that of *possessing* a legal and administrative apparatus normally able to guarantee respect for international human rights, and the second is that of *using* such an apparatus with the diligence the circumstances require.[42] It seems from the language used by the Committee that *if* States possess a legal mechanism to punish their nationals or companies for violations of economic, social and cultural rights abroad, they are under an obligation to use that legal mechanism. The use of domestic litigation to hold corporations accountable for breaches of human rights abroad has increased in recent years. In the United States such claims are based on the Alien Tort Claims Act[43], and in Britain tort litigation has also been launched against

[39] General Comment no. 14, para. 39.
[40] General Comment no. 15, para. 33.
[41] Pisillo-Mazzeschi, 1992, p. 24.
[42] Ibid.
[43] 28 United States Code Ss 1350. The ATCA says "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States". Lawsuits are currently pending against a number of multinationals including: Shell (for its alleged roles in the events that led to the execution of Ken Saro-Wiwa in Nigeria); Chevron (for its alleged role in supporting violent government suppression of protestors on an off-shore platform in Nigeria); Texaco (on the basis of claims that it is destroying the Ecuadorean rain forest); ExxonMobil (for alleged complicity in abuses committed by Indonesian security forces in Aceh); and Coco-Cola together with bottlers of its soft drinks in Colombia (for alleged complicity in the suppression by paramilitaries of union activity, including the killing of a union activist at a bottling plant). See further report of International Council on Human Rights Policy, 2002; see also, Gibney M., & Emerick D.R., 1996 p. 123.

corporations based in Britain for injuries inflicted abroad.[44] The International Council on Human Rights Policy comment, "that these types of cases – where courts in the 'home' country are used to ensure companies do not abuse human rights in the 'host' country – offer some advantages….they hold the promise of extending the protection of an independent and well-functioning judicial system to victims (or potential victims) in countries where corporations can take advantage of the absence of the rules of law. In doing so they demonstrate in a convincing way the *international* dimension of human rights. Litigation is based on the belief that companies should not engage in activity abroad that would be outlawed at home".[45] The Committee also requires that steps should be taken to influence third parties by political means, rather than simply legal means. Encouragingly F.I.A.N. report that the German government has taken a more proactive role in developing instruments to control the behaviour of companies based on voluntary activities such as Codes of Conduct. In particular the German government is involved in financing an exchange of experience of all actors involved in Codes of Conduct.[46] The Committee should encourage other governments to take similar steps and to engage with their multinational corporations operating abroad on the question of corporate social responsibility.

In general international law does not stipulate the exact steps States should undertake to fulfil their international human rights obligations. This is left to the discretion of the State. The Committee therefore does not *require* States, if they do not possess a legal mechanism to punish their nationals for harmful activities abroad, to enact such a legal mechanism. However Scott comments on this issue that, "[t]he more consensus there is of a common international interest in a specific form of legal sanction with respect to specific subject matter the more that this will count in favour of the acceptability of extraterritorial regulation. The point at which that consensus becomes so widespread and clear that states are no longer simply *permitted* to regulate a matter but *required* to do so is the point at which we move from the realm of state jurisdiction to state obligations……For example, normative discourse has progressed to the point with respect to the problem of child sex tourism that some states, such as Canada and Australia, have made it a criminal offence for their nationals to have 'sex' with children anywhere in the world.

[44] *Connolly v. RTZ Corporation Plc & Ors.* [1997] 4 All ER 335; *Lubbe & Ors. & Cape Plc. and Related Appeals* [2000] 4 All ER 268.
[45] International Council on Human Rights Affairs, 2002, p. 105.
[46] Windfuhr, 2001, para. 41.

Little if any protest from states afflicted by the sex-tourism trade, such as Thailand and Sri Lanka, has occurred, and the debate has rapidly gone to another level. The real question now is not whether states are permitted to regulate their nationals' conduct but whether they have a duty to do so as an extension of their duty to ensure human rights. The more debate focuses on this question, the more it is reasonable to assume that states at least have (prescriptive and adjudicative) jurisdiction over their nationals' behaviour".[47]

The Committee on the Rights of the Child has taken an active approach in its concluding observations on State party reports with regard to the issue of the transnational regulation of sexual exploitation of children. In its concluding observations on the second periodic report of Finland for example the Committee observed, "[w]hile appreciating the review of legislation and other measures undertaken by the State party to improve the protection of children from sexual exploitation, in line with the recommendation of the Committee (see CRC/C/15/Add.53, paras. 19 and 29), the Committee notes with deep concern the phenomenon of Finnish child sex tourists travelling to the nearby countries of the former Soviet Union seeking child prostitutes. The Committee urges the State party to undertake adequate measures to combat this phenomenon and to pursue international cooperation for the investigation and the prosecution of cases of sexual abuse and exploitation of children by Finnish citizens abroad".[48] Therefore there is a growing consensus on the need to regulate the harmful conduct of ones nationals abroad and on the legitimacy of States enacting legislation with transnational scope to prevent and respond to such harmful conduct.

The considerable power and harmful activity of multinational corporations is constantly being highlighted and represents another area in which States should legitimately take steps to prevent and respond to the harms caused by their nationals.[49] There are often obstacles in the way of the victims of violations committed by multinational corporation from seeking and being granted

[47] Scott, 2002, in Scott, 2002 (ed.), p. 55.
[48] CRC/C/15/Add.132, para. 57-58. The Committee on the rights of the child has also commended States on their enactment of legislation to combat child sex tourism in the cases of Sweden, CRC/C/15/Add.101, para. 5; Luxembourg CRC/C/15/Add.92 para. 38 and Ireland CRC/C/15/Add.85, para. 5.
[49] Joseph, 1999, comments at p. 172, "[m]ultinational enterprises are very powerful entities in the current world order. Indeed, it is trite to note that the power of some MNEs outstrips the power of certain nation-states. In view of their vast economic power and ubiquitous presence, and consequent intrusion into many aspects of people's lives, it is not surprising that MNE activity can and does occasionally impact detrimentally on the enjoyment of internationally recognised human rights"; see further Addo, 1999, pp. 3-37, in Addo, 1999, (ed.).

redress in the host State, such as the lack of well functioning legal system, or the lack of free legal aid system.[50] In the case of *Connolly v. RTZ Corporation Plc & Ors.*[51] the House of Lords accepted that the lack of free legal aid for the plaintiff to take his claim against the multinational corporation in the host State, Namibia, was a valid ground for holding that substantial justice could not be done in the host state, where the violations occurred. The House of Lords stated;

> "It is clear that the nature and complexity of the case is such that it cannot be tried at all without the benefit of financial assistance. There are two reasons for this…..first… there is no practical possibility of the issues which arise in the case being tried without the plaintiff having the benefit of professional legal assistance; and the second is that his case cannot be developed before a court without evidence from expert scientific witnesses. It is not in dispute that in these circumstances the case cannot be tried in Namibia; whereas, on the evidence before the Court of Appeal and before your Lordships, it appears that if the case is fought in this country the plaintiff will either obtain assistance in the form of legal aid or, failing that, receive the benefit of a conditional fee agreement with his solicitor….In these circumstances I am satisfied that this is a case in which, having regard to the nature of the litigation, substantial justice cannot be done in the appropriate forum, but can be done in this jurisdiction where the resources are available".[52]

Given the growing consensus that exists around the need to regulate the conduct of multinational corporations, and the obstacles that the victims of the harmful conduct often face in seeking substantial justice in the host State, there is legitimate grounds for States to enact legislation to prevent and respond to such harmful activity.[53] The Committee on Economic, Social and Cultural rights should take an active approach similar to the Committee on the Rights of the

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[50] Joseph, 1999 comments, pp. 176-177, "MNEs are sometimes more powerful than their host states. This is often the case when comparing the relative power of an MNE and a developing country. The economic muscle of MNEs may allow them to resist domestic sanctions. For example, they may terminate business dealings in the sanctioning state and establish themselves in a more corporate-friendly state. They may even be able to discourage sanctions by *threatening* to disengage from a state, many of which perceive that they need MNE investment to improve their economic development….Furthermore, some states lack the technical expertise to monitor and regulate corporate activities in order to, for example, decide whether a corporation's environmental practices or safety precautions are satisfactory. Developing nations may also lack the legal machinery, such as resources to undergo complex discovery of documents, to unravel the corporate veil which may shield an asset-rich parent company behind an asset-poor local subsidiary".

[51] *Connolly v. RTZ Corporation Plc. & Ors.* [1997] 4 All ER 335.

[52] Ibid.

[53] See further Sornarajah, 2002 in Scott, 2002, (ed.), pp. 491-512.

Child in recommending that States enact legislation to regulate the conduct of their multilateral corporations operating abroad.

The Maastricht guidelines also explicitly deal with the question of the regulation of the conduct of transnational corporations in the following terms:

> "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".[54]

The principle of due diligence has been elaborated upon in the case of *Velasquez v. Rodriquez*[55] before the Inter-American Court on human rights as follows:

> "An illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention….. What is decisive is whether a violation of the rights recognized by the Convention has occurred with the support or the acquiescence of the government, or whether the State has allowed the act to take place without taking measures to prevent it or to punish those responsible. …The State has a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation".[56]

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[54] Maastricht Guidelines, para. 18 (emphasis added). Also note the preamble of the Universal Declaration provides, "Every individual and *every organ of society*, …keeping this declaration constantly in mind, shall strive…by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Members States themselves and among the peoples of territories under their jurisdiction" (emphasis added).

[55] *Velasquez Rodriguez* Series C No. 4 I/A Court H.R.

[56] Ibid. paras. 172-176.

In accordance with the due diligence standard therefore reasonable and serious steps should be taken by the State to prevent or to respond to violations of economic, social and cultural rights that occur as a result of the conduct of private actors. The question therefore arises, what reasonable and serious steps are required of States in a transnational context? It is submitted that the due diligence standard requires States to enact legislation that allows victims of violations of economic, social and cultural rights by multinational corporations, to seek redress before the Courts of the home State of the corporation, where the victim would not receive substantial justice before the Courts of the State in which the violations occur. In addition States should take active steps to encourage their multinational enterprises operating abroad to comply with the appropriate economic, social and cultural rights standards in same manner as is required of them in the home State.

3.5 Fulfil-bound transnational obligations

The obligation to fulfil in a transnational context requires States to take positive steps towards the full realisation of the economic, social and cultural rights of all persons. Unlike the obligations to respect and protect which are often seen as negative, cost-free obligations, the obligation to fulfil is regarded as a positive obligation involving the allocation of resources to ensure the minimum core content of the rights enumerated in the Covenant.[57] In its general comment number 3 on the nature of States obligations the Committee noted that the phrase "to the maximum of its available resources", was intended by the drafters of the Covenant "to refer to both the resources existing within a State and those available from the international community through international cooperation and assistance".[58] In addition the Committee commented, "international cooperation for development and thus for the realization of economic, social and cultural rights is an obligation of all States" and is particularly incumbent on those States that are in a position to assist others in this regard.[59]

[57] Chapman & Russell, 2002 in Chapman & Russell, 2002, (eds.) p. 12.
[58] General Comment no. 3, para. 13.
[59] Ibid. para. 14.

In its general comment on the right to health the Committee articulates States' transnational obligations to fulfil in the following terms, "[d]epending on the availability of resources, States should facilitate access to essential health facilities, goods and services in other countries, wherever possible and provide the necessary aid when required".[60] A similar observation is made in the general comment on the right to food and the general comment on the right to water.[61] In particular in relation to the fulfilment of core obligations the Committee asserts, "[f]or the avoidance of any doubt, the Committee wishes to emphasize that it is particularly incumbent on States parties and other actors in a position to assist, to provide 'international assistance and cooperation, especially economic and technical', which enables developing countries to fulfil their core and other obligations indicated in paragraphs 43 and 44".[62] In its general comment on the right the water the Committee reiterated this obligation asserting "[t]he economically developed States parties have a special responsibility and interest to assist the poorer developing States in this regard".[63]

The Committee assumes that States have access to the resources needed to fulfil their domestic minimum core obligations in relation to the rights contained in the Covenant. The Committee has repeated in a number of general comments that "it is important to distinguish the inability from the unwillingness of a State party to comply with its obligations under article 12. … If resource constraints render it impossible for a State to comply fully with its Covenant obligations, it has the burden of justifying that every effort has nevertheless been made to use all available resources at its disposal in order to satisfy, as a matter of priority, the obligations outlined above. It should be stressed, however, that a State party cannot, under any circumstances whatsoever, justify its non-compliance with the core obligations set out in para. 43 above, which are non-derogable".[64] Chapman and Russell argue such an assumption may be untenable and that the somewhat "abstract international human rights system has not grappled fully with the potential

[60] General Comment no. 14, para. 39.
[61] General Comment no. 12, para. 36, "States parties should take steps…to facilitate access to food and to provide the necessary aid when required"; General Comment no. 15, para. 34, "Depending on the availability of resources, States should facilitate realization of the right to water in other countries, for example through provision of water resources, financial and technical assistance, and provide the necessary aid when required".
[62] General Comment no. 14, para. 45.
[63] General Comment no. 15, para. 34.
[64] Ibid. n. 145, para. 47. A similar statement is made in General Comment no. 12, para. 17, and General Comment no. 15, para. 41.

contradictions in the minimum State obligations approach".[65] Given that the maximum available resources include those resources that are available from the international community it appears that the State would have to prove that it sought international assistance where it was unable to provide the minimum core content of the rights in the Covenant from its own resources. However if the State is unsuccessful and does not receive international assistance, or receives international assistance that is inadequate, can the victims of the violation of the minimum core content of their rights claim that the international community is not using the maximum of its available resources to fulfil economic, social and cultural rights? Kunnemann asserts, "[f]ulfil-bound obligations are often trapped between the nation state and the international community. And it is the victims of related breaches who suffer in this trap: Who will pick up the bill for the obligatory programmes, or more precisely, who will pick up how much? Where does the international obligation end – and where does the internal obligation start – or vice-versa? The result is a situation where the maximum of available resources is neither reached internationally nor nationally, with a convenient excuse to blame the other side".[66] In order to make the obligation to fulfil effective clearer guidance is required on when exactly the domestic resources available from the State are considered to be exhausted, and similarly when it is considered that the maximum of available resources from the international community is considered to be exhausted.

3.6 Concluding observations on State party reports

In its concluding observation on Ireland's second periodic report the Committee noted, "[t]he Committee encourages the State party, as a member of international organisations, including international financial institutions such as the International Monetary Fund and the World Bank, to do all it can to ensure that the policies and decisions of those organisations are in conformity with the obligations of States parties under the Covenant, in particular the obligations contained in articles 2(1), 11, 15, 22 and 23 concerning international assistance co-operation".[67] The Committee also urged the State "to ensure that its contribution to international development cooperation reaches 0.45 per cent of GNP by the end of 2002 and that this annual figure

[65] Chapman & Russell, 2002 in Chapman & Russell, 2002 (eds.), pp. 10-11.
[66] Kunnemann, 2003, p. 13.
[67] E/C.12/1/Add.77, para. 37.

increases, as quickly as possible, to the United Nations target of 0.7 per cent of GNP".[68] Almost identical statements about their obligations as members of the international financial institutions were recently made in the Committees concluding observations on the State party report of the United Kingdom, France, Sweden, Japan, Germany and Finland.[69] The most recent observations on Ireland broadened the focus to international organisations in general.

3.7 Concluding remarks

The Committee on Economic, Social and Cultural rights has taken important steps in three of its most recent general comments to define the international obligations of the States parties. It has specifically applied the threefold categorisation of obligations in the context of States' international obligations giving some normative content and definition to these obligations. It is proposed a specific general comment on the question of States' transnational obligations under the Covenant should be drafted by the Committee to reinforce the steps already taken by the Committee in this regard, and to provide more precise guidance on what is required of States to implement and comply with their transnational obligations.

[68] Ibid. para. 38.
[69] United Kingdom E/C.12/1/Add.79, para. 26; France, E/C.12/1/Add.72, para. 32; Sweden E/C.12/1/Add.70, para. 24; Japan, E/C.12/1/Add.67, para. 37; Germany, E/C.12/1/Add.68, para. 31; Finland, E/C.12/1/Add.52, para. 24

4. TOWARDS A SYSTEMATIC FRAMEWORK ON TRANSNATIONAL OBLIGATIONS.

4.1 The categorisation of States' transnational obligations

International human rights law proceeds on the basis that the State will protect the persons residing within its territory against harms perpetrated by another State or private actor. This is in accordance with the basic conception of the State in international law, as the primary duty holder towards the persons residing within it. In interpreting the ICESCR in a transnational manner it is not purported to depart from this basic principle, or absolve the domestic State of its primary obligations under the Covenant. The State in which the harm occurs in undoubtedly the primary duty holder.

However it has been demonstrated that the ICESCR creates transnational legal obligations for States that apply externally beyond the territory of a State in accordance with the correct interpretation of the wording of article 2(1). Where a State is in violation of its transnational obligations it is in violation of the Covenant, regardless of the fact that the State in which the harm occurs is primarily responsible for protecting the persons residing within it against such harm. In the words of the Human Rights Committee it would be "unconscionable" to permit States or their nationals operating abroad, to carry out violations of economic, social and cultural rights on the territory of another State which violations would not be permitted on its own territory.[70]

A violation of transnational obligations as previously examined can be usefully assessed with reference to the threefold categorisation of obligations, the obligation to respect, protect and fulfil. Kunnemann identifies a further threefold categorisation of obligations under the Covenant that facilitates a deeper analysis of the nature and scope of transnational legal obligations.[71] These include, internal domestic obligations, external obligations and international obligations. In accordance with this threefold categorisation the domestic State is the primary bearer of internal obligations towards the persons residing within its territory to respect, protect and fulfil

[70] Lopez Burgos A/36/40.
[71] Kunnemann, 2003, p. 8.

the rights of those persons. External obligations are the obligations that a foreign State is duty bound to uphold in its external activities towards persons residing outside of its territory. International obligations are those duties that States both individually and collectively are bound to uphold in their activities through international authorities and the decisions they take therein.[72] This chapter further explores the nature and scope of transnational obligations under the Covenant and asks what systematic framework should be used to assess States' violations of their transnational obligations? Moreover what are the implications for the practise of the Committee in its monitoring of State compliance with their transnational obligations?

4.2 External obligations

4.2.1 A contextual approach

External obligations are the obligations that a foreign state has under the Covenant to respect, protect and fulfil the rights of persons residing outside of its territory in accordance with its commitment to realise economic, social and cultural rights through international cooperation and assistance. From the perspective of the transnational scope of the ICESCR the advantage of article 2(1) is that it does not contain a territorial or jurisdictional clause. This allows the Committee to focus on the actual relationship between the individual and the State in relation to a violation of that person's economic, social and cultural rights, wherever that violation occurs. The Human Rights Committee in the *Lopez Burgos*[73] case has adopted this approach. Scheinin points to this case and asserts that the question of whether an individual is within the jurisdiction of a State for the purposes of a human rights treaty is a contextual, or relational matter, based on "a contextual assessment of the State's factual control in respect of facts and events that allegedly constitute a *violation* of a human right".[74] While Scheinins approach focuses on the question of whether an individual is "within the jurisdiction" of a State, it provides a useful analytical tool to explore how the Committee on Economic, Social and Cultural rights should approach an assessment of States' compliance with their transnational obligations. This approach

[72] Ibid.
[73] *Lopez Burgos v. Uruguay*, A/36/40.
[74] Scheinin M., 2003, p.1.

contains three questions, firstly, what do the facts reveal about the conduct of the domestic State vis-à-vis foreign harms? Secondly what do the facts reveal about the conduct of the foreign State? Finally, what do the facts reveal about the relationship between the two States in terms of shared responsibility for a violation of the Covenant?[75] The conduct of both the domestic State and the foreign State can be further assessed by reference to acts of control by the State or its agents, and the indirect opportunity of the State to control non-state actors.[76]

By way of illustration the interaction of two States, State A and State B will be examined by reference to the framework outlined above. In these scenarios State A is the foreign territorial State whose transnational activities have the potential to adversely impact upon the economic, social and cultural rights of persons residing outside its territory in State B.

4.2.2 Violations carried out by the State or its agents

Where State A controls an activity that adversely impacts upon the economic, social and cultural rights of persons in States B, without the involvement or acquiescence of State B, who can be said to be in violation of the Covenant? Clearly in this factual context State B as the primary duty holder is under an obligation to prevent violations by third parties within its territory whether by States or non-State actors. Where State B fails to do so it is in violation of its obligation to protect under the ICESCR. However, State A also has a transnational obligation to respect the economic, social and cultural rights of persons in other countries, and thereby should refrain from interfering with the enjoyment of the rights of persons residing in State B.

The question then becomes when can it be said that the conduct of a State or its agents is attributable to the State under international law? The attribution of conduct to a State is addressed in chapter II of the Draft Articles on State Responsibility.[77] In accordance with article 4, the conduct of any organ of the State as it is defined by that States internal law whether

[75] Ibid.
[76] Ibid.
[77] International Law Commissions Draft Articles on State Responsibility, Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10 (A/56/10), chap. V. See further Crawford, 2002, p. 91.

exercising legislative, executive, judicial or other function is conduct attributable to the State.[78] Similarly the conduct of any person or entity that is not an organ of the State but which is empowered by the law of the State to exercise elements of governmental authority is considered an act of the State.[79] Article 7 provides the conduct of an organ, person or entity even where they exceed their authority or contravene instructions is still attributable to the State.[80] Article 8 provides the conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.[81]

Where State A aids and assists State B in the violation of the economic, social and cultural rights of persons in State B who can be said to be in violation of the Covenant? Clearly State B has the primary responsibility to refrain from violating the rights of those resident within its territory and bears the primary responsibility for this violation. However, where State A is complicit with State B in the harmful activity then it is also responsible for a violation of the rights of persons in State B, to the extent that its involvement in the harmful activities caused those rights to be violated. Therefore a causal connection between the activity of the aiding State and the resultant harm in the other State would have to be established.

However, what types of activity amount to aiding and assisting a State in the violation of the rights contained in the ICESCR? The Draft Articles on State Responsibility deal with the question of the aid and assistance of one State by another in the commission of an internationally wrongful act.[82] In accordance with article 16 the aiding State must provide the assistance with the knowledge of the circumstances of the internationally wrongful act and the act must be internationally wrongful if committed by the State.[83] Crawford gives the example of a State knowingly providing an essential facility for the commission of the act or financing the act.[84] However he asserts the assisting State only has a supporting role and will only be responsible to

[78] Ibid. article 4.
[79] Ibid. article 5.
[80] Ibid. article 7.
[81] Draft Article on State Responsibility, article 8.
[82] Ibid. article 16.
[83] Ibid.
[84] Crawford, 2002, p.148.

the extent that its own conduct has caused or contributed to the internationally wrongful act.[85] The State is not responsible for aid or assistance under article 16 unless the relevant State organ *intended*, by the aid or assistance given, to facilitate the occurrence of the wrongful conduct, and the internationally wrongful conduct is actually committed by the aided or assisted State.[86] The requirement of intention to commit the wrongful conduct when providing the aid or assistance is problematic within the context of international human rights law. Commenting on this provision in the draft articles Gibney, Tomaševski and Vedsted-Hansen assert, "[o]ne of the most obvious problems with this position is the difficulty, if not the impossibility, of being able to prove such intent. Beyond this, however, the intent requirement is *simply too high* a standard. In the real world, states will seldom, if ever, arm or equip another country with the intent of aiding or assisting the receiving state in committing an internationally wrongful act. The problem is not so much one of 'intent' but 'deliberative indifference'…".[87] Perhaps a more appropriate standard in the context of human rights law is where State A provides essential aid and assistance to State B for activities that State A knows or ought to know will result in violations of economic, social and cultural rights. This standard is more in line with the Maastricht guidelines that provide a State violates economic, social and cultural rights when the State pursues by action or omission, a policy or practise that deliberately contravenes *or ignores* its obligations under the Covenant.[88] Therefore where State A through its official development assistance program finances or provides an essential facility for a project that discriminates on the basis of gender, race or religion, and State A is aware of this or failed to operate due care in this regard, State A is in violation of its transnational obligations. Or, where State A funds a large scale infrastructure project in State B where it knows, or it ought to know, given the scale of the project, that large numbers of forced evictions will occur and the attempts to mitigate the harmful effects of the project and the compensation that will be provided is inadequate, State A is in violation of its transnational obligations.

[85] Ibid.
[86] Ibid. p. 149.
[87] Gibney, Tomaševski and Vedsted-Hansen, 1999, p. 294.
[88] The Maastricht Guidelines, 2000, E/C.12/2000/13, para. 11.

4.2.3 Violations carried out by non-state actors

Where State A's national, a multinational corporation for example, causes a violation of the rights of persons in the territory of State B, and where State A is aware that its national has caused these violations, who can be said to be in violation of the Covenant? State B undoubtedly has the primary responsibility to control the activities of third parties operating within its jurisdiction. However, according to the Maastricht guidelines, State A is also responsible for violations of economic, social and cultural rights that result from State A's failure to exercise *due diligence* in controlling the behaviour of private entities and individuals, including transnational corporations over which it has jurisdiction. The Committee on Economic, Social and Cultural rights requires States to take steps, both political and legal, to prevent third parties from violating the rights of persons in other countries. The due diligence standard requires States to take reasonable and serious steps to prevent, or to respond to an abuse by a private actor. Therefore where State A is aware of the violations being committed by a transnational corporation subject to its jurisdiction, but it fails to take any action at all, political or legal, to attempt to control the behaviour of the transnational corporation, it can be said to be in violation of it's transnational obligation to protect under the Covenant.

4.3 International obligations

International obligations are those duties that States both individually and collectively are bound to uphold in their activities through international authorities and the decisions they take therein. Firstly, all States parties are under a general obligation to seek, in the international organisation in which they are members, the adoption of policies conducive to the achievement of the rights set out in the Covenant. Secondly, a State party receiving technical or financial assistance is under an obligation to ensure that the program it undertakes for such assistance is consistent with its obligations under the Covenant. Over the past fifty years the importance of organisations of States (such as the EU) or intergovernmental organisations (such as the IMF) has increased to such an extent, that measures formerly taken exclusively through national authorities have increasingly been delegated to international authorities – thereby turning the "national

obligations" into "international obligations".[89] Kunnemann asserts if the governing body of the international authority takes a decision that fails to comply with States' parties' obligations under the ICESCR, then those States parties that have ratified the Covenant have violated it by such a decision.[90] In this sense therefore the ICESCR implies obligations for international authorities. If States parties to the ICESCR form a voting majority in an international authority the international authority can then be called a duty-bound international authority**.**

The Committee has addressed the voting decisions of States within international authorities in its concluding observations in the following terms, "[t]he Committee encourages the State party, as a member of international organisations, including international financial institutions such as the International Monetary Fund and the World Bank, to do all it can to ensure that the policies and decisions of those organisations are in conformity with the obligations of States Parties under the Covenant, in particular the obligations contained in articles 2(1), 11, 15, 22, 23 concerning international assistance and cooperation".[91] The Maastricht guidelines define a violation through an act of omission as, "[t]he failure of a State to take into account its international legal obligations in the field of economic, social and cultural rights when entering into bilateral or multilateral agreements with other States, international organisation or multinational corporations".[92] The Committee has also addressed the activities of States through international agreements in general comment 15 it asserts, "States parties should ensure that the right to water is given due attention in international agreements and, to that end, should consider the development of further legal instruments. With regard to the conclusion and implementation of other international and regional agreements, States parties should take steps to ensure that these instruments do not adversely impact upon the right to water. Agreements concerning trade liberalization should not curtail or inhibit a country's capacity to ensure the full realization of the right to water".[93]

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[89] Kunnemann, 2003, p. 8.
[90] Ibid. p. 8.
[91] Ireland, E/C.12/1/Add.77, para. 37; United Kingdom E/C.12/1/Add.79, para. 26; France, E/C.12/1/Add.72, para. 32; Sweden E/C.12/1/Add.70, para. 24; Japan, E/C.12/1/Add.67, para. 37; Germany, E/C.12/1/Add.68, para. 31; Finland, E/C.12/1/Add.52, para. 24
[92] The Maastricht Guidelines, E/C.12/2000/13, para. 15 (j).
[93] E/C.12/2002/11, para. 35.

In their interaction with international organisations the primary obligation remains with the State undertaking an agreement that will impact upon the economic, social and cultural rights of its nationals to ensure that its domestic human rights obligations are taken into consideration. An international organisation should accept that the State's domestic human rights obligations are an important consideration in negotiating an agreement with the State. In addition, for those member States of the international organisation that have ratified the Covenant, it is imperative that those States take steps to ensure that the policies of the international organisation do not adversely impact or fail to consider the economic, social and cultural rights of the persons affected. If they fail to take these steps, or ignore their transnational obligations in this regard, it is submitted they can be considered to be in violation of the Covenant.

4.4 Transnational obligations and the activities of the Committee

4.4.1 The examination of State party reports

As previously asserted the Committee should draft a separate general comment on the question of the normative content of States' transnational obligations under the Covenant to reinforce the steps it has already taken in relation to "international obligations" and to put the issue of the transnational scope of the Covenant on a stronger footing. In addition the Committee should regularly check State compliance with their transnational obligations including their external and international obligations when analysing States reports. In its new reporting guidelines the Committee should require States to provide a specific section on their transnational obligations both bilaterally and within the context of inter-governmental organisations. This section could include for example an assessment by the State of the outcome of its own policies affecting persons in other countries, including development cooperation, trade, and agricultural policies. In line with the Committees recommendation the State should provide information on to what extent the State is taking steps to ensure that the policies and decisions of the international organisations of which it is part are in conformity with the obligations of the State under the Covenant. The State should provide a statement about how it will analyse in future the outcome of policies and programmes of the WTO, IMF, World Bank and other intergovernmental institutions on vulnerable people in other countries. The work of the Committee would be greatly

aided by parallel reports of non-governmental organisations similar to that of F.I.A.N. on Germany's compliance with its international obligations

4.4.2 The draft optional protocol and transnational obligations

Article 1 of the text of the current draft optional protocol as suggested by the Committee on Economic Social and Cultural rights provides:

> "A State Party to the Covenant that becomes a Party to the present Protocol recognizes the competence of the Committee to receive and examine communications from any individuals or groups *subject to its jurisdiction* in accordance with the provisions of this Protocol", (emphasis added).[94]

Therefore under the current draft complainants who fall within the jurisdiction of a state can lodge a complaint against the state and furthermore it is required that the State is a party to the optional protocol. The wording of the draft optional protocol does not take into account the unique wording of article 2(1) of the Covenant, however there appears to have been some debate on the question of the "international obligations" of States under the ICESCR surrounding the draft optional protocol. At a working group organised by the Commission on Human Rights, on the justiciability of economic, social and cultural rights Windfuhr pointed out that international factors such as structural adjustment programmes, trade regimes and World Trade Organisation rules, and others, were also of importance to the realisation, or violation, of economic, social and cultural rights.[95] He continued, "[i]nternational obligations, which were covered in the Covenant, raised questions both of the duty of international support and aid (positive obligations) and avoidance of interference, like unfair fishing and trade policies and practices (negative obligations)".[96] Discussion took place as to how in the context of international obligations, responsibility could be apportioned between national Government breaches of the Covenant

[94] E/CN.4/1997/105. A open-ended working group on the Draft optional protocol was established at the 59th session of the Commission on Human Rights with a view to considering options regarding the elaboration of an optional protocol, E/CN.4/2003/L.21. Although the wording of the draft submitted by the Committee will not serve as the only basis for further discussion, this draft has been the central focus for discussion so far.
[95] E/CN.4/2001/62/Add.2, "Report on the workshop on the justiciability of economic, social and cultural rights, with particular reference to the draft optional protocol to the ICESCR", para. 25.
[96] Ibid.

obligations to respect, protect and fulfil the rights on the one hand, and international cooperation responsibilities on the other.[97] Windfuhr asserted that the draft optional protocol would create no new substantive obligations, as these were already contained in the Covenant itself. As for difficult causation questions, he asserted, those could be explored on a case-by-case basis, as many NGO's had done many times, even exploring the international causal links.[98]

A number of Governments and NGOs have provided their comments on the draft optional protocol written by the Committee.[99] In particular the American Association of Jurists (hereinafter AAJ) in commenting on the draft optional protocol at the 54th session of the Commission on Human Rights asserts that the phrase "subject to the jurisdiction of the State" should be eliminated.[100] The AAJ point out that international law doctrine and jurisprudence acknowledge that individuals are subjects of international law and that therefore individuals should be admitted to bring their complaints before relevant international bodies if their rights are violated by any State, legal entity or individual, and not only by the State with jurisdiction over the complainant.[101] The AAJ focusing on article 2(1) point out that the ICESCR does not make the effects of the rights it enumerates conditional either upon territory or upon jurisdiction. This NGO assert recognising a universal active obligation to guarantee the rights in the Covenant through international cooperation is not to imply any release from responsibility of the State in which those violations took place, but "rather to introduce the concept of the joint responsibility of the authorities of the State and of the international organizations and/or other States that contributed by their policies to such violations. The victims, either under the jurisdiction of the State responsible for the violation or not, should be given the right to denounce the facts and the State responsible for an action or an omission violating the human rights of the victim".[102]

While the wording of article 2(1) requires States to realise the rights in the Covenant both individually and through international cooperation, some form of restriction clearly needs to be

[97] Ibid. para. 27.
[98] Ibid.
[99] E/CN.4/1998/84, "Draft optional protocol to the International Covenant on Economic, Social and Cultural rights, Report of the Secretary-General".
[100] Ibid. Section III, Comments Submitted by NGOs, para. 8.
[101] Ibid. para. 10.
[102] Ibid. para. 26.

in place to define the category of persons who can make an individual complaint before the Committee for a violation of their economic, social and cultural rights. The Human Rights Committee as previously examined has taken a progressive approach to the requirement of jurisdiction, focusing on the relationship between the complainant and the State with regard to the alleged violation, regardless of where the violation occurred or the nationality of the complainant. This demonstrates that a restrictive interpretation of the phrase “subject to its jurisdiction” is not necessarily required. If the wording of the draft optional protocol remains as it now appears in the final draft, the jurisprudence of the Human Rights Committee will be of significant importance to retain a robust interpretation of the Covenants transnational scope.

5. TRANSNATIONAL OBLIGATIONS IN PRACTICE.

5.1 Background

States, whether acting bilaterally, or multilaterally within international organisations, can contribute to violations of the economic, social and cultural rights of persons beyond their national territory. In this chapter practical examples of the external activities States engage in that have resulted in violations of economic, social and cultural rights are provided. In line with Kunnemanns categorisation examined in the previous chapter, States activities are assessed in terms of the activities they engage in bilaterally, and the activities they engage in through the medium of international organisations. In particular some aspects of the bilateral development cooperation activities of Japan, and the multilateral activities of the World Bank (hereinafter WB) and the International Monetary Fund (hereinafter IMF) are critically presented.

5.2 Bilateral external activities

5.2.1 Bilateral development cooperation – the case of Japan

There are a number of external activities that States carry out on a bilateral basis that have caused, or have the potential to cause, a violation of the economic, social and cultural rights of persons outside of its territory. In particular, the Committee on Economic, Social and Cultural rights has expressed concern in two of its general comments in relation to the adverse impact of large development projects that often lead to large-scale forced evictions.[103] In this section some of the large development projects that have resulted in violations of economic, social and cultural rights, and that have been carried out with the official development assistance funding of Japan are presented.

[103]E/1990/23, para. 6; E/1998/22, para. 17.

In 2002 Japan provided the second highest net total of official development assistance funding in the world after the United States, standing at $9847 million.[104] However as a percentage of GNI Japans contribution is average, standing at 0.23%.[105] One means by which the Japanese government distributes its official development assistance contribution is through a governmental financial institution called the Japan Bank of International Cooperation (hereinafter JBIC).[106] The JBIC provides concessionary long-term, low-interest funds needed for the self-help efforts of developing countries, including social infrastructure development and economic stabilization.[107] The JBIC assert official development assistance loans provided by them account for 40 per cent of Japan's official development assistance.[108] This makes the role of the JBIC in its own words a "cornerstone of Japanese ODA policy".[109]

The JBIC funded the entire Indonesian Koto Panjang Dam project to the sum of $251 million.[110] The feasibility study for the project was funded by the Japanese International Cooperation Agency and the project was carried out by the Tokyo Electric Power Services Co. Ltd. Japanese and Indonesian companies were awarded the construction for the main part of the dam. According to a report by the International Rivers Network at least 4888 households, representing between 17,000 to 23,000 persons, were relocated in the early 1990's to make way for the

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[104] OECD, 2002, Development Cooperation Report, Statistical Annex, available at www.oecd.org , last accessed 7/7/2003.
[105] Ibid.
[106] The JBIC has been created pursuant to Law No. 35, 1999, as amended by Law No. 169 of December 1999, and Law No. 99 of May 2001. Article 1 of the law provides, "[t]he purpose of the Japan Bank for International Cooperation shall be to contribute to the sound development of Japan and the international economy and society through lending, etc., to contribute to the promotion of Japan's exports or imports or Japanese economic activities overseas, or the stability of the international financial order, and lending, etc., to contribute to economic and social development or economic stability in developing areas overseas…., in accordance with the principle that it shall not compete with ordinary financial institution". In accordance with article 5, "[t]he capital of the Japan Bank for International Cooperation shall be the aggregate of the amounts deemed to be subscribed by the Government…". In accordance with article 11 of the law the governor and auditors of the JBIC are to be appointed by the Minister of Finance, and in accordance with article 52 of the law, the Minister of Finance shall supervise the JBIC and "when he deems necessary for the enforcement of this Law, issue the Japan Bank for International Cooperation such orders concerning its business as are necessary for the supervision", available at www.jbic.go.jp, Profile of JBIC, JBIC Law, last accessed 7/7/2003.
[107] Japanese Bank of International Cooperation, website www.jbic.go.jp ,Profile of JBIC. The JBIC also provides Private-Sector Investment Finance supporting business activities in developing countries, and development-related research, last accessed 7/7/2003.
[108] Ibid.
[109] Ibid.
[110] International Rivers Network report, 2003, "Development Disasters, Japanese-Funded Dam projects in Asia", p. 1.

dam.[111] The affected individuals were given no chance to participate in decisions regarding the dam, or plans for resettlement and compensation.[112] The compensation that was delivered was at extremely low levels and very different to that promised. The International Rivers Network allege thousands of families from the ten villages that were forced to resettle are now facing severe hardship in the resettlement area, with no income to sustain their lives.[113] In many of the resettlement sites, the topsoil has washed away because the area was originally tropical rainforest that was bulldozed to create the settlements, thus making agriculture impossible. Also, the water in the reservoir is of very poor quality due to the failure to clear vegetation from the reservoir that has rotted, making the water unsuitable for household use. In September 2002 3861 Indonesians filed a legal action in Toyko District Court, and a further 4600 joined the suit on March 28th 2003, against the Japanese government and the JBIC.[114]

The JBIC has also been involved in funding the San Roque Multipurpose project in the Philippines to the tune of $700 million, the total cost of the project amounting to $1.19 billion.[115] According to the International Rivers Network the dam has displaced more than 4,400 persons, and threatens the livelihoods of thousands of indigenous Ibaloi people living upstream of the dam.[116] Most of the 4,400 persons who were resettled to make way for the project were subsistence farmers who met their basic needs from gold-panning, farming, gardening and animal raising. JBIC and the San Roque Power Corporation claimed that resettlement would be carried out according to international best practice, and that the standard of living of those resettled would be at least restored, or preferably improved, after resettlement. However, according to the International Rivers Network, three years after they were moved, many people are struggling to survive in cramped resettlement sites without any land or source of income.[117] Many families are reported to have left the resettlement site because of the lack of sustainable livelihoods.

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[111] Ibid. p. 3. These reports are confirmed in the Asia Times online in two articles entitled, "The scandal of Japanese aid to Indonesia", and "Indonesian victims of Japanese aid", available at www.atimes.com last accessed 7/7/2003.
[112] Ibid.
[113] Ibid.
[114] See article "More Indonesians to sue Japan over aid-funded dam", www.planetark.org last accessed 7/7/2003.
[115] International Rivers Network, 2003, p. 8.
[116] Ibid.
[117] Ibid. p. 9.

The JBIC is also in the process of providing official development assistance loans to a number of other projects where such projects have the potential to adversely affect persons economic, social and cultural rights. These include the Zipingpu Dam China where 40,000 persons will potentially be resettled, and the Metro Manila Flood Control Project, the Philippines where the land and livelihoods of 380,000 persons will be affected.[118]

The JBIC has adopted a set of "Guidelines for Confirmation of Environmental and Social Considerations" in April 2002 that will come into operation in October, 2003.[119] However there is very little mention of human rights standards in the guidelines, including the international commitments Japan has undertaken as a State party to the ICESCR and the ICCPR. According to these guidelines where a project will result in large-scale involuntary resettlement, in principle, the project proponents must submit a basic resettlement plan.[120] The guidelines state involuntary resettlement and loss of means of livelihood are to be avoided where feasible, and all viable alternatives are to be explored. Where no alternative proves feasible to the project proposed, effective measures to minimize the impact of the project, and to compensate the persons adversely affected must be agreed upon with the persons in question.[121] Individuals who are to be resettled involuntarily and whose means of livelihood will be hindered or lost must be sufficiently compensated and supported by the project proponents in a timely manner. The guidelines provide the project proponents must make efforts to enable the persons affected by the project, to improve their standard of living, income opportunities and production levels, or at least to restore them to pre-project levels.[122] In relation to indigenous peoples the guidelines provide when a project may have an adverse impact on indigenous peoples, all their rights in relation to land and resources must be respected in accordance with the spirit of the relevant international declarations and treaties. Similarly efforts must be made to obtain the consent of indigenous peoples after they have been fully informed.[123]

[118] Ibid. pp. 20-28.
[119] JBIC, 2002, "JBIC Guidelines for Confirmation of Environmental and Social Consideration".
[120] JBIC Guidelines, p. 17.
[121] Ibid.
[122] Ibid.
[123] Ibid.

The guidelines represent an important improvement in the JBICs approach to the environmental and social impacts of the projects that it funds, and represent an important step towards implementing the transational obligations of Japan as a State party to the ICESCR, towards the economic, social and cultural rights of persons effected by its external activities. The guidelines were drafted in wide consultation with different experts from various governments, Japanese government ministries, academic institutions and NGOs.[124] However the guidelines are discretionary and the language used by the JBIC is weakly formulated. The JBIC merely *encourages* project proponents seeking funding from the JBIC to undertake appropriate environmental and social considerations and asserts, it will "take the results of environmental reviews into account for its decision-making on funding".[125] If appropriate environmental and social considerations are not undertaken the JBIC assert they *may* decide not to extend funding.[126] If it becomes evident that the borrower and the project proponents have not met the conditions required by the JBIC under the guidelines, or if it becomes apparent that the project will have an adverse impact on the environment after funding is extended, due to the borrower's or related parties failure to supply correct information during the environmental review process, the JBIC *may*, in accordance with the loan agreement, suspend the disbursement or declare all the principal outstanding at the time, with interest and any other charges thereon, to be payable immediately.[127] It remains to be seen when the Guidelines come into force whether the JBIC will effectively implement and monitor compliance with these guidelines.

The JBIC is a governmental financial institution with a public policy mandate under the direct supervision of the Minister of Finance.[128] As previously examined in chapter four the conduct of the JBIC as an institution is attributable to the State of Japan coming within the meaning of article 5 of the Draft Articles on State responsibility as an "entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of governmental authority..".[129] In accordance with Japans commitment to realise economic, social and cultural rights through international cooperation and assistance, the official development

[124] See report of Study Group on Environmental Guidelines for the Japanese Bank of International Cooperation, 2001.
[125] JBIC Guidelines, p. 8.
[126] Ibid. p. 13.
[127] JBIC Guidelines p.8.
[128] Ibid. n.182, JBIC Laws.
[129] Draft Articles on State Responsibility, article 5, Ibid. n. 140.

assistance loans provided by Japan should not be granted where violations of economic, social and cultural rights will result from projects carried out with the assistance of Japan. It is submitted that in funding a project where Japan knows, or ought to know, given the large scale of a project that large numbers of forced evictions will result, and Japan fails to ensure that all appropriate protection and compensation will be provided to the victims, it is in violation of its transnational obligation to respect the economic, social and cultural rights of persons in other countries.

5.3 International activities

5.3.1 International Financial institutions

The activities carried out by the international financial institutions, the WB and the IMF have considerable influence on the economic, social and cultural rights of persons worldwide. The Special Rapporteur of the Sub-Commission for the Prevention of Discrimination and Protection of Minorities observed in 1991 that "[t]he leverage (both potentially and de facto) imposed by these agencies upon and within States is so extensive that human rights can be jeopardized or potentially enhanced in a number of ways".[130] Darrow observes,

> "[t]he influence wielded by the IFI's – whether as a direct or indirect consequence of credit decisions, lending policies and associated conditionalities, or through technical advisory services or less direct means – over the human rights situations in many of their member states is considerable. This pattern of influence is markedly asymmetrical, with the IFIs' human rights impacts being experienced most strongly in developing country shareholder states. Within these countries, the broadened and extended scope of the IFIs' activities means that they not infrequently determine, or at least significantly influence, national policy in areas with obvious human rights dimensions and consequences, such as: health; education; the right to food and adequate standard of living; women's human rights; environmental protection; employment and labour rights; social security; and

[130] E/CN.4/Sub.2/1991/17, "Realization of economic, social and cultural rights, Second progress report" prepared by Mr. Danilo Türk, Special Rapporteur, para. 53(c).

(through conditions promoting 'good governance' and the rule of law) the framework within which civil and political rights are exercised".[131]

Given the large scale human rights impacts of the IFI's policies and activities "[t]he Bank and Fund have a clear responsibility to take better account of human rights factors in the spheres affected by their increasingly broad and complex mandates".[132] The question of the extent to which the WB and IMF are obliged to and can deal with human rights in their policies has been written about extensively in recent years.[133] The focus of such studies has been on the interpretation of the Articles of Agreement of both institutions and the status of the IBRD, IDA and the IMF as specialised agencies that have been brought into relationship with the UN.[134] The IFIs are also institutions that are composed of governments with human rights obligations, and as has been argued in this paper in relation to the ICESCR such obligations exist not only domestically, but also transnationally. As previously examined within transnational obligations, international obligations are those duties that States both individually and collectively are bound to uphold in their activities through international authorities and the decisions they take therein. First, all States parties are under a general obligation to seek, in the international organisation in which they are members, the adoption of policies conducive to the achievement of the rights set out in the Covenant. Second, a State party receiving technical or financial assistance is under an obligation to ensure that the program it undertakes with such assistance is consistent with its obligations under the Covenant. The Committee has been reminding States of their international obligations in their voting decisions within international organisations including in particular the international financial institutions such as the World Bank and the IMF, "to do all it can to ensure that the policies and decisions of those organizations are in conformity with the obligations of States parties under the Covenant, in particular the obligations contained in articles 2.1, 11, 15, 22 and 23 concerning international assistance and cooperation".[135]

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[131] Darrow M., 2003, pp. 111-112.
[132] Ibid. p. 112.
[133] Bradlow, 1996; De Feyter, 2002; Skogly, 2001.
[134] See further Skogly, 2000, pp. 93-109; Darrow, 2003, pp. 113-194. Article 57 of the UN Charter provides that these specialised agencies are "established by inter-governmental agreement and [have] wide international responsibilities, as defined in their basic instruments, in economic, social, cultural, educational, health, and related fields".
[135] Ireland, E/C.12/1/Add.77, para. 37; United Kingdom E/C.12/1/Add.79, para. 26; France, E/C.12/1/Add.72, para. 32; Sweden E/C.12/1/Add.70, para. 24; Japan, E/C.12/1/Add.67, para. 37; Germany, E/C.12/1/Add.68, para. 31; Finland, E/C.12/1/Add.52, para. 24.

5.3.2 The World Bank and major infrastructure projects

The International Bank for Reconstruction and Development (hereinafter IBRD) and the International Development Association (hereinafter IDA) within the WB are both specialised agencies of the United Nations, and both loan or grant funds for development directly to developing nations. Membership in the IBRD within the World Bank is conditional on membership of the IMF, "the intention being to oblige countries to agree to standards in the monetary field as a condition for receiving the benefits of Bank membership".[136] As of 2003 the IBRD is owned by 184 members states, 147 of them have ratified the ICESCR accounting for 78% of the total voting power.[137] Within the IBRD five Executive Directors are appointed by the members with the five largest numbers of shares. These include the United States (16.41%), Japan (7.87%), Germany (4.49%), France (4.31%) and the United Kingdom (4.31%).[138] The remaining 19 Executive Director's are elected by the other members. As of 2003 the IDA is owned by 162 member States, 128 of them have ratified the ICESCR accounting for 75.86% of the voting power within the IDA.[139] Therefore both the IBRD and the IDA are duty bound international organisations and the majority of members that have ratified the ICESCR should ensure the activities of both entities are in accordance with their transnational obligations under the Covenant.

While the level of the Bank's lending for major infrastructure projects fell significantly during the 1990s in proportion to other sectors within its overall portfolio, the human rights impacts of the Bank's work in the infrastructure sector have been, and to some extent continues to be, the source of considerable controversy.[140] The WB is currently considering supporting the controversial Nam Theun 2 hydropower project in Lao Peoples Democratic Republic.[141] However there are high human rights and environmental risks involved, combined with a relative

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[136] Darrow, 2003 p. 10.
[137] Authors own calculation based on voting power available on World Bank website at www.worldbank.org, About us, Organisation, Executive Directors, last accessed 7/7/2003.
[138] Darrow, 2003 p. 27.
[139] Authors own calculation based on voting power, Ibid. n. 35.
[140] Darrow, 2003 p. 72.
[141] For the current status of the project see WB website at www.worldbank.org, Countries and regions, Lao PDR, Pipeline Projects, last accessed 7/7/2003.

lack of freedom of expression within Lao PDR to foster legitimate public debate on the issue.[142] International Rivers Network assert the project will forcibly displace 4,500 indigenous peoples from their ancestral lands, and severely impact upon the river system on which 130,000 depend for their fishing and farming-based livelihoods.[143] Further reports assert that the Nam Theun 2 project does not comply with the World Commission on Dams seven strategic priorities for planning large-scale dam projects.[144] These include, gaining public acceptance, doing a comprehensive options assessment of alternatives to the dam, addressing existing dams, sustaining rivers and livelihoods, sharing rivers for peace, development and security, and finally ensuring compliance with commitments undertaken.[145] On the question of participation and public acceptance there have been a number of public consultations with the persons living on the Nakai Plateau who will be affected by the dam.[146] However the decision to construct the dam had been taken well before the public was invited to participate in the decision-making process. The majority of the public consultation took place after the project's detailed design had already been finalised.[147] Due to the logging on the Nakai Plateau the project in effect commenced long before communities had any opportunity to provide their consent. The logging accelerated the deterioration of the natural resource base that local communities depended upon, but no interim compensation was offered for the decline in their livelihoods.[148] The information that was available about the project was not accessible to directly affected communities, province and district residents, and even government officials because of a tremendous knowledge gap between foreign experts and consultants on the one hand and locals on the other.[149] The World Bank's International Advisory Group stated that it "has doubts about the effectiveness of consultations on the ground with the most vulnerable populations, particularly women and ethnic

[142] Amnesty International report, 2002, states "The Lao government greatly restricts the fundamental rights to freedom of expression, association and assembly. The only legal political party in the country is the Lao Peoples Revolutionary Party, the communist party which controls the government. Opposition to the government is not permitted and the States retains control of institutions such as the media, religious organizations and trade unions".
[143] International Rivers Network, 2002, "The Nam Theun 2 Hydropower Project in Laos: Another World Bank Disaster in the Making".
[144] Imhof A., "An Analysis of Nam Theun 2 Compliance with World Commission on Dams Guidelines", 2001, International Rivers Network, pp. 1-14.
[145] The Report of the World Commission on Dams, 2000, chapter 8, pp. 1-45.
[146] Guttal S., 2000, "Public Participation and Consultation for the Nam Theun 2 Dam", pp. 1-9.
[147] Ibid. p. 3.
[148] Ibid. p. 4.
[149] Ibid. p. 5.

minorities…Its own direct contacts with these groups, though not extensive, suggest that the level of comprehension of project proposals and their impacts is low".[150]

The WB is a duty bound international organisation in which the vast majority of its member States have ratified the ICESCR. Those States parties to the Covenant are under an obligation to ensure that the decisions and activities that the WB engages in take into consideration the economic, social and cultural rights of the persons affected by those decisions.

5.3.3 IMF and Structural Adjustment

As of 2003 the IMF is owned by 184 member states. Of the 184 member states in the IMF 143 have ratified the ICESCR and they account for 74.59% of the voting power.[151] There are 24 executive directors, nineteen are elected by the other members, and five are appointed by the five members having the largest quotas. The five members with the largest quotas and voting powers respectively are the United States (17.49% and 17.16%), Germany (6.12% and 6.02%), Japan (6.27% and 6.61%), France (5.06% and 4.97%), and the United Kingdom (5.06% and 4.97%).[152] The combined voting power of the five appointed Executive Directors, alone, is almost forty per cent of the total, proportionately far in excess of the voting power of the developing country Executive Directors, who represent the needs of the members most critically in need of IMF assistance.

The impact of structural adjustment policies on economic, social and cultural rights has been highlighted by the Committee on Economic, Social and Cultural rights in its general comment on international technical assistance measures.[153] The Committee asserts that both States parties and the United Nations agencies should make a particular effort to ensure the protection of the most basic economic, social and cultural rights is built in to adjustment programmes and that measures

[150] International Advisory Group, 1997, "World Bank's handling of social and environmental issues in the proposed Nam Theun 2 hydropower project in Lao PDR", p. 11.
[151] Authors own calculation based on voting power available on IMF website, www.imf.org , About the IMF, Members, last accessed 7/7/2003.
[152] Darrow, 2003. p. 27.
[153] E/1990/23,

to deal with the debt crisis should take full account of the need to protect economic, social and cultural rights through "*inter alia*, international cooperation".[154]

The negative impacts of structural adjustment policies on human rights have been documented in the seminal reports of the Sub-Commission's Special Rapporteur for the realisation of economic, social and cultural rights in 1991-1992.[155] These reports provide an general overview of the impact structural adjustment has or can have on a number of selected rights including the right to work, the right to food, the right to adequate housing, the right to health, the right to education and the right to development, as well as the impact on vulnerable groups including the poor, women, and children. The second periodic report of the Special Rapporteur concludes, "[s]tructural adjustment programmes continue to have a significant impact upon the overall realisation of economic, social and cultural rights, both in terms of the ability of people to exercise these rights, and of the capability of Governments to fulfil and implement them. While significant and positive changes have taken place concerning the design and nature of adjustment, these have yet to result in a marked shift sufficient not only to protect fully the rights of the most vulnerable, but also actually to decrease levels of impoverishment. Human rights concerns continue to be conspicuously underestimated in the adjustment process".[156] A decade later an independent expert of the Commission on Human Rights is still studying the effects of structural adjustment policies on the full realisation of human rights. This report asserts, "[f]or almost 20 years, the international financial institutions and creditor Governments were engaged in the self-deceptive and destructive game of managing third world economies from afar and forcing unpopular economic policies down the throats of powerless third world countries in the belief that the bitter medicine of macroeconomic adjustment would ultimately put these countries on a path to prosperity and a debt-free existence. Two decades later, many countries are in worse condition that when they started implementing IMF/World Bank structural adjustment programmes. The social and ecological costs of these harsh austerity programmes have been far-

[154] Ibid. para. 9.
[155] E/CN.4/Sun.2/1991/17, "Realization of economic, social and cultural rights, Second progress report" prepared by Mr. Danilo Türk, Special Rapporteur; E/CN.4/1992/16, "Realization of economic, social and cultural rights, Final report", submitted by Mr. Danilo Türk, Special Rapporteur.
[156] E/CN.4/Sub.2/1991/17, para. 195.

reaching, with many countries experiencing a dramatic decline in human development indices".[157]

The IMF has been adamant that human rights is an area completely outside the scope of the IMF's activities, and remains the responsibility of the individual government.[158] In May 2001 at a consultation in Geneva organised by the Committee on Economic, Social and Cultural Rights and the High Council for International Cooperation the IMF General Counsel presented an analysis of normative aspects of the relationship between the IMF and the ICESCR.[159] In this paper the Fund attempts to rebut a number of arguments that have been advanced to justify the applicability of the ICESCR to the IMF, including what the General Counsel labels the "indirect effect of the Covenant", which arises out of the fact that the vast majority of the member states of the fund have ratified the Covenant.[160] As the general counsel of the IMF describes it, "[u]nder this view, the members of the Fund that are party to the Covenant would have an obligation to seek the implementation of the Covenant not only in their bilateral relation with other parties, but also through their actions in international organisations".[161] The IMF attempts to counter this argument by stating, "States party's obligation with respect to international cooperation within international organisations is no greater than its obligation to cooperate on a bilateral basis with other States parties. As the State party's obligation under the Covenant is stated in general terms, without any quantified or other criteria, its obligation to cooperate within international organisations and in their relation with international organisations is also a general one, not one that is defined in terms of quantitative or other criteria".[162]

The view of the IMF fails to consider the approach of the Committee on Economic, Social and Cultural rights in four of its most recent general comments that specifically apply the threefold

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[157] E/CN.4/2000/51, Joint report of Special Rapporteur, Mr. Reinaldo Figueredo, and the Independent Expert, Mr. Fantu Cheru, para. 1.
[158] Skogly, 1999, p. 242, in Hanski & Suksi, 1999.
[159] Gianviti, 2001, "Economic, Social and Cultural Rights and the International Monetary Fund". Darrow, 2003, at p. 134 observes this paper is significant as the "first public occasion on which a General Counsel of either the Bank or Fund has sought to debate questions relating to mandate width within the international human rights normative framework".
[160] Gianviti, 2001, p. 18.
[161] Ibid. pp. 18-19.
[162] Ibid. p. 20.

categorisation of obligations, respect, protect and fulfil to States international obligations.[163] These specific criteria apply both in States bilateral activities, and in their actions as members of international organisations. Rather than merely general international obligations the Committee has been taking steps to define their normative content and requires States to implement and comply with these obligations. The Committee has also specifically addressed the activities carried out by the IMF, and asserts that the obligations of States parties to the ICESCR also apply in relation to the activities they carry out through the IMF. The Committee asserted in its most recent general comments that, "States parties should ensure that their actions as members of international organizations take due account of the right to water. Accordingly, States parties that are members of international financial institutions, notably the International Monetary Fund, the World Bank, and regional development banks, should take steps to ensure that the right to water is taken into account in their lending policies, credit agreements and other international measures".[164] Therefore contrary to the IMFs assertions, the States parties to the Covenant that form a voting majority within the IMF have an obligation to ensure that their activities do not adversely impact upon the economic, social and cultural rights of the persons affected by their activities.

5.4 Concluding remarks

Whether acting bilaterally or through the medium of international organisations the activities and policies of States have significant potential to impact upon the economic, social and cultural rights of persons in other countries. At a bilateral level the extent to which States are complying with their transnational obligations may be easier to measure given the greater accountability of a single State towards its own polity. However within international organisations there is often a lack of transparency particularly in the WB and IMF. Decisions by the IBRD, IDA and IMF executive boards are shrouded in secrecy, minutes of Board meetings are not published and votes are rarely taken, and so cannot be recorded or publicised.[165] Darrow observes "[t]he result is that citizens of shareholder countries have no means of holding Executive Directors or their

[163] E/C.12/1999/5; E/C.12/2000/4; E/C.12/2002/11.
[164] E/C.12/2002/11, para. 36.
[165] Darrow, 2003, p. 83.

governments accountable for their policies in the Fund or Bank, policies with frequently major human rights dimensions and consequences".[166]

[166] Ibid.

6. CONCLUSIONS.

The central question in this paper is, can the terms of article 2(1) of the ICESCR be interpreted to give rise to transnational legal obligations for States to respect, protect and fulfil the economic, social and cultural rights of persons outside their territory who are adversely affected by those States external activities? Moreover, the question is posed, if it is accepted that article 2(1) creates transnational obligations for States, what is the nature and scope of such obligations? The premise for the transnational scope of article 2(1) lies in the commitment of the States parties to the Covenant to take steps both "individually and through international assistance and cooperation especially economic and technical" to bring about the progressive realisation of economic, social and cultural rights.

The Vienna Convention on the Law of Treaties requires that the wording of an international treaty is to be interpreted in good faith, in accordance with the ordinary and natural meaning of the words, in light of the objects and purposes of the treaty taken as a whole.[167] In accordance with these interpretative principles the natural and ordinary meaning of the words "individually and through international assistance and cooperation, especially economic and technical" indicates that there is a collective aspect to duty holding under the ICESCR. At a minimal level international cooperation and assistance require that States do not take steps that adversely impact upon the economic, social and cultural rights of persons in other countries. Such activities are clearly in contradiction to the requirements of international cooperation. Cooperation and assistance also imply positive duties for States to work together towards the mutual goal of the full realisation of economic, social and cultural rights. Significantly, in contrast to its sister Covenant the ICCPR, there is no territorial and, or jurisdictional clause in the ICESCR. Neither is there an indication that States obligations of international cooperation are secondary only to individual domestic obligations. Economic, social and cultural right are to be achieved by both individual and collective action.

The *travaux preparatoires* as a supplementary means of interpretation can provide important clarification as to the meaning of the text of an international treaty. On the question of the

[167] VCLT, Article 31(1).

transnational scope of the ICESCR the *travaux preparatoires* reveal that at the time of the drafting there was a general consensus that the realisation of economic, social and cultural rights for developing countries would be dependent upon the cooperation and assistance of the international community. It also seems clear that economic, social and cultural rights have consistently been tied to the notion of "international cooperation", rather than to the concepts of jurisdiction and territory, as in the case of civil and political rights. Importantly this has been recently reinforced in article 4 of the CRC which provides economic, social and cultural rights shall be achieved within the framework of international cooperation. However the drafters of the ICESCR did not explicitly discuss the question of the transnational scope of the Covenant.

The relevant jurisprudence of the European Court of Human Rights and the Human Rights Committee demonstrates that even where human rights treaties contain a jurisdictional and, or territorial clause, cases have arisen that have required the stretching of the territorial scope of both Conventions. In contrasting the position of the Court and Committee on this issue clearly the progressive interpretation of the Human Rights Committee is to be preferred in relation to the transnational scope of the ICESCR. The interpretative work of the Human Rights Committee is also a more relevant authority for an interpretation of the ICESCR as the second half of the International Bill of Rights with a similarly international and universal scope. Two important principles emerge from the jurisprudence of the Human Rights Committee on the application of the ICCPR outside the national territory of the State. Firstly, the Human Rights Committee assert that it is not acceptable for the State to violate the human rights of persons subject to their jurisdiction where the State is operating outside its national territory, or the effects of its legislation violate the rights of persons outside of its territory, even where such persons are not nationals of the State concerned.[168] Moreover, the Human Rights Committee focuses on the relationship between the State and the person in relation to the violation, wherever that violation occurs in determining whether an individual is subject to the jurisdiction of the State.[169]

In interpreting the wording of article 2(1) of the ICESCR it must be borne in mind that a strictly textual interpretation of the wording of the provision in this manner may be limited. Human rights treaties by their nature are phrased in a general manner and often require further

[168] *Lopez Burgos v. Uruguay*, A/36/40; *Gueye et. al. v. France*, CCPR/C/35/D/196/1985.
[169] Ibid.

clarification and development. The ICESCR in particular is phrased in a general, obscure and imprecise manner. Craven observes, "[w]hile the Covenant benefits from an impressive scope, it suffers from the excessive generality of its terms".[170] On the other hand it has also been observed that "[t]he generality and breadth of the Covenant's terms could be said to contribute to its longevity by providing scope for a dynamic interpretation of its provisions".[171] This makes the interpretative work of the Committee on Economic, Social and Cultural rights of central importance to developing and defining the content of the Covenants norms. In relation to the transnational scope of the Covenant the Committee has taken steps to address what it terms the "international obligations" of States. In its earlier general comments the Committee noted in general terms that States have international obligations under the Covenant, and that "international cooperation for development and thus for the realization of economic, social and cultural rights is an obligation of all States".[172] However in four of its most recent general comments the Committee has included a separate paragraph on the subject of "international obligations", requiring States to respect, protect and fulfil the economic, social and cultural rights of persons in other countries. The Committee in its most recent general comment on the right to water has provided its most detailed articulation on the content of States' international obligations.[173] Moreover, the Committee has taken a "violations-based" approach to State compliance with their international obligations. The Committee asserts that States are in violation of the Covenant where they fail to take into account their international legal obligations regarding economic, social and cultural rights when entering into agreements with other States or with international organizations. However in its concluding observations, with the exception of countries voting decisions within international organisations in particular the World Bank and IMF, and the level of Official Development Assistance provided by the States parties, the Committee has not been very active on the subject of international obligations. It is submitted the Committee should take a more active role with regard to international obligations and enter into a dialogue with States to urge them to ensure that their external activities do not adversely impact upon the economic, social and cultural rights of persons in other countries.

[170] Craven, 1995, p. 25.
[171] Ibid. p. 26.
[172] General Comment no. 3, E/1991/23, para. 14.
[173] General Comment no. 15, E/C.12/2002/11, para. 31.

It has been demonstrated in this paper that article 2(1) of the ICESCR, in accordance with the interpretative principles of the law of treaties, and the interpretative work of the Committee to date, can be interpreted to give rise to transnational legal obligations for States. In accordance with this interpretation States are responsible for the adverse impacts of their external activities on the economic, social and cultural rights of person in other countries, and are required to take steps to actively bring about the realisation of economic, social and cultural rights for all persons. Having demonstrated the Covenant can be interpreted to give rise to transnational legal obligations, the question then arises, what is the nature and scope of States transnational legal obligations?

With regard to the nature and scope of the transnational obligations under the Covenant, the Committee has applied the threefold categorisation of obligations, the obligation to respect, protect and fulfil to States' international obligations in three of its most recent general comments.[174] In accordance with this categorisation State A is under an obligation to respect the rights of persons residing outside its territory in State B and should refrain from transnational activities that adversely affect the economic, social and cultural rights of such persons. In its most recent general comment on the right to water the Committee asserted State actions that directly *or indirectly* lead to a deprivation of the right to water in other countries are regarded as a violation of the obligation to respect under States' international obligations.[175] However apart from this most recent general comment, the Committee has not provided precise detail with regard to the exact content of the obligation to respect in a transnational context.

It is submitted that the obligation to respect the economic, social and cultural rights of persons in other countries, includes the obligation to refrain from aiding and assisting another State in the violation of the rights of its own nationals. Therefore, where State A knows or ought to know that violations of economic, social and cultural rights will result from activity that it aids and assists State B in carrying out, it is in violation of its transnational obligation to respect the rights of persons in State B. The case study of Japan demonstrates how official development assistance funding can be used to fund projects that lead to large scale forced evictions without the provision of appropriate protection and compensation. Where Japan, through the medium of the

[174] E/C.12/1999/5; E/C.12/2000/4; E/C.12/2002/11.
[175] E/C.12/2002/11, para. 31.

JBIC, provides funding for a large dam project where it knows or, ought to know, given the size and nature of the project, that large scale forced evictions will occur, without the provision of appropriate protection and compensation, it is submitted it is in violation of its transnational obligation to protect.

Under the transnational obligation to protect, State A is under an obligation to protect the rights of persons in State B by exercising due diligence in controlling the activities of its nationals operating abroad, in particular multinational enterprises subject to its jurisdiction. The "due diligence" standard requires State A to takes reasonable and serious steps, by both political and legal means, to prevent and respond to such harmful activities. There is a growing consensus of the need for the transnational regulation of States nationals carrying out harmful activities outside their home State as can been seen from the growing acceptance of legislation that regulates the sexual exploitation of children by States' nationals abroad. It is submitted that in order for States to effectively implement their transnational obligation to protect in line with the due diligence standard, they should enact legislation that allows victims of violations by their national MNEs to seek redress in their Courts where those victims will not receive substantial justice in the jurisdiction in which the violation occurred. To make the transnational obligation to protect under the Covenant more effective the Committee on Economic, Social and Cultural rights should take a more active role in encouraging States parties to enact such legislation.

Finally, State A under the obligation to fulfil, is required to provide assistance to States to fulfil their economic, social and cultural rights depending on the available resources of State A. The Committee continually emphasises this obligation is particularly incumbent upon those States that are in a position to assist, and that the phrase in article 2(1), "to the maximum of its available resources", refers to those resources available not only within the State but from the international community as a whole. Therefore the fulfil-bound transnational obligation implies positive requirements for States to allocate to the maximum of their available resources to assist States in the realisation of the rights in the Covenant.

The scope of transnational obligations applies to both the activities States carry out individually on a bilateral basis, and the activities States carry out through the medium of international

organisations. The influence of a number of international organisations, in particular the WB and IMF, on the economic, social and cultural rights of persons in developing shareholder countries is considerable. However, the IMF in particular remains adamant that human rights is an area completely outside the scope of its activities, while the WB has a growing, albeit selective appreciation of the relevance of human rights. Within the IBRD, IDA and IMF the vast majority of member States have ratified the ICESCR accounting for approximately 75 per cent of the voting power in all three organisations. In accordance with those States' transnational obligations the policies of the institution of which they form a voting majority should be conducive to the achievement of the human rights contained in the Covenant.

The work of the Committee on Economic, Social and Cultural rights is of central importance to developing and defining the content of transnational obligations under the Covenant. In order to put transnational obligations into operation it is submitted that the Committee should draft a separate general comment on States' transnational obligations. A specific general comment on the question of States' transnational obligations would serve to underline the steps the Committee has already taken in defining the international obligations of States and violations of those international obligations, in its four most recent general comments. Moreover, a general comment on transnational obligations would provide more precise normative content on what is required of States in their external activities in order to implement their obligation to respect, protect and fulfil the economic, social and cultural rights of persons in other countries.

It is proposed in its examination of State party reports the Committee should take a more active role with regard to transnational obligations under the Covenant in an effort to enter into a dialogue with States about the effect of their external activities on persons in other countries both in a bilateral context and a multilateral context. In its reporting guidelines the Committee should require States to provide a specific section within their periodic report on their transnational obligations, and should ask States to what extent they are taking steps to ensure that the policies and decisions of the international organisations of which they are part, are in conformity with the obligation of the State under the Covenant.

The draft optional protocol submitted by the Committee requires that the individuals and groups that are subject to the jurisdiction of a State party to the optional protocol are entitled to take an individual complaint before the Committee. The wording of the draft optional protocol fails to take into consideration of the unique wording of article 2(1) of the Covenant. However, some form of restriction needs to be in place to define the category of persons who can make an individual complaint before the Committee. In any case, the jurisprudence of the Human Rights Committee establishes that to be "subject to the jurisdiction" of a State refers to the relationship between the individual and the State in terms of the violation wherever it occurs, regardless of the nationality of the individual victim. Therefore the jurisdiction clause in the draft optional protocol should not be interpreted literally to exclude the actions of States in a transnational context where those activities have caused or significantly contributed to a violation of economic, social and cultural rights.

The ICESCR was drafted as the centrepiece of a new world order based on freedom from want and from fear. A dynamic interpretation of States obligations under the Covenant requires a renewed look at one of the fundamental principles that is unique to the Covenant and that was central was to its drafting, that economic, social and cultural rights are to be achieved by means of international cooperation and assistance. In order to maintain the integrity of States' commitments in this regard, the normative content of States' transnational legal obligations under the ICESCR needs to be further developed and brought into operation.

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