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**International Covenant on Economic,
Social and Cultural Rights**

The Extraterritorial Scope of the International Covenant on Economic, Social and Cultural Rights

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While investigating the extraterritorial scope of the ICESCR this paper introduces the threefold classification of internal, external and international obligations applicable to all human rights treaties. Moreover it emphasises that most Intergovernmental Organisations (IGOs) are duty-bound under human rights treaties and suggests steps to operationalise the related states obligations.

1. Introduction

Asking about the extraterritorial scope of the International Covenant on Economic Social and Cultural Rights (henceforth: ICESCR) is tantamount to asking about obligations of a state party towards individuals and groups outside its territory. Such obligations could be termed "extraterritorial obligations". Does the ICESCR give rise to such obligations? And if so, what is their nature and structure?

To the first question there is a quick reply: Yes, it does. In fact there is nothing in the ICESCR which would limit the rights recognised and measures undertaken (art.2.1) to persons within a state party's territory. This limitation or any "territorial / extraterritorial" distinction is simply not made. There may be some disagreement whether or not this fact alone is sufficient to make a treaty binding outside a state party's territory. The territorial scope of treaties is qualified in article 29 of the Vienna Convention on the Law of Treaties, which reads "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". The obvious intention (embodied in the word "entire") is to prevent states parties from claiming that the treaty is not binding for a certain part of their territory – or to make sure that such an intention is explicit beforehand. Art.29, however, does not establish that the ICESCR, which is a treaty not explicitly restricted to be binding for each state party only in its territory, would automatically not be binding outside and would need for its extraterritorial obligations a specific statement to this effect.

If art.29 was expanded to the effect that: "Any deviation from the state party's territory as the area in which the treaty is binding for the state party has to appear from the treaty as intended or has to be otherwise established.", then we would have to check whether such an intention appears in the ICESCR or is otherwise established. Before considering the intention appearing in the ICESCR, we note that there are good grounds to claim that such an intention is also "otherwise established" – namely by the fact that the *raison d'être* of both the ICCPR and ICESCR has been to serve as legal instruments to implement the Universal Declaration of Human Rights, which is as universal as can be: ICESCR is not just any international treaty, but a human rights treaty. Reference can also be made to the UN Charter – as in the preamble of the ICESCR - by "Considering the obligation of States under the Charter of the United Nations to promote universal respect for, and observance of, human rights and freedoms, ..." It is within this fundamental framework of universality that the problems for administrative competency and sovereignty, which may result from extraterritorial obligations, have to be dealt with.

Faced with the challenges of globalisation there is growing interest of the international human rights community in such obligations.² At the same time the UN human rights system increases its activities in this field. Nevertheless only very few systematic treatments of this issue for the ICESCR can be found, for example by Craven³, Gibney/Tomasevski/Vedsted-Hansen⁴ and most recently Skogly/Gibney⁵.

² This growing interest shows for example in the first parallel report to the UN Committee on Economic, Social and Cultural Rights dealing exclusively with extraterritorial obligations: "The Compliance of Germany with its International Obligations under the ICESCR", prepared by Michael Windfuhr (windfuhr@fian.org).

³ M.C.R. CRAVEN, *The International Covenant on Economic, Social and Cultural Rights – A Perspective on Its Development* (1995), 144-152

⁴ M. GIBNEY, K. TOMASEVSKI, J. VEDSTED-HANSEN, 'Trans-national State Responsibility for Violations of Human Rights', 12 *Harvard Human Rights Journal* (1999) 273

⁵ S.I.SKOGLY, M. GIBNEY, 'Trans-national Human Rights Obligations', *Human Rights Quarterly* 24 (2002) 781-798

The paper will first look at some relevant articles of the ICESCR, and consider the interpretative work of the Committee on Economic, Social and Cultural Rights. It will then (in chapter 3) draw some conclusions on the nature of the different types of extraterritorial obligations. In chapter 4 it will make some concluding remarks along with recommendations for next steps.

2. The ICESCR and its interpretation

2.1 A look at the ICESCR

The most relevant article is art.2.1 as it outlines the nature of states' obligations (here and in the following articles the emphasis is by the author):

Article 2

1. 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 realisation of the rights recognised in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

Five observations should be made: First of all, it should be noted that ICESCR 2.1 does not limit the realisation of the right (and the related obligations) to persons within the territory of a state party. Moreover the realisation of rights in a territory of a state that is not party is also not excluded.

Secondly, an important provision for extraterritorial obligations is, of course, that steps (also) be taken both individually and through international assistance and co-operation. Some detail on the exact nature of co-operation and assistance is given below (in articles 22,23). The Committee takes "assistance" to mean transfers of funds, goods, and services, and sees it as a specific kind of co-operation.⁶ In fact, the early drafts of art.2.1 had mentioned co-operation⁷ only. Assistance was added later-on (and put in front), obviously to underline its importance as a form of co-operation.

Thirdly the reference to international assistance and co-operation is not focused on "recipient states" but is kept general and hence includes states in a position to provide international assistance as much as those who benefit from assistance. More generally it underlines that all states parties benefit from international co-operation.

Fourthly, the term co-operation is not restricted to "developmental" co-operation, but includes a much wider range of joint activities⁸ of states such as the joint international management of sustainability, trade and other important issues.⁹ Any identification of this provision with "development aid or development co-operation" would be inappropriate.

And finally: There is no indication that the measures taken "individually" refer to territorial obligations and those "through international assistance and co-operation" to extraterritorial obligations. Both types of obligations can be undertaken either individually or through international co-operation as the case may be: The obligation of a

⁶ M.C.R. CRAVEN, *The International Covenant on Economic, Social and Cultural Rights – A Perspective on Its Development* (1995), 147

⁷ Art.2.1 in the 1952 draft of the ICESCR reads 'Each State Party hereto undertakes to take steps, individually and through international co-operation, to the maximum of available resources, with a view to achieving progressively the full realisation of the rights recognised in this Covenant by legislative as well as other means.' Commission on Human Rights, Report of the Eighth Session (14 April to 14 June 1952), ECOSOC Official Records Fourteenth Session, Suppl. No.4, Annex I. The same wording was contained in the draft which the Human Rights Commission handed over to the General Assembly in 1954, and which was then further discussed in the Third Committee of the General Assembly between December 1954 and December 1966.

⁸ The wide scope of the term co-operation as used by the ICESCR can be gathered from art.15.4: 'The States Parties to the present Covenant recognise the benefits to be derived from the encouragement and development of international contacts and cooperation in the scientific and cultural fields.'

⁹ This view is obvious from the general comments quoted in section 2.2 below.

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.

Art.2.1 simply formulates how states have to undertake their obligations: They should always consider both aspects. So there is a certain "collective aspect" to duty-holding under the ICESCR: Even though there is no indication that the beneficiaries of co-operation under art.2.1 are limited to persons in the territories of the community of states parties, any states obligations to co-operate under the Covenant would be limited to this community of states parties.

Art.2.1 outlines the general nature of obligations for the rest of the articles in the ICESCR. Among the articles of part III there is one of particular importance for the extraterritorial scope of the ICESCR:

Article 11

"1. The States Parties to the present Covenant recognise the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realisation of this right, *recognising to this effect the essential importance of international co-operation based on free consent.*

2. The States Parties to the present Covenant, recognising the fundamental right of everyone to be free from hunger, shall take, *individually and through international co-operation*, the measures, including specific programmes, which are needed:

(a) To improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilisation of natural resources;

(b) *Taking into account the problems of both food importing and food exporting countries, to ensure an equitable distribution of world food supplies in relation to need.*"

Due to art.2 international co-operation, as an obligatory ingredient to full realisation, is implicit in all articles of the ICESCR part III. Art.11 is the only article in part III which makes this explicit again. This seems to give the respective rights a particular importance. Whereas art.11.2 simply repeats the words of the then current draft art.2.1 ('individually and through international co-operation'), art.11.1 'recognises the essential importance of international co-operation...' for the rights mentioned in this article. It does not touch the nature of obligations involved as formulated in the subsequent final reading of art.2.1. In particular should the added clause 'based on free consent' not be seen as restricting the obligatory nature of international co-operation.¹⁰

Art.11.2(b) gives some specifics on international co-operation around world food supplies: 'An equitable distribution of world food supplies in relation to need' implies freedom from hunger as world food supplies are sufficient to meet the respective need. States therefore have both territorial and extraterritorial obligations to ensure that the malnourished and starving world-wide have sufficient food.

Would this give a hungry and malnourished person a legal claim to world food supplies - and which authorities should the hungry persons turn to? Craven¹¹ relates a conclusion drawn by one of the members of the committee on a day of

¹⁰ The second sentence in art.11.1 was controversial in the travaux préparatoires of the Third Committee and led to a complicated debate. Many drafters saw it as unnecessary as the issue was already covered by art.2.1. Others felt that international co-operation was important particularly for art.11 and should be mentioned there as well. The proposal of the Syrian delegate to add a clause "based on free consent" to the second sentence referred more to assistance rather than co-operation (as suggested by his formulation co-operation "should be given ..."). His point was that assistance should be based on free consent, and not that such assistance itself be arbitrary. This Syrian amendment was marginal in the discussion. When votes were taken it had the support of only one third of the Committee (20), but nevertheless passed due to the large number of abstentions (21), who apparently did not take a position perhaps as they saw art.11.1 not introducing specific forms of international co-operation detailed enough to be seen as compulsory on the states parties, and that future steps needed the consent of the co-operants. (UNGA, 11th session, Third Committee, 742nd and 743rd meeting, 25th and 28th of January 1957)

¹¹ M.C.R. CRAVEN, *The International Covenant on Economic, Social and Cultural Rights – A Perspective on Its Development* (1995).324

general discussion to the effect that this art.11.2.b would make world food supplies a ,common heritage of mankind for meeting the needs of the hungry and malnourished'. Quite often the plight of the hungry could already be solved by an equitable distribution of domestic food supplies.

A crucial and recurring problem is the relationship between internal obligations and extraterritorial obligations: To what extent can the issue at hand be reasonably addressed by invoking an internal obligation? Are domestic authorities working with scarce (but ultimately sufficient) resources be expected to establish higher standards (for example in equity of distribution) than those prevailing in the international community in general? These and others issues will be dealt with below in section 3.4.

Article 1 on self-determination, in spite of its reference to "peoples" rather than human beings, also sheds some light on extraterritorial obligations:

Article 1

2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic cooperation, based upon the principle of mutual benefit, and international law. *In no case may a people be deprived of its own means of subsistence.*"

If a person is deprived of her means of subsistence because she belongs to a people which is deprived of its means of subsistence, the Covenant will be violated – and frequently by an outside authority breaching an extraterritorial obligation.

The first sentence implies the freedom of peoples to keep their natural wealth and resources disregarding obligations arising out of international economic co-operation. This article could have considerable relevance for the questions of international debt and structural adjustment, as these heavily impact on the natural wealth and resources of indebted countries. Moreover the destruction of local agriculture by international agribusiness or the ruinous exploitation of natural wealth by mining corporations etc. deprives millions of people (and in the latter case in particular indigenous peoples) of their means of subsistence.

Returning to article 2, it should be noted that the co-operation referred to in art.2.1 is a co-operation necessary for the full realisation of the rights recognised in the Covenant and is binding for each state party both internally and extraterritorially. Extraterritorial obligations live in a world of co-operation, but so do domestic obligations. Many states, whose domestic policies are co-determined for example by the IMF – would certainly agree. And in a globalised set up where corporations with a seat in one part of the world affect the lives of people in a different part, co-operation is essential for the full realisation of human rights. Beyond this basic principle reflected in art.2.1 the ICESCR remains fairly open on the details. This is illustrated in articles 22 and 23.

Article 23

The States Parties to the present Covenant agree that *international action for the achievement of the rights recognised 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 organised in conjunction with the Governments concerned.

The furnishing of technical assistance is therefore seen as 'international action for the achievement of the rights recognised'. It remains vague, however, to what extent technical assistance is obligatory and for whom.

Article 22 looks at first like a mere procedural article. It does, however, set some standards for the work of international authorities:

Article 22

The Economic and Social Council may bring to the attention of other organs of the United Nations, their subsidiary organs and specialised 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.

Besides being procedural the article presupposes that it belongs to the tasks of such international authorities to decide for their own field of competence whether or not an international measure contributes to the implementation of the Covenant. It can therefore be assumed that international measures by these international authorities are (also) meant to

implement the rights recognised. This raises the issue how states parties can implement their extraterritorial obligations through such international authorities. This question will be considered in chapter 3.

2.2 Comments and observations by the Committee on Economic, Social and Cultural Rights

There has been increasing reference to Economic, Social and Cultural Rights in the UN human rights system. The Committee on Economic, Social and Cultural Rights is the supervisory body for the ICESCR (henceforth "the Committee") and the main source of comments and observations in the UN system on the Covenant and its extraterritorial scope. In the current context exclusive reference will be made to the pronouncements of the Committee. A key role here has to be attributed to its General Comments. They are meant to clarify the content of the ICESCR¹².

So far there have been 15 General Comments (in short GCs). Two of them (GC 2 and GC 8) deal exclusively with issues related to extraterritorial scope. Eight of the others carry paragraphs specifying extraterritorial obligations – and increasingly so since 1999.

GC 2 (1990, international technical assistance measures, art.22)

In this GC the Committee goes about some standard setting for UN agencies, which can be seen as indicative of international obligations.

§6. UN agencies must not be involved in projects which 'involve large-scale evictions or displacement of persons without the provision of all appropriate protection and compensation.' In §7 the Committee refers to the fact that 'development co-operation activities do not automatically contribute to the promotion of respect for economic, social and cultural rights. Many activities undertaken in the name of "development" have subsequently been recognised as ill-conceived and even counter-productive in human rights terms. In order to reduce the incidence of such problems, the whole range of issues dealt with in the Covenant should, wherever possible and appropriate, be given careful consideration.'

§8(b). Consideration should be given by United Nations agencies to the proposal, made by the Secretary General in a report of 1979¹³, that a "human rights impact statement" be prepared in connection with all major development co-operation activities;

§8(b) The training or briefing given to project and other personnel employed by United Nations agencies should include a component dealing with human rights standards and principles.

§8(d) Every effort should be made, at each phase of a development project, to ensure that the rights contained in the Covenants are duly taken into account. This would apply, for example, in the initial assessment of the priority needs of a particular country, in the identification of particular projects, in project design, in the implementation of the project, and in its final evaluation.

§9 refers to the 'major element of austerity' linked to structural adjustment programmes: 'Under such circumstances, however, endeavours to protect the most basic economic, social and cultural rights become more, rather than less, important.' 'Similarly, international measures to deal with the debt crisis should take full account of the need to protect economic, social and cultural rights through, inter alia, international co-operation. In many situations, this might point to the need for major debt relief initiatives.'

¹² Most General Comments are available for example under <[www1.umn.edu/humanrts/gencomm/...](http://www1.umn.edu/humanrts/gencomm/)>

¹³ 'The international dimensions of the right to development as a human right in relation with other human rights based on international co-operation, including the right to peace, taking into account the requirements of the new international economic order and the fundamental human needs' (UN Doc. E/CN.4/1334, §314)

GC 3 (1990, the nature of States Parties obligations, art.2.1)

§13. '[T]he Committee notes that the phrase "to the maximum of its available resources" was intended by the drafters of the Covenant to refer to both the resources existing within a State and those available from the international community through international co-operation and assistance: Moreover the essential role of such co-operation in facilitating the full realisation of the relevant rights is further underlined by the specific provisions in articles 11, 15, 22 and 23....'

§14. 'The Committee wishes to emphasise that in accordance with articles 55 and 56 of the Charter of the United Nations, with well-established principles of international law, and with the provisions of the Covenant itself, international co-operation for development and thus for the realisation of economic, social and cultural rights is an obligation of all states. It is particularly incumbent upon those States which are in a position to assist others in this regard.'

GC 4 (1991, the right to adequate housing, art.11.1)

§19. [T]raditionally less than 5 percent of all international assistance has been directed towards housing or human settlements, and often the manner by which such funding is provided does little to address the housing needs of the disadvantaged groups. States parties, both recipients and providers, should ensure that a substantial portion of financing is devoted to creating conditions leading to a higher number of persons being adequately housed. International financial institutions promoting measures of structural adjustment should ensure that such measures do not compromise the enjoyment of the right to adequate housing. ...

GC 7 (1997, forced evictions and right to housing, art.11.1)

§18: The Committee is aware that various development projects financed by international agencies within the territories of States parties have resulted in forced evictions. In this regards, the Committee recalls its General Comment No.2 (1990) which states inter alia that "...international agencies should scrupulously avoid involvement in projects which , for example ... promote or reinforce discrimination against individuals or groups contrary to the provisions of the Covenant, or involve large-scale eviction or displacement of persons without the provision of all appropriate protection and compensation. Every effort should be made, at each phase of a development project, to ensure that the rights contained in the Covenant are duly taken into account.

§19: Some institutions, such as the World Bank or the OECD have adopted guidelines on relocation and/or resettlement with a view to limiting the scale of human suffering associated with forced eviction. Such practices often accompany large-scale development projects, such as dam-building and other major energy projects. Full respect for such guidelines, insofar as they reflect the obligations contained in the Covenant, is essential on a part of both the agencies themselves and States parties to the Covenant. ...

GC 8 (1997, economic sanctions and economic, social and cultural rights)

§11 relates to the party or parties responsible for the imposition, maintenance or implementation of the sanctions, whether it be the international community, an international or regional organisation, or a State or group of states. In this respect, the Committee considers that there are three conclusions which follow logically from the recognition of economic, social and cultural rights. The first is that these rights should be fully taken into account when designing sanctions. The second calls for effective monitoring of these rights throughout the period of sanction. And 'Third, the external entity has an obligation "to take steps, individually and through international assistance and co-operation, especially economic and technical," in order to respond to any disproportionate suffering experienced by vulnerable groups within the targeted country.(§14)' Such obligations are – by the very nature of sanctions – extraterritorial.

GC 11 (1999, plan of action for primary education, art.14)

§9: '[W]here a State party is clearly lacking in the financial resources and/or expertise required to "work out and adopt" a detailed plan, the international community has a clear obligation to assist.'

GC 12 (1999, right to food, art.11)

§17. '[A] state claiming that it is unable to carry out its obligations for reasons beyond its control therefore has the burden of proving that this is the case and that it has unsuccessfully sought to obtain international support to ensure the availability and accessibility of the necessary food.'

§19. 'Violations ... include ... 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.'

GC 12 carries a specific section (§§36-41) on International Obligations with the subheadings 'States parties', 'States and international organisations', 'the United Nations and other international organisations'.

§36 identifies as a consequence of the essential role of international co-operation a 'commitment to take joint and separate action to achieve the full realisation of the right to food' The three classes of obligations (respect, protect, fulfil) are then applied to extraterritorial obligations. §37 asks states to refrain from food embargoes and the use of food as a means of political and economic pressure (referring to GC 8).

§38 identifies a joint and individual responsibility to co-operate in providing disaster relief and humanitarian assistance. §39 puts conditions on food aid.

§40 calls for a better co-operation of the respective UN agencies and §41 recommends that international financial institutions pay attention to the right to food in their policies and ensure that the right to food is protected in structural adjustment programmes. (as in GC 2, §9)

GC 13 (1999, right to education, art. 13)

§53: [A]rticles 2.1 and 23 of the Covenant, article 56 of the Charter of the United Nations, article 10 of the World Declaration on Education for All, and §34 of the Vienna Declaration and Programme of Action, all reinforce the obligation of States parties in relation to the provision of international assistance and co-operation for the full realisation of the right to education. In relation to the negotiations and ratification of international agreements, States parties should take steps to ensure that these instruments do not adversely impact upon the right to education. Similarly, States parties have an obligation to ensure that their actions as members of international organisations, including international financial institutions, take due account of the right to education.

GC 14 (2000, right to health, art. 12)

§39 applies the three classes of obligations (respect, protect, fulfil) to the issue of extraterritorial obligations for the states parties 'to comply with their international obligations in relation to article 12'.

§40: 'States parties have a joint and individual responsibility, in accordance with the Charter of the United Nations and relevant resolutions of the UN General Assembly and of the World Health Assembly, to co-operate in providing disaster relief and humanitarian assistance in times of emergency, including assistance to refugees and internationally displaced person. Each State should contribute to this task to the maximum of its capacities. ...'

§41 takes up the issue of embargoes and the obligation of States parties to refrain from restricting the supply of adequate medicines and medical equipment.

§§63 to 65 describe the different functions of UN agencies in the field of health and the need for improved co-ordination and use of existing expertise. Moreover:

§65 '[P]riority in the provision of international medical aid, distribution and management of resources, such as safe and potable water, food and medical supplies, and financial aid should be given to the most vulnerable or marginalised groups of the population.'

GC 15 (2002, right to water, art. 11,12)

§§30 to 36 deal with international obligations along the lines of the previous general comments. §31, for example, recalls that '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.'

The Committee's views on the extraterritorial scope of the ICESCR are also reflected in its concluding observations on the states' reports received under the Covenant. For a couple of years, now, the ICESCR included in its concluding observations references to the level of Official Development Assistance (ODA) and to the role of the state party as a member of international organisations, and in particular the international financial institutions.

In its concluding observations on Ireland 05/06/2002 the Committee noted for example:

‘§37. ‘The 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 and co-operation.’

§38. ‘The Committee urges the State party to ensure that its contribution to international development cooperation reaches 0.45 per cent of GNP by the end of 2002 (see paragraph 4 of the Committee's concluding observations on the State party's initial report) and that this annual figure increases, as quickly as possible, to the United Nations target of 0.7 per cent of GNP.’

In its state's report of 1998 Ireland had announced this as an aim.

Almost identical statements about their obligations as members of the international financial institutions were recently made on the U.K., France, Sweden, Japan, Germany and Finland.¹⁴ The observations on Ireland broadened the focus to international organisations in general.

The Committee took note of the level of ODA as a percentage of GNP in its observations on Japan, Germany and Finland.¹⁵ In these observations it seems to consider 0.7% of the GNP as a minimum amount for ODA.

3. Towards a systematic view on extraterritorial obligations

The interpretative work so far of the Committee¹⁶ provides some basic lines of approach towards a systematic view on extraterritorial obligations under the ICESCR.

A key element of every systematic treatment of obligations under the ICESCR will have to be a renewed understanding of the term co-operation. In recent years this term has been reduced to and identified with development aid. It is necessary to return to the original meaning of co-operation as "working together" in the realisation of human rights for each person.

The classification of states' obligations into the three classes of obligations to respect, protect and fulfil has proved a useful tool for the Committee and for human rights in general. The obligation to respect means that a state must not destroy a person's human rights standards. The obligation to protect makes a state duty-bound to protect a person's human rights standards against destruction by third parties. Both classes of obligations deal with persons or groups who are enjoying their human rights standard, but who are threatened. The obligation to fulfil deals with persons deprived of a human rights standard and puts the state under a duty to re-establish this standard.¹⁷ Whereas respect-bound

¹⁴ U.K. 05.06.2002, France 30.11.2001, Sweden 30.11.2001, Japan 24.09.2001, Germany 24.09.2001 Finland 01.12.2000 (The concluding observations of recent years are available from <www.unhchr.ch>)

¹⁵ Japan 24.09.2001, Germany 24.09.2001, Finland 01.12.2000

¹⁶ In chapter 3 most footnotes on the Committee's comments and observations refer to quotes documented in section 2.2. The reader is therefore referred to this section for further details.

¹⁷ Details about these three classes, and in particular the fulfil-bound obligations can be found in R KÜNNEMANN, 'The Right to Adequate Food: Violations related to its minimum core content' in A.CHAPMAN, S.RUSSELL (eds.), *Core Obligations: Building a Framework for Economic, Social and Cultural Rights* (2002) 161-184

obligations are immediate under all circumstances, the protect-bound obligations and, in particular, fulfil-bound obligations require positive action and have to be implemented ‘as expeditiously as possible’¹⁸.

It seems reasonable to make use of this three-fold classification for a systematic approach to extraterritorial obligations. The Committee already commented in this direction.¹⁹ Moreover there is an additional three-fold classification which may prove useful. It results from the differences of states’ authorities involved, as outlined in the following section.

3.1 Internal, external and international obligations

Victims of violations of the ICESCR must find remedy, for example before national and international courts²⁰. With a view to (future) judicial remedy there are good grounds for a human rights analysis to look at states’ obligations from the perspective of the victims of violations. Violations of a human right are breaches of states obligations which destroy people’s human rights standards (in the case of respect- or protect-bound obligations) or keep people in a state of deprivation (in the case of fulfil-bound obligations)²¹.

It is not the abstract State that victims have to deal with, but concrete states’ authorities. A states’ authority (short: authority) is an organisation led by one or more states to exercise functions on behalf of these governing states. For a victim a domestic authority is an authority led by her own state. An authority is a foreign authority if it is governed by a foreign state, and it is termed an international authority, if it is jointly led by a number of states with formalised rules of decision making. Authorities are led by states, and hence obligations of states under the ICESCR sometimes imply obligations for such authorities in the sense that the governing states have to meet their obligations under the ICESCR also in the context of authorities in whose leadership they are involved.²²

This should be immediately clear for domestic and foreign authorities: A victim should be able to count on internal obligations of national authorities, if her state is a party. Similarly the victim should count on extraterritorial obligations of foreign authorities, if the foreign state is a state party. A domestic or foreign authority acting against these obligations would have to be corrected by the respective state, otherwise the state would violate the ICESCR.

A similar argument can be made in the case of international authorities – at least if states parties have a voting majority in the authority: If the governing body of the international authority takes a decision which fails to comply with states’ parties’ obligations under the ICESCR, then at least some states parties must have violated the Covenant by such a decision. Such decisions must therefore neither be taken nor presumed under international law. An act of such an international authority, which implies such violations under the ICESCR (if put under a vote) must therefore be ruled out. In this sense the ICESCR therefore implies obligations for international authorities as well. If states parties form a voting majority in an international authority the international authority can then be called a duty-bound international authority (duty-bound through the ICESCR) as much as national authorities are duty-bound if their state is a party. In ”lax language” both types of authorities can therefore be said to ”violate” human rights. Strictly speaking of course, it is only states who can violate human rights - if they take part in the governance of a malfunctioning authority and fail to address such ”violation”.

Most international authorities (the UN and its agencies, the World Bank, IMF, WTO etc.) are duty-bound in this sense. How about international authorities in which states parties do not carry a majority? States parties must not be part of

¹⁸ GC 12 §14: ‘The principal obligation is to take steps to achieve *progressively* the full realisation of the right to adequate food. This imposes an obligation to move as expeditiously as possible towards that goal.’

¹⁹ GC 12, §36, GC 14, §39

²⁰ GC12 §32: ‘Any person or group who is a victim of a violation of the right to adequate food should have access to effective judicial or other appropriate remedies at both national and international levels. ...’ Similarly for other rights.

²¹ Cf. VAN BOVEN et al. (eds.) *The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights* (1998)

²² In a number of concluding observations (mentioned at the end of section 2.2) the Committee pointed to such obligations of states parties as members of international organisations, in particular the international financial institutions.

such authorities, as they could be forced to breach their obligations under the Covenant. Otherwise a state could for example come into a situation where it supports activities in its own territory through such international authorities which would be ruled out under the Covenant for its national authorities and against which it carries a protect-bound obligation. Moreover, a state party must not be a member of any institution which is not led by states or governed by states – as through such institutions an evasion of obligations under the Covenant would be similarly possible.²³

Authorities are not states parties, and hence cannot carry direct obligations under the ICESCR. Nevertheless, obligations of the governing states imply obligations for the authorities which they control – and this is true for international authorities as well. If a violation by an international authority is based on explicit voting it should be clear which states parties are in violation. If a violation is not based on explicit voting it can at least be said that the governing community of states parties is implied in a violation of the ICESCR. It must now take corrective action by decision (just as a nation state faced with a violating act by a domestic authority would have to do). And once it does so, the act of the authority will either be corrected, or the corrective vote will be defeated and through this vote some governing states parties identify themselves to be violating the ICESCR in this context.

Accountability of an authority (and its governing state or states) requires procedures for victims of violations to approach the governing body to take such a vote for identifying violators and for corrective action. Approaching these states individually will most likely turn out prohibitive: How can victims be expected to approach 146 governing states parties, if necessary in order to have them take a remedial decision? Such an approach will not provide remedy for the victim for very practical reasons. Remedy requires both a separate and joint responsibility of governing states parties. Therefore the conclusion must be drawn that in a duty-bound international authority the community of states parties should also be jointly responsible (as a group) for breaches of international obligations.

Another threefold typology of obligations of states has thus emerged consisting of:

- internal obligations, which a state has towards the victims in its own territory through its national authorities.
- external obligations, which a state has towards victims outside its own territory through its own national authorities.
- international obligations, which a state carries individually towards victims inside and outside its territory through an international agreement or international authority for which it is as a member of the governing body or which states parties jointly carry as governing majority of a duty-bound international authority.

In the following sections the scope of each of the three classes of obligations to respect, protect and fulfil will be considered with regard to internal, external and international obligations.

3.2 Respect-bound Obligations

States parties jointly and individually must not destroy anybody's human rights standard. Such an obligation is incumbent under all circumstances. There is no difference whether the victim lives inside or outside the territory or whether the destruction is taking place individually or in co-operation with others.²⁴ Moreover it should be noted that a

²³ The Committee pointed to these problems for example in GC 12 §19: When states parties enter into agreements with other states or international organisations, failing to take into account their "international legal obligations" this would be seen as a violation of the Covenant. A similar note is struck on the right to education in GC 13, §53: 'In relation to the negotiations and ratification of international agreements, States parties should take steps to ensure that these instruments do not adversely impact upon the right to education.' Both provisions are not restricted to domestic obligations. They imply that non-participation in international institutions will be obligatory if the obligations under the Covenant cannot be safe-guarded in such a co-operation.

²⁴ The Committee has been concerned with extraterritorial respect-bound obligation basically in the context of sanctions, large scale forced evictions as well as structural adjustment programmes and the debt issue. The Committee has treated extraterritorial respect-bound obligations linked to

breach of an external or international respect-bound obligation would trigger an internal protect-bound obligation of the victim's state.

3.2.1 External respect-bound obligations

What are the options of a victim seeking remedy against a breach of an external respect-bound obligation? This question is not sufficiently answered by pointing to the victim state's domestic obligation to protect. Yes, the victim's states may also have breached its obligation in this context. The victim should expect from her state to become active and provide remedy as it failed in its protect-bound obligation. In a second step the domestic state may then approach the destructive foreign state for compensation. The need, however, remains for ways and means of the victim to approach the foreign state directly (in court or otherwise), in particular if her own state fails to provide remedy and compensation.

Situations in which these obligations are relevant include active support by a foreign state agency for the destruction of livelihoods of vulnerable groups, such as the Canadian CIDA in the case of the Barabaig in Tanzania.²⁵ Trans-border water issues such as dams withholding water from flowing into neighbouring counties are covered by §31 of GC 15, which states that '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.'

3.2.2 International respect-bound obligations

What is left to do for somebody victimised by a breach of an international respect-bound obligation? As in the external case, the reference to the internal obligation to protect is correct, but insufficient. Here the situation, however, is more complicated and a distinction has to be made depending on the type of international organisation which destroyed the victim's human rights standard.

If the international organisation is not duty-bound every state party who is member has breached its respect-bound obligations, since it could have known that even by voting against such a destructive act it could not have guaranteed a prevention of destruction. Victims should therefore be seen as having legitimate claims against such states.

If the destructive agent is a duty-bound international authority and the destructive act was based on a vote in the governing body – those states parties who voted in favour are jointly and separately responsible, and the victim should be able to approach them individually and jointly. If the destructive act was not based on a vote, the victim must have some means to approach the governing community of state's parties in order to find redress, as they are expected to prevent such destructive acts. This implies some collective identity of states parties in the governing bodies of international authorities which allows them to act jointly in providing remedy upon being approached by victims or courts.

Such situations are referred to for example in GC 2.6 (UN agencies involved in large scale evictions and other ill-conceived and counter-productive "development" projects), or GC 4.19 (International financial institutions promoting

sanctions and embargoes in particular in GC 8, §11. In §14 it calls for specific compensatory measures for the victimised vulnerable groups. GC 12, §37 asks states to refrain from food embargoes and the use of food as a means of political and economic pressure. Breaches of international and external respect-bound obligations occur through the destruction of people's economic, social and cultural human rights standards, when ODA or international authorities support mega projects which displace people without adequate rehabilitation and compensation (GC 7 §18,19). In relation to structural adjustment the Committee calls upon the protection of economic and social rights in structural adjustment programmes (for example in GC 2 §9, GC 12 §41). This call includes international measures. The Committee remains rather vague in assigning responsibilities among the different actors involved. The term protect could imply taking international action against states breaching internal respect-bound obligations through their retrogressive measures under the programmes. As many of these breaches originate from advice or conditionality of international institutions, the Committee can be seen as pointing to international respect-bound obligations instead.

²⁵ In the period from 1970 to the mid 1990s the Tanzanian National Agriculture and Food Corporation (NAFCO) carried out a wheat project on 46000 ha lands of the nomadic Barabaig people – against their expressed will and interest: This particular stretch of land was crucial for the survival of the nomadic tribe. The tribe was deprived of its traditional land rights. CIDA was actively supporting this wheat project failing to respect the Barabaigs' access to food and food producing resources.

measures of structural adjustment which compromise the enjoyment of the right to housing). Another example is the dumping of EU beef on the markets of vulnerable nomadic producers in Burkina Faso in 1993.²⁶

3.3 Obligation to protect and to co-operate in protection

The destructive agent for a victim's human rights standard could be a private party (domestic or foreign) or a domestic, foreign or international authority. What kind of protection-bound obligations can a victim expect from a foreign or international authority?

3.3.1 External obligations to protect and to co-operate in protection

If the destructive agent is a states authority, the destructive act is a breach of internal, external or international respect-bound obligations and hence a violation of human rights. Can a foreign country be expected to protect the victim for example by preventing a breach committed by the victim's state or another foreign state? For most practical purposes this goes beyond what foreign states can do, as it means direct and adverse interference with acts of foreign or international states authorities. Canada, for example, would have problems to protect welfare mothers in the USA against being deprived of their unconditional right to food in the US welfare reform. On the other hand, if the foreign state had the chance to do so, and could be reasonably expected to protect each person under similar circumstances, it would certainly have the obligation to do so as well. It may be difficult for the victim to establish such facts.

If the destructive agent is a private party, adversarial action towards other states is not required. Protective action may be obligatory, at least in those cases where the private party is a citizen of the respective foreign states (or a corporation registered in the foreign country). A European state may have to exercise its external obligation to protect children's rights in an Asian country, by prosecuting sex-tourists through "extraterritorial application" of the respective European law. If a transnational corporation with seat in a country A destroys access to food in a country B (for example by forced evictions), this crime against human rights is to be considered punishable under the legal systems of A even if the state B does not intervene. If dumping is practiced in international trade by an industry in country A against a vulnerable group in country B and this group would lose its access to food as a consequence, this crime against the right to food is to be considered punishable in country A even if country B does not intervene. In the case of transnational corporations or international trade, experience shows that sometimes neither state A nor state B meet their obligation to protect.²⁷

State A could claim that its intervention against "its" transnational corporation is an insufficient and futile measure to protect the victim because the same project could and would otherwise be carried out by another corporation from a different state (perhaps a non-state party to the covenant). In such situations a state party's extraterritorial obligation to protect requires that joint action be taken with other states parties in the context of an international authority which would have the capacity to regulate at least the transnational corporations of states parties and perhaps even the others as well. Hence in some of these situations there is an international obligation to protect, as external obligations to protect would not be sufficient to meet a state parties protect-bound obligation under the Covenant.

Another issue is the question of a foreign state's obligation to co-operate with the victims' national authorities in protecting the victim. In most cases there may be some kind of protective effort by national authorities to protect the victim against a destructive private party. Any act of a foreign state which would countervene such domestic protection-bound activities is a breach of the external obligation to protect and to co-operate in protection. Beyond such a

²⁶ The Burkina beef markets are essential for the vulnerable nomadic producers' right to feed themselves. In 1993 highly subsidised beef from EU surpluses was dumped on these markets depriving the Sahel nomads from their means to trade their main product (beef) against essentials from the Southern regions. The EU through its subsidies was actively involved in this destructive process leading to hunger and malnutrition. International pressure made the EU abandon the dumping of beef in this region.

²⁷ A case in point are the activities of transnational oil corporations in the Ecuadorian Amazon, where they destroy the indigenous peoples' territories and ecological resources on which these communities depend to feed themselves. In the past the Ecuadorian government has been unwilling – and partially perhaps also unable – to meet its domestic obligation to protect the indigenous peoples' economic, social and cultural rights in the Amazon. The home states of TNCs sometimes claim that such social questions are to be regulated by the state of the victims. Nevertheless class action suits in the home states have been brought in similar situations.

minimum co-operation with (and respect for) the national authorities there are certainly more far-reaching obligations to assist domestic protective measures.²⁸ They would have to be determined on a case to case basis.

3.3.2 International obligations to protect and to co-operate in protection

In the previous subsection the need for international authorities as a vehicle for the implementation of a state party's extraterritorial protect-bound obligations under the ICESCR has been mentioned: Confronted with globalisation, states parties may find that they are unable to meet their extraterritorial (and even sometimes their internal) obligations under the ICESCR without effective duty-bound international authorities. The Covenant would then have to take measures to establish such authorities in keeping with art.2.1. One case in point is the international debt crisis and the related international protect-bound obligations.²⁹

The ICESCR does not detail the nature of co-operation and the delineation of responsibilities between the internal, external and international obligations to protect. One would certainly expect that all authorities involved will act in good faith and would even try to implement their obligation to protect if they are faced with failures to do so by other authorities. This, however, may not help the victims, who need more clarity as to how much protection of economic, social and cultural human rights standards is incumbent on national authorities, and how to deal with different domestic, foreign and international authorities possibly blaming each other. A reasonable analysis of cases will certainly lead to reasonable international standards, once the states parties understand that this is the need of the hour, as they have to implement their protect-bound obligations under the ICESCR in a globalising world.

3.4 The obligation to fulfil and to co-operate in fulfilment

3.4.1. Extraterritorial fulfil-bound obligations: A duty to pay – to whom?

Fulfil-bound obligations make demands on the deployment of resources – domestic and others. ICESCR 2.1 asks from each state the deployment of the maximum of its available resources for the full realisation of the rights recognised in the Covenant. ICESCR 2.1 uses the clause 'to the maximum of its available resources' without distinction between donor states providing assistance and recipient states receiving assistance. States can therefore be seen under an extraterritorial obligation to contribute to the maximum of their available resources³⁰. Would this generate a legal claim of low-income states for development assistance? In the drafting period most states have reacted strongly against a related duty to pay to states.³¹ Recently the Committee has been reconsidering the issue – at least in principle – as can be seen by its repeated reference in some concluding observations to the 0.7% goal for ODA³².

²⁸ A case in point is the extraterritorial application in Europe of domestic protective legislation for children's rights (ICESCR 10.3) in situations where a citizen had abused children in an Asian country (sex-tourism cases). Such measures are taken, of course, in co-operation with the protective measures of the respective foreign state itself.

²⁹ A solution to the debt crisis is one of the contexts where institutional arrangements are necessary so that states can meet their extraterritorial protect-bound obligations: 'Similarly, international measures to deal with the debt crisis should take full account of the need to protect economic, social and cultural rights through, inter alia, international co-operation. In many situations, this might point to the need for major debt relief initiatives.' (GC 2.9)

³⁰ Concerning ICESCR 2.1 the Committee underlined (in GC 3.13) '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 co-operation and assistance.' This comment must not be misunderstood as reducing the resources to be made available by the international community to those which the community deems 'available', whereas the domestic obligation refers to (all) 'the resources existing within'. The Committee's comment refers to the situation of a state which receives assistance, whereas ICESCR 2.1 makes no distinction between donor states providing assistance and recipient states receiving assistance. It uses 'available resources' certainly not in the sense of 'resources deemed available' as this would deprive the clause of any meaning. The question remains, of course, how such 'maxima of available resources' can be determined.

³¹ M.C.R. CRAVEN, *The International Covenant on Economic, Social and Cultural Rights – A Perspective on Its Development* (1995), 148f

0.7% is a rather arbitrary figure, possibly far away from the ‘maximum of available resources’ (ICESCR art.2.1) in the community of states parties. Moreover many activities that come under ODA have been counterproductive in human rights terms. The Committee itself has noted this sobering fact³³. The concept and practice of ODA is largely unrelated to the fulfilment programmes obligatory for a realisation of the respective human rights.³⁴ The UNDP concept of human priority expenditure³⁵ describes the only part of ODA that has elements of the programmes necessary to fulfil human rights standards such as those recognised in ICESCR art.11,12,13.³⁶ The OECD average for human priority expenditure, however, is below 10% of its total ODA.³⁷ Besides being only vaguely related to fulfilment of economic and social rights. The following subsection will provide another reason, why ODA is not a promising concept in the context of extraterritorial fulfil-bound obligations under the ICESCR.

3.4.2. External obligations to fulfil and co-operate in fulfilment

External fulfil-bound obligations can hardly play a role: A deprived person will find it difficult to claim fulfilment as an obligation from a foreign state party X, but not from a foreign state party Y - even if both states had the resources to do so. Such obligations need to be basically the same for all states. This holds true for the obligation to co-operate in fulfilment as well. Why should X be duty-bound to assist in fulfilment, whereas Y is not.³⁸ Therefore extraterritorial fulfil-bound obligations have to be mainly dealt with as international obligations.

3.4.3. International fulfil-bound obligations

Fulfil-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?³⁹ 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.

Some of the reluctance of OECD countries towards victims’ legal claims under extraterritorial fulfil-bound obligation could be related to the arbitrariness involved when dealing with fulfilment-bound obligations on an external level. The second reason, perhaps, is the OECD countries’ reluctance to support non-existing or failing fulfilment systems in

³² See section 2.2, concluding observations on Finland, Germany, Ireland, Japan.

³³ In GC 2 §7 the Committee notes that ‘Many activities undertaken in the name of “development” have subsequently been recognised as ill-conceived and even counter-productive in human rights terms.’

³⁴ ODA tends to be determined by economic and political considerations of donor countries and UN agencies rather than by obligations under the ICESCR. The Committee (in GC 2, §8) makes some proposals to improve this situation. See section 2.2 for details.

³⁵ UNDP Human Development Report (1991), 53ff

³⁶ The Committee criticises in GC 4 the low percentage of international assistance devoted to housing – and the fact that even this little assistance fails to reach the disadvantaged groups.

³⁷ UNDP Human Development Report (1991) 55, the data are from 1989.

³⁸ In situations of emergency GC 14, §40 requires (for the right to health) that ‘each state should contribute to this task to the maximum of its capacities.’ In such situations a neighbouring state may have geographical capacities not available to other states, and these have to be made available. In terms of the cost of the operation, however, the mentioned limitations of external fulfil-bound obligations remain.

³⁹ GC 12 §17 puts the burden of proof for lacking resources or other reasons for ‘inability to carry out its obligations’ on the victim’s state. Moreover, the state would have to prove that it sought (unsuccessfully) international assistance. In order to make such a provision more useful for victims and courts there should be some ideas, how it could be operationalised. When can the domestic resources available for agrarian reform, minimum income or food programmes be considered exhausted? At ten or twenty percent of the GDP? And if the state’s search for international assistance was unsuccessful – did the international community deploy resources to the maximum of its available resources?

foreign countries by transferring funds to the respective states without proper control over the use made. The third reason, of course, is unclarity about cost.

Each of these points could be taken care of: The ICESCR implies the duty to create the necessary international authorities (and generate the related funds) to meet extraterritorial fulfilment obligations.⁴⁰ The question of possible national misuse of funds can be addressed by full and transparent co-operation of international authorities with national authorities in the implementation of the respective fulfilment-bound programmes – and, in particular, by introducing remedy procedures, including legal ones, for victims of fulfilment programmes which are either non-existent, failing or suffering severe irregularities.

Even for the third point (sharing of cost between international and national authorities) there are proposals for fair settlements which could be used for standard setting to operationalise international as well as internal fulfil-bound obligations: The first step should be to start with the core content of the rights in the ICESCR as a matter of priority and assess for each country (perhaps through the process of national framework laws⁴¹) the respective programmes and the related cost for their full realisation. Moreover the maximum of nationally available resources for the fulfilment of core content could be stipulated to cover at least the global average percentage of the GDP which OECD states⁴² spend on social services⁴³ as defined for example in the World Development Reports. Covering the deficit (if any) between this figure and the national cost would be seen as an international obligation.⁴⁴ The funds to comply with this obligation could be raised by a flat tax from each state party or country.

If one side in these joint programmes honours its obligation and the other side does not, neither side should be seen under an obligation to pick up the total cost. It would seem fair that the other side can only be seen under an obligation to provide the same portion of the necessary fund, as the failing side: If the international authority has to provide 60% of the programme and the (poor) nation state 40%, and the international authority only provides one half of its due amount (30% of the project cost), then the state can only be seen under an obligation to provide half of this amount as well (20% of total cost) – and vice versa. In both cases the programme can only be carried out at one half of the necessary level. The side (state or community of states parties) which triggered the lack of funds in such joint programmes would be seen in violation of human rights.⁴⁵

4. A look at the other half of the International Bill of Human Rights

⁴⁰ GC 3 §14 emphasises that ‘international co-operation ... for the realisation of economic, social and cultural rights is an obligation of all states. It is particularly incumbent upon those States which are in a position to assist others in this regard.’ The last sentence underlines the principle that in terms of funds generated for the field of international co-operation affluent states have to provide more. It would be hard to operationalise such provisions as a external obligation in a way that is of any use for the claims of victims.

⁴¹ GC 12 §29 asks states to introduce a framework law to operationalise a national strategy towards the full realisation of the right to food.

⁴² There are two reasons for taking OECD states as a point of reference (rather than the global average of all states): High income countries should not expect higher standards in distributional justice from low income countries than their own. Moreover there should be no incentive to low income countries to keep their standards low in order to achieve more from the international community.

⁴³ This may imply that funds for the domestic fulfil-bound obligations would be taken out of the social services budget and affect other social programmes. The concept of core content would indeed require such priority setting under the ICESCR.

⁴⁴ The Committee formulates such an obligation in GC 11 §9 for an action plan on primary education: ‘[W]here a State party is clearly lacking in the financial resources and/or expertise required to “work out and adopt” a detailed plan, the international community has a clear obligation to assist.’ It can be presumed that if the state is clearly lacking the resources for a plan, resources will also be lacking for its implementation so that this obligation extends to its implementation as well. The question remains to set indicators to determine when a state party is ‘clearly lacking’ financial resources.

⁴⁵ Exaggerated demands on the domestic resources of low income states are both unfair and counterproductive. Such demands should stay within the relative standards that are not unusual for OECD countries.

The previous section revealed for the ICESCR that even though extraterritorial respect-obligations are incumbent under all circumstances, extraterritorial protect- and fulfil-bound obligations need a detailed approach: Along with the structure of a state party's extraterritorial obligations it was submitted that a well-defined co-operation of states parties is necessary to ensure the effect of extraterritorial obligations of a party and the respective right for persons outside (and sometimes even inside⁴⁶) the party's territory. External and international obligations were identified. In this context, it was observed that these would only be sufficient by themselves to ensure the human rights standard of the extraterritorial victim, if the state party had in fact the power to do so. Such obligations, however, remain crucial for the ICESCR in the context of the duty to co-operate. ICESCR 2.1 takes care of these limitations in the field of positive obligations by explicit reference to the question of resources, to progressive realisation and to international co-operation.

The ICCPR deals, of course, with limitations as well. ICCPR 2.1, however, fails to make this reference explicit in the way of ICESCR 2.1. Instead it introduces the term jurisdiction: 'Each state party to the present Covenant undertakes to respect and to ensure to all individuals in its territory and⁴⁷ subject to its jurisdiction⁴⁸ the rights recognised in the present covenant...' This term is notably absent from the ICESCR – not only in its general articles on the nature of obligations and beneficiaries, but also in the rest of this covenant⁴⁹.

The qualifying clause on territory/jurisdiction in ICCPR 2 needs a careful reading: Does it pertain to "ensure", where it stands, or both to "respect and ensure"? Do persons for whom the party must ensure the right have to be subject to its jurisdiction, or also those for whom the party has to respect the right. If the second was correct the text should have read "to respect and ensure to all individuals ..." The fact that it reads instead "to respect and to ensure to all individuals ..." underlines that the limiting clause refers to "ensure" only. ICCPR 2.1 should therefore be read: States respect the rights. And states ensure the rights for all individuals subject to their jurisdiction. There are, in fact, no reasons why ICCPR should limit states' obligations to refrain from acts destroying human rights standards, as these are under the full control of the state party.⁵⁰

Therefore, when it comes to extraterritorial questions, ICCPR makes similar distinctions between negative obligations (respect) and positive obligations (ensure, protect, fulfil) as were found in the ICESCR. The American Convention on Human Rights makes these distinctions even clearer: "The States Parties to this Convention undertake to respect the rights and freedoms and to ensure to all persons subject to their jurisdiction the free and full exercise ..." (art.1.1). The European Convention art.1 spells out the second aspect only: "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined..." It takes the unlimited respect for human rights for granted. And there is every reason to do so.

In section 1 it was submitted (even before considering ICESCR 2) that the universal nature of rights and the duty to co-operate for their realisation are already implicit in the very purpose of the ICESCR as a human rights treaty. The same

⁴⁶ A lack of national resources can prevent the fulfilment of the right to food even inside a territory of a party – a situation that can be overcome by international co-operation.

⁴⁷ It has been generally accepted that this "and" has to be interpreted as "or".

⁴⁸ The term jurisdiction is not an easy one. It can refer to courts, officials and states and has various meanings in the public and in different fields of law. Jurisdiction can be "the power that an official or court of law has to enforce laws or carry out legal judgements" (Collins-Cobuild, English Language Dictionary 1993). Webster's New World Dictionary of the American Language 1968 gives five meanings: "administration of justice, authority or legal power to hear or decide cases", "authority or power in general", "the range of authority", "the territorial range of authority", "a law court of system of law courts".

⁴⁹ The only exception is art.14 on compulsory primary education.

⁵⁰ Such a limitation could lead to absurd consequences: Consider the right to life of a person detained by state agents of state X operating on the territory of state Y. After detention A is under the jurisdiction of X. If A gets killed in detention, this would of course be a violation of the covenant. If the person gets killed by the state agents before being detained the second interpretation would allow to argue that the person was outside the jurisdiction of X and hence the ICCPR does not apply to her. Such a reading of ICCPR 2 would defeat the purpose of the Covenant: The Covenant would not strengthen but weaken the right to life of this person.

argument can be made for the ICCPR: Even though international co-operation is not explicitly mentioned in ICCPR 2, it has been well-understood and state practice, for example in the persecution of criminals (obligation to protect). Any use (and interpretation) of the jurisdiction clause in ICCPR 2 should therefore show some degree of sophistication⁵¹ in order to avoid defeating the covenant's purpose.

5. Conclusions and Recommendations

The ICESCR offers a wide extraterritorial scope, which has been largely under-utilised. The Covenant was conceived as a center-piece for a new world order in the aftermath of a devastating war – a world based on universal rights and global co-operation. Today, almost 60 years later, this new world order is still far from being achieved. One of the reasons might very well be the failure to fully utilise the extraterritorial scope of the International Bill of Human Rights.

One of the main tasks of the new century will be the transition to sustainability: This will mean drastic changes both in the North and South: Population growth will have to come to an end. The same is true for a contradictory economic paradigm based on the endless destruction of finite natural resources. The paradigm of aggressive growth – aggressive towards Nature including our fellow human beings, ourselves and our children – will have to be replaced by a culture of peaceful and regulated sharing. It will be a transition to a new world offering a clear perspective, the perspective of human rights as the dynamic center and purpose of all global political activities.

The extraterritorial scope of the ICESCR provides an opportunity for states parties to meet these global challenges of the 21st century. The first step will be to start operationalising extraterritorial obligations. They entail institutional consequences – for example in the reform of the UN. These first steps could perhaps be promoted by the following measures:

1. Both in the new reporting guidelines and in the hearings on states reports the Committee should put detailed emphasis on states' reporting about external and international obligations.
2. Resources for the Committee must be strengthened so that it can get increasingly involved with external and international obligations without diminishing its work on internal obligations.
3. The upcoming optional protocol to the ICESCR should contain sections for complaints against breaches of external and international obligations.
4. Each state party should establish institutions to promote its extraterritorial obligations, in particular international obligations.
5. The community of states parties in the governing boards of duty-bound Intergovernmental Organisations (IGOs) should establish a joint group to implement its (joint and separate) obligations under the ICESCR in the respective IGO (ICESCR-group).
6. The ICESCR-groups in duty-bound IGOs should prepare regular reports to the Committee on the IGOs' performance respecting, protecting and fulfilling the standards set by the ICESCR. These reports should be submitted by a team of states' representatives mandated by the ICESCR-group.
7. The UNHCHR prepares an optional protocol on international obligations to the ICESCR.
8. The UNHCHR prepares a Human Rights Convention on IGOs.

The International Covenant on Economic, Social and Cultural Rights is perhaps the most violated international treaty of all. This includes both internal, external and international obligations. For the victims, and for all of us as fellow human

⁵¹ Consider the case of a mass murderer operating in the border region of states X and Y, hiding in X and committing a series of killings in Y only. State X is unwilling to detain the mass murderer and denies law enforcement agencies of Y proper co-operation. Are the victims outside the jurisdiction of X? A simplistic territorial interpretation might agree – to the detriment of the victims' protection and the purpose of the Covenant. Obviously X has authority over the murderer and hence considerable power over the victims. For the case at hand they can therefore very well be seen subject to its jurisdiction. It may therefore be necessary not to rule out such cases.

beings whose rights have been recognised in the Covenant, it offers an important point of departure towards a new world order where our economic, social and cultural rights are realised. Such a realisation requires the human rights accountability of international institutions and external business activities. For this to happen, the extraterritorial scope of the ICESCR must be allowed to bear fruits. The political challenge is there. It is for all of us to take it up – and urgently so.