UTRECHT JOURNAL OF
INTERNATIONAL AND EUROPEAN LAW

Providing Remedy for Corporate Human Rights Abuses Committed Abroad: The Extraterritorial Dimension of Home States' Obligation Under ICESCR

RESEARCH ARTICLE

WUBESHET TIRUNEH

ubiquity press

ABSTRACT

International human rights law, as a system underpinned by the Westphalian paradigm, heavily relies on the role of territorial States in the protection of human rights. However, the territorial model that allocates human rights obligations within and between territorial States suffers serious limitations regarding corporate human rights abuses. Host States, within whose territory corporate human rights abuse occurred, are often unwilling and/or unable to hold TNCs liable and provide remedies for victims. This explains why home States are increasingly urged to remove or reduce various barriers and serve as a potential forum for victims to seek and obtain a remedy for corporate human rights abuses committed abroad. However, whether home States should provide a remedy as a matter of legal obligation under international human rights law or just as a domestic policy consideration remains contentious, particularly under human rights treaties containing jurisdictional clauses.[1] Against this, the article seeks to highlight how home States' obligation to provide remedy for abuses committed abroad by corporations incorporated or domiciled within their respective territories is increasingly recognized within the practice of the Committee on ICESCR.

CORRESPONDING AUTHOR:

Wubeshet Tiruneh

Graduate Institute of International and development Studies, CH

wubeshet.tiruneh@graduateinstitute.ch

KEYWORDS:

Extraterritorial; Home States; ICESR; Remedy; UNGPs

TO CITE THIS ARTICLE:

Wubeshet Tiruneh, 'Providing Remedy for Corporate Human Rights Abuses Committed Abroad: The Extraterritorial Dimension of Home States' Obligation Under ICESCR' (2023) 38(1) *Utrecht Journal of International and European Law* pp. 14–24. DOI: https://doi.org/10.5334/ujiel.587

INTRODUCTION

Access to an effective remedy for victims of corporate human rights abuses remains an exception rather than the rule.[2] Particularly abuses committed abroad along corporations' supply chains and global operations have often met with impunity and a lack of access to an effective remedy.[3] Improving victims' access to an effective remedy is therefore considered to be one of the most pressing issues in the realm of business and human rights.[4] Home States of TNCs can to some extent address this challenge by serving as a potential venue for seeking and obtaining redress for corporate abuses committed abroad.[5] How victims who are denied remedy in their domestic jurisdictions are increasingly turning to home States courts signifies the essential role of home states.[6]

However, whether home States should provide remedy as a matter of legal obligation or just as a domestic policy consideration is rarely explored. No doubt that States assume the obligation to provide effective remedies for victims of human rights violations under almost all international and regional human rights instruments.[7] States are not even allowed to derogate their obligation to provide effective remedy during national emergencies, particularly in relation to those rights that cannot be suspended in a state of emergency.[8] The question, however, relates to whether States' obligation to provide remedy is limited to abuses committed within States' territories or does it also apply extraterritorially regarding corporate human rights abuses committed abroad. Indeed, the notion that the spatial scope of the application of human rights treaties is territorially confined has been vigorously challenged in recent years.[9] Almost all UN and regional treaty bodies abandoned the traditional territorially limited understanding of human rights protection and recognized that human rights treaties apply extraterritorially in certain circumstances. However, the existing scholarship and case laws addressed extraterritorial human rights obligations mainly in relation to States' actions or omissions impairing human rights abroad.

Against this, the article seeks to highlight how home States' obligation to provide remedy for corporate human rights abuses committed abroad is increasingly recognized within the practice of the Committee on ICESCR. However, before addressing its extraterritorial scope, Part II of the article starts by discussing States' obligation to provide remedy for corporate human rights abuses and its substantive and procedural aspects in light of the third pillar of the UN Guiding Principles on Business and Human Rights.[10] Part III argues that, although there is no specific provision regarding the right to remedy under ICESCR, the State obligation to provide remedy articulated under the UNGPs is recognized under ICESCR as part of States' 'duty to protect' rights recognized under ICESCR. Part IV explores the prevailing ambiguity regarding the extraterritorial scope of the obligation: whether the obligation applies extraterritorially with regard to corporate human rights abuses committed abroad. Finally, Part V discusses how and in what circumstances the home States' obligation to provide remedy for corporate human rights abuses committed abroad is recognized within the practice of the Committee on ICESCR.

I. STATE OBLIGATION TO PROVIDE REMEDY: AS ARTICULATED UNDER THE UNGPS

The right to an effective remedy is recognized in most universal and regional human right instruments.[11] However, the corollary obligation that States assume under the right to remedy is often deemed to be confined to violations committed by state actors. This partly ensues from the absence of explicit reference to corporations or other non-state actors under international human rights treaties.[12] John Ruggie, in one of his reports, noted that 'it is unclear how far the individual right to remedy extends to abuses by non-state actors.'[13] Since there is no explicit provision concerning the right to remedy under ICESCR, this section does not intend to further discuss whether the right to effective remedy imposes a corollary State obligation to provide remedy for abuses committed by non-state actors, including corporations. Instead, it will discuss the substantive and procedural aspects of State obligation to provide remedy for corporate human rights abuses and how it is affirmed under the UN Guiding Principles on Business and Human Rights.

State obligation to provide remedy for corporate related human rights abuses is one of the main legal issues articulated under the third pillar of the UN Guiding Principles.[14] Principle 25 of the UN Guiding Principles provides that 'States must take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, … those affected have access to effective remedy.'[15] The use of the word 'must' under Principle 25 is one of the very few formulations applauded from the UN Guiding Principles.[16] In contrast to the word 'should', which merely encourages States to do something, the word 'must' indicates a mandatory obligation.[17] State obligation to provide remedy is not just affirmed under the UN Guiding Principles; it is also considered as a foundational principle of the third pillar.[18] The commentary to Principle 25 of the Guiding Principle noted that 'State-based judicial and non-judicial grievance mechanisms should form the foundation of a wider system of remedy'.[19]

One could ask why the state obligation to provide remedy and state-based mechanisms have acquired primacy under the third pillar. This could be attributed to John Ruggie's position that the 'role of States in relation

to human rights is primary' and that corporations are not 'co-equal duty bearers for the broad spectrum of human rights'.[20] As noted in his interim report, Ruggie was of the opinion that making corporations equal duty bearers with regard to 'the obligation to promote, secure the fulfilment of, respect, ensure respect .....may undermine efforts to build indigenous social capacity and to make governments more responsible to their own citizenry'.[21] This is commonly called 'dilution problem' argument against the obligation of non-state actors under international human rights law.[22]

The third pillar of the UN Guiding Principles on Business and Human Rights does not just restate States' obligation to ensure remedy. Under Principles 26–28, it provides guidance regarding how States should discharge their obligation to provide remedy. In this regard, it recognizes that the obligation to ensure effective remedy has both procedural and substantive aspects.[23] The procedural aspect requires States to establish mechanisms or procedures through which victims can seek and obtain remedy. The UN Guiding Principles do not dictate the state to use a particular procedural mechanism. Instead, it recognizes different grievance mechanisms through which States can discharge the procedural aspect of the obligation. It defined grievance mechanism as 'any routinized, State-based or non-State-based, judicial or non-judicial process through which grievances concerning business-related human rights abuse can be raised and remedy can be sought'.[24]

As the definition indicates, judicial mechanisms are not the only means of ensuring effective remedy in the context of business-related human rights abuses.[25] States may use other procedural mechanisms, such as state-based non-judicial mechanisms and non-state grievance mechanisms, as far as they are effective in a particular context. However, given the political and economic influence of TNCs, coupled with the serious nature of human rights abuses they are often implicated with, the ability of non-judicial mechanisms to address such violations is very much doubtful.[26]

Judicial mechanisms, which enjoy strong guarantees of independence and a high potential of enforceability, are better equipped to provide effective remedy for victims of corporate-related human rights abuses.[27] That is why state-based judicial mechanisms are considered 'the core of ensuring access to remedy' under the UN Guiding Principles.[28] The preference accorded to judicial remedies under the UN Guiding Principles is a reiteration of international human rights instruments. Under ACHR and ACHPR, judicial bodies are recognized as the only means of ensuring effective remedies.[29] Although non-judicial mechanisms are allowed to be used under article 2(3) of ICCPR and article 13 of ECHR, States are nevertheless required to use judicial mechanisms regarding serious human rights violations.[30] For example, regarding cases involving violations of right to life, disciplinary or administrative remedies cannot be considered as effective remedy under article 2(3) of ICCPR.[31]

However, unless procedural, legal, and other related barriers are removed or reduced, the existence of procedural mechanisms does not by itself guarantee the availability of effective remedy. Accordingly, under Principle 26, States are called on to 'reduce legal, practical and other relevant barriers that could lead to a denial of access to remedy'.[32] Procedural and practical barriers that prevent cases from being brought to the court include, among others, court fees, restrictive standing rules, absence of reasonable accommodation, and lack of need-based legal aid.[33] The UN Guiding Principles also identified different legal barriers that could hinder victims' access to courts. One of the main legal barriers that could hinder access to remedy is 'the way in which legal responsibility is attributed among members of a corporate group under domestic criminal and civil laws.[34] Besides, the UN Guiding Principles also identified various legal barriers which restrict victims' access to home state remedies.[35]

The procedural aspect of the obligation also requires States to investigate and punish serious corporate human rights abuses. Principle 1 of the UN Guiding Principles requires States to take 'appropriate steps to prevent, investigate, punish and redress' business-related human rights abuses.[36] The Commentary to Principle 25 also highlights that 'unless States take appropriate steps to investigate, punish and redress business-related human rights abuses when they do occur, the State duty to protect can be rendered weak or even meaningless.'[37] It also reminds States of the need to equip prosecutors with adequate resources, expertise, and other relevant supports to meet the obligations to investigate individual and business involvement in human rights-related crimes.[38] The Corporate Crime Principles, by basing itself on the UN Guiding Principle, also affirmed that States' obligation to ensure remedy includes the obligation to investigate allegations of violations and hold perpetrators accountable.[39]

Although the third pillar of the UN Guiding Principles primarily focuses on the procedural aspect of remedy, it also briefly discussed the substantive aspect of remedy. After all, the procedural aspect is just a means through which the substantive aspect of the remedy will be secured. Accordingly, the UN Guiding Principles also require States to ensure that persons who are found to be victims of corporate related human rights obtained full and effective relief or redress. The UN Guiding Principles could be criticized for failing to mention 'reparations', commonly used under international human rights instruments. However, it referred to different modalities of remedies which can be considered as such. Principle 25, for instance, indicated that remedy includes apologies, restitution, rehabilitation, financial or non-financial compensation and punitive sanctions (whether criminal or administrative, such as fines) and the prevention of harm through, for example, injunctions or guarantees of non-repetition.[40]

II. THE 'DUTY TO PROTECT' HUMAN RIGHTS AS A LEGAL BASIS

The UN Guiding Principles, as a soft law instrument, do not create or impose legal obligations. The Preamble of the UNGPs clearly states that 'nothing in these Guiding Principles should be read as creating new international law obligations, or as limiting or undermining any legal obligations a State may have undertaken or be subject to under international law with regard to human rights.'[41] However, the State obligation to provide remedy, like other contents articulated in the UNGPs, is just a restatement of the existing obligation under international human rights law. As part of the duty to protect human rights, States are required to provide remedy for abuses committed by private actors, including corporations, under most universal and regional human rights instruments. This is even recognized under the UNGPs, which states that:

> **As part of their duty to protect against business-related human rights abuse**, States must take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such abuses occur within the territory and/or jurisdiction those affected have access to remedy[42]

Unlike many international human rights treaties,[43] there is no explicit provision regarding the right to an effective remedy under ICESCR. This does not, however, prevent the Committee on ICESCR from reminding States that effective remedies must be available to redress violations of rights.[44] Under General Comment no. 9, for instance, the Committee stated that 'appropriate means of redress, or remedies must be available to any aggrieved individual or group'.[45] This is because, although there is no explicit provision regarding the right to effective remedy which imposes corollary state obligation under ICESCR, the Committee recognizes state obligation to provide remedy, particularly regarding abuses committed by private actors, including corporations, as part of States' duty to protect human rights.

Under the practice of almost all treaty bodies, every right is considered to give rise to three interdependent correlative state obligations: the duty to respect, protect and fulfil.[46] The duty to protect, which is the focus of this section, is one of these correlative duties. It is particularly crucial in connecting States with regard to abuses committed in the private sphere.[47] The duty to protect requires States to take all appropriate measures not only to prevent abuses by private actors but also to provide remedy whenever abuses occur. States' obligation to provide remedy for abuses committed by private actors, including corporations, is therefore recognized as an essential part of the duty to protect human rights.

Under ICESCR, the duty to protect human rights flows from article 2(1) of the Covenant, which requires States to take all appropriate steps for the realization of rights recognized in the Covenant.[48] The fact that ICESCR entails an obligation to protect human rights is affirmed in various general comments, concluding observations and statements adopted by the committee.[49] By relying on the duty to protect human rights, the Committee on ICESCR has adopted two documents exclusively articulating state obligations regarding corporate activities.[50] In the 2011 Statement on the Obligation of State Parties regarding the Corporate Sector, the Committee stated that the duty to protect requires States to prevent and remedy corporate-related human rights abuses. Regarding the state obligation to provide remedy, the 2011 Statement of the Committee particularly emphasized that:

> It is of the utmost importance that States Parties ensure access to effective remedies to victims of corporate abuse of economic, social and cultural rights, through judicial, administrative, legislative or other appropriate means.[51]

The most detailed articulation of state parties' obligation with regard to corporate activities under ICESCR is provided under General Comment no 24. In the section dealing with the duty to protect human rights, the Committee extensively discussed the obligation of state parties to ensure remedy for abuses committed by corporations.[52] The Committee highlighted that the duty to protect human rights requires States to impose 'criminal or administrative sanctions and penalties, as appropriate, where business activities result in abuses of Covenant rights'.[53] The Committee also went on to remind States to 'enable civil suits and other effective means of claiming reparations by victims of rights violations against corporate perpetrators'.[54] To that end, the Committee highlighted the need to regularly review the adequacy of legislation and other related gaps.[55] In sum, although a provision guaranteeing the right to effective remedy is absent under ICESCR, states are nevertheless required to provide remedy as part of their obligation to protect rights recognized under ICESCR.

III. THE PREVAILING AMBIGUITY ON THE SPATIAL SCOPE OF HOME STATES' OBLIGATION

As indicated in the forgoing discussion, state obligation to provide remedy for corporate human rights abuses is well recognized as part of the 'duty to protect' under ICESCR. However, the question remains whether States' obligation is limited to corporate abuses committed within their respective territories or does it also extend extraterritorial with regards to corporate human rights

abuses committed abroad. Particularly under ICESCR, the extraterritorial scope of States' obligation to prevent and redress corporate human rights abuses was a subject of contention during the preparation of General Comment no 24 on State obligation in the Context of Business activities. In their observations submitted to the Committee, Some States have expressed their position that efforts to prevent and redress corporate human rights abuses should solely be based on territorial jurisdiction. The UK, for instance, stated that 'obligations under the Covenant are primarily territorial and do not have extra-territorial effect'.[56] Norway, similarly, noted that 'States are generally not required under international law to regulate the extraterritorial activities of businesses domiciled in their territory',[57] although it agrees with the Committee that under certain exceptional circumstances, human rights conventions, including the Covenant on Economic, Social and Cultural Rights, may have an extraterritorial scope.[58]

The prevailing ambiguity regarding the extraterritorial scope of home States' obligations is also reflected in various National Action Plans (NAPs). Many of the NAPs adopted so far are either silent or vague regarding the extraterritorial obligation of home States to provide remedy for abuse committed abroad.[59] The NAP of the Netherlands, for instance, noted the existence of 'a difference of opinion on the question of whether the Dutch court system should be open to civil or criminal law proceedings against Dutch companies in the event of alleged human rights abuses on the part of their foreign subsidiaries.'[60] The NAP of the UK also indicated that '[h]uman rights obligations generally apply only within a State's territory and/or jurisdiction. Accordingly, there is no general requirement for States to regulate the extraterritorial activities of business enterprises domiciled in their jurisdiction, although there are limited exceptions to this, for instance under treaty regimes.'[61] Only a few States unequivocally accepted that States undertake an obligation to provide remedy with regard to overseas corporate human rights abuse. The 2016 NAP of Switzerland, for instance, stated that:

> [t]he Federal Council regards preventing human rights abuses by Swiss companies abroad and ensuring access to effective remedy, as integral parts of its State duty to protect and its constitutional mandate to promote respect for human rights. This is particularly true with regard to the foreign activities of companies that are based in Switzerland.[62]

The difference in opinion regarding the extraterritorial dimension of States' obligation is not unexpected considering the position adopted in the UNGPs. According to the UNGPs, international human rights law does not require home States to regulate and adjudicate overseas activities of their corporate nationals.[63] It means that the spatial scope of States' obligation to regulate and provide remedy is confined to abuses committed within their territory. The extraterritorial protection of human rights from the activities of TNCs is, therefore, entirely dependent on the policy considerations of home States. Victims of overseas corporate human rights cannot claim remedies in home States as a matter of right unless home States provide them out of their own policy rationales. This explains why the UNGPs is criticized for having marginalized the extraterritorial protection of human rights from '[s]tates' extraterritorial obligations under human rights law to States' policy rationales.'[64]

However, as will be discussed in the following section, the approach adopted in the UNGPs does not reflect the current state of international human rights law, particularly the practice within the Committee on ICESCR. By departing from the policy-based approach of the UNGPs, the Committee on ICESCR is increasingly recognizing the extraterritorial obligation of home States, including the obligation to provide remedy.

IV. THE EXTRATERRITORIAL SCOPE OF HOME STATES' OBLIGATIONS UNDER ICESCR

States' obligations, including the obligation to protect human rights, which requires States to prevent and remedy abuses committed by private actors, including corporations, cannot be extraterritorially engaged in the same manner under all human rights treaties. This ensues from the fact that the spatial scope of States' obligations varies from treaty to treaty. While the spatial scope of States' obligations under some international human rights treaties, including ICCPR, is confined to their territory or jurisdiction, the territorial or jurisdictional clause is conspicuously absent under other treaties, including ICESCR.

Under human rights treaties with jurisdictional clauses, home States' extraterritorial obligation will be triggered only when victims of overseas corporate human rights abuses fall within their jurisdiction.[65] The mere fact that a corporation, which causes human rights abuses abroad, is incorporated or has its domicile in a given State does not, by itself, enough to engage the extraterritorial obligation of that State. In this regard, one should note that jurisdiction under international human rights law is an autonomous and distinct concept from jurisdiction under public international law. Jurisdiction under public international law relates to States' competence to regulate and adjudicate conduct within and outside of their territory. Based on principles of active personality, universality, and protective principle, States may exercise extraterritorial jurisdiction to regulate or adjudicate conducts occurring outside of their territories.[66] However,

a state is competent to regulate and adjudicate certain extraterritorial conduct under public international law does not necessarily mean that it has an extraterritorial human right obligation in relation to that specific conduct.

As established in the practice of different human rights treaty bodies, human rights jurisdiction is mainly territorial. However, States may establish human rights jurisdiction outside of their territories in two main ways: through 'control over a territory' and 'control over an individual'.[67] This begs a question of whether and in what circumstances victims of overseas corporate human rights abuses could be considered to have fallen under the jurisdiction of home States under these conceptions of jurisdiction. The issue was for the first time raised and discussed in *Yassin v Canada* by the UN Human Rights Committee.[68]

Yassin v Canada is the first-ever complaint lodged before treaty bodies regarding the obligation of home States, over which the committee adopted its view in October 2017. The authors of this complaint, who are residents of the Palestinian village of Bil'in, alleged that Green Park International, Inc. and Green Mount International, Inc., incorporated in Canada and operating in Palestine, engaged in activities which resulted in the forced eviction of the authors from their land.[69] They further stated that their attempt to obtain remedy before Canada Courts had been dismissed on the ground of *forum non conveniens*. Accordingly, the authors complained that 'Canada violated its extraterritorial obligation .....by not providing effective remedies for the authors to hold the two corporations accountable for the violations.'[70]

Canada, in its observation on admissibility and the merits, admitted that Green Park International Plc and Green Mount International Plc are legally incorporated and domiciled in the Province of Quebec. However, it argued that 'the only connection between Canada and the extraterritorial events alleged by the authors is the fact that Green Park International and Green Mount International were incorporated in a Canadian jurisdiction'.[71] According to Canada, the mere incorporation and having their sit in Canada is not enough to establish a situation in which the authors were subject to Canada's jurisdiction at the relevant time. In short, Canada argued that 'the authors were neither within Canada's territory nor subject to its jurisdiction, and therefore Canada could not have had obligations to ensure their Covenant rights'.[72]

In its consideration, the Committee noted that there are 'situations where a State party has an obligation to ensure that rights under the Covenant are not impaired by extraterritorial activities conducted by enterprises under its jurisdiction'.[73] However, it did not clearly articulate those situations under which home states', in this case, Canada's, extraterritorial obligation can be engaged. What is, however, clear from the analysis of the Committee is the fact that a company is incorporated or domiciled within a territory of a state is not enough to engage the extraterritorial obligation of that State. This is because, although the Committee noted the fact that Green Park International and Green Mount International have been registered and domiciled in Canada since 2004,[74] it indicated that more connection is required between the companies and the state within whose territory they are incorporated. Finally, the Committee, without indicating what those required connections or nexus should be, declared the communication inadmissible for failure to sufficiently substantiate the nexus between the State party's obligations under the Covenant, the actions of Green Park International and Green Mount International and the alleged violation of the authors' rights.[75]

However, as noted above, ICESCR does not contain a jurisdictional clause regarding its spatial scope of application. It should be noted that ICESCR is not alone in this regard. A jurisdictional clause is similarly absent, for example, under the African Charter on Human and Peoples' Rights.[76] There is no jurisdictional clause under these human rights treaties does not, however, mean that State parties' obligations are confined within their territorial borders.[77] As the Committee on ICESCR noted in its 2011 Statement on the obligations of States parties regarding the corporate sector, the obligations of State Parties with regard to the corporate sector under ICESCR do not stop at their territorial borders.[78] In order to avoid the protection gap, respective treaty bodies and the ICJ in several instances confirmed that human rights treaties with no explicit reference to 'jurisdiction' will nevertheless apply extraterritorially whenever States exercise jurisdiction outside of their territory.[79] ICJ, for instance, in the *Wall Advisory Opinion* held that:

> 'The international Covenant on Economic, Social, and Cultural Rights contain no provision on its scope of application. This may be explicable by the fact that this Covenant guarantees rights which are essentially territorial. However, it is not to be excluded that it applies both to territories over which the State party has sovereignty and to those over which that State exercises jurisdiction.'[80]

This implies that, under ICESCR, like other human right treaties with jurisdictional clauses, the obligation of home States extend extraterritorially whenever victims of overseas corporate human rights abuses fall within their jurisdiction. This approach, however, allows the obligation of home States to be triggered only in limited circumstances since overseas corporate activities rarely constitute jurisdiction within the meaning of international human rights law. This could explain why the Committee, particularly in the context of transnational corporations, has started following

a broader approach to understanding what does the absence of the 'jurisdictional' clause does mean under ICESCR. According to recent practices of the Committee, as far as there is no jurisdictional clause that limits the scope of application of the Covenant, the extraterritorial obligation of state parties should not be limited to situations where they exercise jurisdiction outside of their territory. It should rather extend to situations over which they exercise influence and authority.[81]

Under General Comment no 24, for instance, the Committee stated that '[e]xtraterritorial obligations arise when a State party may influence situations located outside its territory, consistent with the limits imposed by international law, by controlling the activities of corporations domiciled in its territory and/or under its jurisdiction, and thus may contribute to the effective enjoyment of economic, social and cultural rights outside its national territory'.[82] This means that the extraterritorial scope of state obligation under ICESCR does not depend on whether victims of overseas corporate human rights abuse fall within the jurisdiction of home States. As far as home States have legal and factual power over the extraterritorial activities of their corporate nationals, whether victims of overseas corporate human rights abuse fall within their jurisdiction is irrelevant in determining their extraterritorial obligation.

However, it should be noted that some states, in their observations submitted during the preparation of general comment no 24, expressed their opposition to the position adopted by the Committee regarding the extraterritorial scope of home states obligation. The UK, for instance, stated that '[t]he absence of limits to territorial scope in other clauses, or an overarching limiting clause, should not be taken as an assumption or an acceptance of extra-territorial dimensions to the Covenant'.[83] Norway similarly stated that the extraterritorial obligation of home states cannot be engaged unless home states exercise jurisdiction outside of their territory. According to Norway,

> the question of extraterritorial application of the Covenant can only arise where a State exercises effective control over the territory where the business operation is carried out, or where a State exercises a high degree of authority or control over the activity in question affecting human rights abroad.[84]

Be that as it may, the Committee on ICESCR is not the only human rights body to adopt broad extraterritorial scope of the obligation of home States with regard to overseas corporate activities. The Committee on the Convention on the right of the child, under General Comment no. 16 on State obligations regarding the impact of the business sector on children's rights, similarly adopted broad extraterritorial scope of the obligation of home States,[85] although the Convention, under article 2 (1), explicitly limited States' obligation only regarding children within their jurisdiction. In contrast, the Committee on ICESCR relied on the absence of jurisdictional restriction under the Covenant in recognizing the extraterritorial obligation of home States. According to the Committee, 'extraterritorial obligations of States under the Covenant follow from the fact that the obligations of the Covenant are expressed without any restriction linked to territory or jurisdiction'.[86] However, it is very difficult to equally justify such broad scope of extraterritorial obligation both under human rights treaties containing jurisdictional clause and under those expressed without a jurisdictional clause. It is important to quote what Nadia Bernaz noted in this regard:

> It is doubtful that on the basis of the treaties alone there actually exists a state obligation to prevent and punish corporate human rights violations committed abroad, at least for the treaties that actually contain a jurisdiction clause. This is simply because the victims do not fall within the state's jurisdiction and, as such, the state does not owe them any legal obligation. By contrast, it is easier to argue that treaties that do not contain a jurisdiction clause, such as the International Covenant on Economic, Social and Cultural Rights, actually entail a state obligation to prevent and punish corporate human rights violations committed abroad.[87]

Besides the absence of jurisdictional restriction, the Committee on ICESCR also invoked obligations of international assistance and cooperation under article 2(1) of ICESCR as a justification for an extraterritorial scope of home States obligation.[88] State Parties who are in a position to cooperate and assist other States are required under article 2(1) of ICESCR to take steps for the realization of Economic, Social and Cultural rights in other countries. In this regard, the Committee noted that 'to allow a State to remain passive where an actor domiciled in its territory and/or under its jurisdiction, and thus under its control or authority, harmed the rights of others in other States, or where conduct by such an actor may lead to foreseeable harm being caused' is contradictory to the reference of international cooperation and assistance.[89]

By relying on the absence of jurisdictional restriction and/or the obligation of international assistance and cooperation under ICESCR, the Committee on ICESCR has affirmed the home States' obligation to provide remedy for corporate human rights abuses committed abroad under various General Comments. Under General Comment 24, for instance, the Committee noted that States are required:

> to take steps to prevent and redress infringements of Covenant rights that occur outside their territories due to the activities of business entities over which they can exercise control, especially in cases where the remedies available to victims before the domestic courts of the State where the harm occurs are unavailable or ineffective.[90]

Similarly, under General Comment No. 23, the Committee also stated that:

> States parties should introduce appropriate measures to ensure that non-State actors domiciled in the State party are accountable for violations of the right to just and favourable conditions of work extra-territorially and that victims have access to a remedy.[91]

The obligation of home States under ICESCR has also been reflected in different Concluding Observations. In Concluding Observations adopted in 2017 alone, the Committee urged the Netherlands,[92] Russian Federation,[93] Australia,[94] Republic of Korea[95] to ensure accountability and remedy for overseas corporate human rights abuses. In the Concluding Observation adopted regarding the Sixth periodic report of the Netherlands, for instance, the Committee urged the Netherlands to 'remove the legal and practical obstacles to holding companies domiciled under the State party's jurisdiction accountable for violations of economic, social and cultural rights, resulting from their operations on the national territory or abroad.'[96]

In closing, by relying on the absence of jurisdictional restriction and the obligation of international assistance and cooperation under article 2(1) of ICESCR, the Committee concluded that the extraterritorial scope of home States' obligation, including the duty to protect ESC rights, is not limited to situations where they exercise jurisdiction outside of their territory rather extends to all extraterritorial situations over which they exercise influence and authority.

CONCLUSION

Whether the spatial scope of home States' obligations, including the obligation to provide remedy, extend extraterritorially whenever corporations incorporated or domiciled within their territory causes or contributes to human rights abuses abroad is one of the contentious issues in the realm of business and human rights. Indeed, the obligation to provide remedy for corporate human rights abuses is recognized in all human rights instruments, either as a corollary state obligation to the right to remedy or as part of States' duty to protect human rights. However, due to the principle of territoriality that underlies the international system, the spatial scope of home States obligation is often deemed, including by the UN Guiding Principles on Business and Human Rights, to be confined to abuses committed within States' territory. This approach does not, however, reflect the current practice within the Committee on ICESCR. The Committee, by relying on the absence of territorial or jurisdictional restrictions and the obligation of international assistance and cooperation under article 2(1) of ICESCR, is increasingly affirming the extraterritorial scope of home States' obligations`. Indeed, General comments, Concluding Observations and documents adopted by the Committee are not binding on Member States. However, since these documents are adopted by an independent Committee specifically created and mandated by the Covenant to make such pronouncements, they are authoritative and should be given due weight.

NOTES

1 Antal Berkes, 'Extraterritorial Responsibility of Home States for MNCs' Violations of Human Rights' in Yannick Radi (ed), *Research Handbook on Human Rights and Investment* (Edward Elgar publishing 2018) 303. Claire Methven O'Brien, 'The Home State Duty to Regulate the Human Rights Impacts of TNCs Abroad: A Rebuttal' (2018) 3 BHRJ 47. Nadia Bernaz, 'Enhancing Corporate Accountability for Human Rights Violations: Is Extraterritoriality the Magic Potion?' (2013) 117 J Bus Ethics 493.

2 Surya Deva, 'Opening Statement on the 2017 UN Forum on Business and Human Rights' (27 November 2017) <https://www.ohchr.org/Documents/Issues/Business/ForumSession6/SuryaDeva.pdf> accessed 24 November 2020.

3 Human Rights Council, 'Improving Accountability and Access to Remedy for Victims of Business-Related Human Rights Abuse' (10 May 2016) A/HRC/32/19.

4 Surya Deva, 'Access to Effective Remedy: Taking Human Rights and Right Holders Seriously' (29 November 2017) <https://www.cambridge.org/core/blog/2017/11/14/access-to-effective-remedy-taking-human-rights-and-rights-holders-seriously/> accessed 16 December 2020.

5 Ketevani Kukava, 'Extractive Industries and Human Rights Abuse – The Role of a Home State in Protecting Human Rights Abroad' (Master Thesis, University of Gothenburg 2015).

6 Lucas Rorda, 'Adjudicate This! Foreign Direct Liability and Civil Jurisdiction in Europe', in Angelica Bonfanti (ed), *Business and Human Rights in Europe: International Law Challenges* (Routledge 2018) 195.

7 Article (3) (a) and (b) of the ICCPR, for instance, requires states 'to ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy'. Article 13 of ECHR similarly states that everyone whose right has been violated shall have effective remedy. *Albiet* with different wording, Article 25, ACHR states that 'everyone has the right to prompt and simple recourse to a competent court or tribunal.'

8 UN Human Rights Committee, 'General Comment No 29: Derogations during a State of Emergency' (August 31, 2001) CCPR/C/21/Rev.1/Add.11.

9 Karen da Costa, *The Extraterritorial Application of Selected Human Rights Treaties* (Martinus Nijhoff Publishers 2012). Marco Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy*, Oxford Monographs in International Law (OUP 2011). Sigrun Scogly, 'Regulatory Obligations in Complex World, States' Extraterritorial Obligations Related to Business and Human Rights', in Surya Deva and David Bilchitz (eds), *Building a Treaty on Business and Human Rights: Context and Contours* (Cambridge University Press, 2017) 318.

10 UN Guiding principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework (March 21, 2011) A/HRC/17/31.

11 See, for instance, article 2 (3) ICCPR; Article 13 CAT; Article 6 CERD; Article 8 UDHR; Article 13 ECHR; Article 47 of the Charter of Fundamental Rights of the European Union; Articles 7 (1) (a) and 25 ACHR Article 7 (1) (a) AfrCHPR; and Article 9 Arab Charter on Human Rights.

12 It should, however, be noted that newer international human rights treaties make an explicit reference to organizations, private enterprises and other non-state actors and require states to take appropriate steps regarding abuses committed by these actors. See, article 2(e), CEDAW and article 4(e) of CRPD

13 UN Human Rights Council, 'State obligations to Provide Access to Remedy for Human Rights Abuses by Third Parties, including Business: an Overview of International and Regional Provisions', Commentary and Decisions, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises (15 May 2009) A/HRC/11/13/Add.1.

14 Apart from state obligation to provide remedy, the third pillar of the UN Guiding principles also recognizes the responsibility of Business Enterprises to remedy abuses caused or contributed by their activities. Principle 29 states that 'business enterprises should establish or participate in effective operational-level grievance mechanisms for individuals and communities who may be adversely impacted.' It is also noted that "an enterprise cannot, by definition, meet its responsibility to respect human rights if it causes or contributes to an adverse human rights impact and then fails to enable its remediation" See the Office of the U.N High Commissioner for Human Rights, 'The Corporate Responsibility to Respect Human Rights: An Interpretative Guide', HR/Pub/12/02, <https://www.ohchr.org/Documents/Publications/HR.PUB.12.2_En.pdf> accessed 6 February 2021.

15 UN Guiding Principles (n 10) principle 25.

16 Surya Deva, 'Treating Human Rights Lightly: A Critique of the Consensus Rhetoric and the Language Employed by the Guiding Principles', in Surya Deva and David Bilchitz (eds), *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (Cambridge University Press 2013)78.

17 The use of the word 'must' under principle 25 of the UN Guiding Principle stands in sharp contrast to the one used under paragraph 17 of the UN Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with regard to Human Rights. Paragraph 17 of the UN Norms reads: "States should establish and reinforce the necessary legal and administrative framework for ensuring that the Norms and other relevant national and international laws are implemented by transnational corporations and other business enterprises."

18 UN Guiding Principles (n 10) principle 25.

19 ibid. Commentary to principle 25.

20 Interim Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises (22 February 2006) U.N. Doc. E/CN.4/2006/97. para. 66–68.

21 ibid para. 68.

22 Andrew Clapham, *Human Rights Obligations of Non-State Actors* (OUP 2006). According to 'dilution problem' argument, 'attempting to extend legal duties under international human rights law to non-state actors..... will undermine the authority of states and dilute the responsibility of with respect to their human right obligations. According to this approach, to change course now would allow the whole human rights project to unravel. Better to put our faith in the current state-centered system than a new, unknown, and necessarily diffuse accountability arrangement which will inadvertently give non-state actors greater 'status'.

23 UN Guiding Principles (n 10) principle 25 and the accompanying commentary.

24 ibid.

25 Jonathan C. Drimmer and Lisa J. Laplante, 'The Third Pillar: Remedies, Reparations, and the Ruggie Principles', in Jena Martin and Karen E. Bravo (eds), *The Business and Human Rights Landscape: Moving Forward, Looking Back* (Cambridge University Press 2015) 316.

26 Sarah Knuckey and Eleanor Jenkin, 'Company-Created Remedy Mechanisms for Serious Human Rights Abuses: A Promising New Frontier for the Right to Remedy?' (2015) 19 Int. J. Hum. Rights 801. See also Roper Cleland, 'Do Local Grievance Mechanisms work?', (2017) <https://www.cambridge.org/core/blog/2017/11/10/do-local-grievance-mechanisms-work/> accessed 16 February 2021.

27 Regarding the risks of using non-judicial mechanism, see, Lorna MacGregor, 'Activating the Third Pillar of the UNGPs on Access to Effective Remedy' (2018) <https://www.ejiltalk.org/activating-the-third-pillar-of-the-ungps-on-access-to-an-effective-remedy/> accessed 14 January 2021. See also Lorna McGregor, 'Alternative Dispute Resolution and Human Rights: Developing a Rights-Based Approach through the ECHR' (2015) 26 EJIL 607. Stéphanie Lagoutte, 'New Challenges Facing States within the Field of Human Rights and Business' (2015) 33 Nord. J. Hum. Rights 158.

28 UN Guiding Principles (n 10) Commentary to Principle 25.

29 According to article 25 of ACHR, victims of human right violations shall always have a judicial remedy. Similarly, under the African Charter, although there is no specific provision regarding the right to remedy, the Commission has considered effective remedy as judicial remedy.

30 *F. Birindwa ci Bithashwiwa and E. Tshisekedi wa Mulumba v Zaire*, CCPR/C/37/D/241/1987 (29 November 1989) para 14.

31 *Nydia Erika Bautista v Colombia*, CCPR/C/55/D/563/1993 (14 June 1993) para 8.2. *José Vicente y Amado Villafañe Chaparro et al v Colombia*, CCPR/C/60/D/612/1995 (29 July 1997) para 8.2.

32 UN Guiding Principles (n 10) Principle 26.

33 ibid Commentary to Principle 26.

34 ibid.

35 ibid.

36 ibid Principle 1.

37 ibid Commentary to Principle 25.

38 ibid Commentary to Principle 26.

39 International Corporate Accountability Roundtable (ICAR) and Amnesty International, 'The Corporate Crimes Principles: Advancing Investigations and Prosecutions in Human Rights cases', (2016) <http://www.commercecrimehumanrights.org/wp-content/uploads/2016/10/CCHR-0929-Final.pdf> accessed 10 September 2021.

40 UN Guiding Principles (n 10) Commentary to Principle 25.

41 ibid preamble.

42 ibid Principle 25. Regarding the duty to protect human rights under the UN Guiding Principles, see also Daria Davitti, 'Refining the Protect, Respect and Remedy Framework for Business and Human Rights and Its Guiding Principles' (2016) 16 Hum. Rights Law Rev 55.

43 See different international human rights treaties (n 11).

44 UN Committee on ICESCR 'General Comment No 3: The Nature of State Parties' Obligation' (14 December 1990) E/1991/23.

45 UN Committee on ICESCR 'General Comment No 9: The Domestic Application of the Covenant (3 December 1998) E/C/.12/1998/24.

46 Sandra Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (OUP 2008).

47 Frédéric Mégret, 'The nature of State Obligation', in D. Moeckli, S. Shah, and S. Sivakumaran (eds), *International Human Rights Law* (OUP 2014).

48 Article 2(1) of the ICESCR provides that '[e]ach 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'.

49 UN Committee on ICESCR 'General Comment 12: The right to Adequate Food (Article 11)' (12 May 1999) E/C.12/1999/5. See also UN Committee on ICESCR 'General Comment 15: The Right to Water (articles 11 and 12)' (20 January 2003) E/C.12/2002/11.

50 UN Committee on ICESCR 'Statement on the Obligations of States Parties Regarding the Corporate Sector and Economic, Social and Cultural Rights' (20 May 2011) E/C.12/2011/1. UN Committee on ICESCR 'General comment No 24: State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities' (10 August 2017) E/C.12/GC/24.

51 Ibid para 5.

52 General comment no. 24 (n 52) para. 14–22.

53 ibid para 15.

54 ibid.

55 ibid.

56 Submission of the United Kingdom to the Committee on ICESCR on the Draft General Comment on State Obligations under the ICESCR in the Context of Business Activities, (31 January 2017), <http://www.ohchr.org/Documents/HRBodies/CESCR/Discussions/2017/58-Government%20of%20the%20United%20Kingdom.pdf> accessed 6 November 2020.

57 Submission of the Norway to the Committee on ICESCR on the General Discussion on the Draft General Comment on State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities, <http://www.ohchr.org/Documents/HRBodies/CESCR/Discussions/2017/Norway.pdf> accessed 6 November 2020.

58 ibid.

59 Daniel Cerqueira and Alexandra Montgomery, 'Extraterritorial obligations: a missing component of the UN Guiding Principles that should be addressed in a binding treaty on business and human rights' (08 February 2018), <https://dplfblog.com/2018/02/08/extraterritorial-obligations-a-missing-component-of-the-un-guiding-principles-that-should-be-addressed-in-a-binding-treaty-on-business-and-human-rights/> accessed 14 November 2020.

60 Ministry of Foreign Affairs of Netherlands, 'the National Action Plan on Business and Human Rights of Netherland's, (April 2014), <https://www.business-humanrights.org/sites/default/files/documents/netherlands-national-action-plan.pdf> accessed 8 February 2021.

61 See U.K. NAP, 'Good Business: Implementing the UN Guiding Principles on Business and Human Rights' (4 September 2013), <https://mk0globalnapshvllfq4.kinstacdn.com/wp-content/uploads/2017/11/uk-2013-nap-bhr.pdf> accessed 8 February 2021.

62 See the 2016 NAP of Switzerland, 'Report on the Swiss strategy for the implementation of the UN Guiding Principles on Business and Human Rights', (9 December 2016), <https://www.ohchr.org/Documents/Issues/Business/NationalPlans/Switzerland_NAP_EN.pdf> accessed 8 February 2021.

63 UN Guiding Principles (n 10) principle 2 and the accompanying commentary. Regarding this, see also John Ruggie, 'Business and Human Rights: The Evolving International Agenda' (2007) 101 *The American Journal of International Law* 819.

64 Daniel Augenstein and David Kinley, 'When Human Rights 'Responsibilities' become 'Duties': The Extraterritorial Obligation of States that Bind Corporations', in Surya Deva and David Bilchitz (eds), *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (Cambridge University Press 2013) 271.

65 About extraterritorial application of international human right treaties with jurisdictional clauses, see Milanovic (n 9).

66 Jennifer Zerk, 'Extraterritorial Jurisdiction: Lessons for the Business and Human Rights Sphere from Six Regulatory Areas', A report for the Harvard Corporate Social Responsibility Initiative to help inform the mandate of the UNSG's Special Representative on Business and Human Rights, Working Paper No. 59 (2010). <https://www.hks.harvard.edu/sites/default/files/centers/mrcbg/programs/cri/files/workingpaper_59_zerk.pdf> accessed 15 September 2021.

67 For comprehensive discussion on these two conceptions of 'jurisdiction' under international human rights law, see Milanovic (n 9).

68 *Basem Ahmed Issa Yassin et al v. Canada*, CCPR/C/120/D/2285/2013 (2017).

69 ibid para. 2.1 – 2.2.

70 ibid para. 3.4.

71 ibid para. 4.16.

72 ibid para. 4.17.

73 ibid para. 6.5

74 ibid.

75 ibid para. 6.7.

76 African Charter on Human and Peoples' Rights (Banjul Charter). CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force 21 October 1986.

77 It is even argued that the drafters of the ICESCR envisaged the extraterritorial application of the Covenant, This is particularly considering the Preamble of ICESCR which contains a reference to 'the obligation of States under the Charter of the United Nations to promote universal respect for, and observance of, human rights and freedoms'. See Fons Coomans, 'The Extraterritorial Scope of the International Covenant on Economic, Social and Cultural Rights in the Work of the United Nations Committee on Economic, Social and Cultural Rights (2011) 11 Hum. Rights Law Rev. 1.

78 Statement on the Obligations of States Parties (n 50) para. 5.

79 For instance, concerning the application of ICESCR in occupied territories, the Committee on ICESCR, in its concluding observation to Israel, stated that 'the State party's obligations under the Covenant apply to all territories under its effective control'. UN Committee on ICESCR 'Concluding Observations on the additional information submitted by Israel' (31 August 2001) E/C.12/1/Add.69 para 12.

80 Advisory Opinion Concerning Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory' (July 9, 2004) para. 112.

81 See, for example, UN Committee on ICESCR 'General Comment No 19: The right to social security (art. 9)' (23 November 2007) E/C.12/GC/19, para 54. UN Committee on ICESCR 'General Comment No 14: The right to highest attainable standard of health (art. 12)' (4 July 2000) E/C.12/2000/4 para 39.

82 General Comment NO 24 (n 50) para 28. It should also be noted that the *Maastricht Princples* similarly provided that state should take "necessary measures to ensure that non-State actors **which they are in a position to regulate**, such as..... transnational corporations and other business enterprises, do not nullify or impair the enjoyment of economic, social and cultural rights". See Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights, adopted by a Group of Experts in International Law and Human Rights, at a Gathering Convened by Maastricht University and the International Commission of Jurists, 28 September 2011, Principle 24. See also Olivier De Schutter et al., 'Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights' (2012) 34 HRQ 1095.

83 Submission of the United Kingdom (n 58).

84 Submission of the Norway to the Committee on ICESCR (n 59).

85 UN Committee on the Rights of the Child 'General Comment No 16: State obligations regarding the impact of the business sector on children's rights' (17 April 2013) CRC/C/GC/16 para. 43. The General Comment stated that '[h]ome States also have obligations, arising under the Convention and the Optional Protocols thereto, to respect, protect and fulfil children's rights in the context of businesses' extraterritorial activities and operations, provided that there is a reasonable link between the State and the conduct concerned. A reasonable link exists when a business enterprise has its centre of activity, is registered or domiciled or has its main place of business or substantial business activities in the State concerned.

86 General Comment no 24 (n 50) para. 27.

87 Bernaz (n 1) 504.

88 General Comment no (n 50) para. 27.

89 ibid.

90 Genera Comment no. 24 (n 50) para. 30.

91 UN Committee on ICESCR, 'General Comment No 23: The Right to Just and Favourable Conditions of Work' (27 April 2016) E/C.12/GC/23, para 70.

92 UN Committee on ICESCR, 'Concluding Observations on the Sixth Periodic Report of the Netherlands' (6 July 2017) E/C.12/NLD/CO/6.

93 UN Committee on ICESCR, 'Concluding Observations on the Sixth Periodic Report of the Russian Federation' (16 October 2017) E/C.12/RUS/CO/6 para 12(C). In this Concluding Observation, the Committee recommended Russia to '[t]ake all necessary measures to ensure the legal liability of companies based in, or managed from, the State party's territory regarding violations of economic, social and cultural rights resulting from their activities conducted abroad'.

94 UN Committee on ICESCR, 'Concluding Observations on the Fifth Periodic Report of Australia', (11 July 2017) E/C.12/AUS/CO/5, para. 14(B).

95 UN Committee on ICESCR, 'Concluding Observations on the Fourth Periodic Report of the Republic of Korea' (9 October 2017) E/C.12/KOR/CO/4, para 18(b).

96 UN Committee on ICESCR, 'Concluding Observations on the Sixth Periodic Report of the Netherlands' (6 July 2017) E/C.12/NLD/CO/6 para. 12(e).

COMPETING INTERESTS

The author has no competing interests to declare.

AUTHOR AFFILIATION

Wubeshet Tiruneh orcid.org/0000-0001-5436-3729
Graduate Institute of International and development Studies, CH

TO CITE THIS ARTICLE:
Wubeshet Tiruneh, 'Providing Remedy for Corporate Human Rights Abuses Committed Abroad: The Extraterritorial Dimension of Home States' Obligation Under ICESCR' (2023) 38(1) *Utrecht Journal of International and European Law* pp. 14–24. DOI: https://doi.org/10.5334/ujiel.587

Submitted: 26 May 2022 **Accepted:** 04 April 2023 **Published:** 19 April 2023