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**Promotion and protection of all human rights, civil,  
political, economic, social and cultural rights,  
including the right to development**

## **International solidarity and the extraterritorial application of human rights: prospects and challenges**

### **Report of the Independent Expert on human rights and international solidarity, Obiora Chinedu Okafor**

#### *Summary*

In the present report, submitted pursuant to Human Rights Council resolution 44/11, the Independent Expert discusses the question of whether human rights obligations assumed by States and other actors apply outside the boundaries of such States. He also analyses whether the enjoyment of the right of peoples and individuals to human rights-based international solidarity requires States to protect, respect, fulfil and otherwise implement their international human rights obligations beyond their boundaries, and assesses what, if any, issues are associated with adopting a positive or negative answer to this question. The Independent Expert also identifies the limits of extraterritorial human rights obligations, especially in the context of State sovereignty and the vulnerabilities of particular peoples, and the extent to which it is possible to achieve the goals of international solidarity in the human rights field without an understanding of human rights obligations as having an extraterritorial dimension.



## I. Introduction

1. At the forty-seventh session of the Human Rights Council, the Independent Expert on human rights and international solidarity, Obiora Chinedu Okafor, presented his fourth report to the Council,<sup>1</sup> in which he discussed international solidarity in aid of the realization of human rights during and after the coronavirus disease (COVID-19) pandemic.

2. In the first report presented by the Independent Expert to the Human Rights Council,<sup>2</sup> pursuant to Council resolution 35/3, a number of issues were canvassed, including the enumeration of the thematic priorities that the Independent Expert intended to focus on during his tenure. These include migration and international solidarity;<sup>3</sup> refugees and international solidarity;<sup>4</sup> climate change and international solidarity;<sup>5</sup> extraterritorial human rights obligations and international solidarity; civil society and international solidarity; global citizenship and international solidarity; South-South cooperation as international solidarity; technology and innovation and international solidarity; cities and local governments as agents of international solidarity; the threat of populism to the principle of international solidarity;<sup>6</sup> taxation and international solidarity; and international solidarity and economic security.<sup>7</sup>

3. In the present report, the Independent Expert engages with the question of whether or not human rights obligations assumed by States and other actors apply outside the boundaries of such States (an aspect of the extraterritorial application of human rights), as this is a highly consequential issue for the effort to fully realize human rights around the world, in solidarity. More specifically, he will, inter alia, interrogate whether the enjoyment by everyone of the right of peoples and individuals to human rights-based international solidarity requires States to protect, respect, fulfil and otherwise implement their international human rights obligations extraterritorially – at least some of the time; assess what, if any, problems are associated with adopting a positive or negative answer to this question; identify the limits of extraterritorial human rights obligations, especially in the context of State sovereignty and State vulnerabilities; and tackle the question of whether it is possible to achieve international solidarity in the human rights field without an understanding of human rights obligations as having an extraterritorial dimension.

4. The work of the Independent Expert in this regard aligns with the work of his immediate predecessor-in-office, Virginia Dandan, who identified the possibility of international solidarity serving as a framework for extraterritorial obligations of States, thus implying a significant level of coordination between States in human rights implementation.<sup>8</sup> It also reflects the growing focus on extraterritorial human rights obligations in diverse contexts, such as economic and social rights<sup>9</sup> and business and human rights,<sup>10</sup> and in the work of some of the special procedures of the Human Rights Council.<sup>11</sup>

5. The report is divided into five sections. The present section sets the stage and contextualizes the report. In section II, the Independent Expert analyses the linkages between the extraterritorial application of human rights and international solidarity, in order to illustrate how States and other actors can express, or fail to express, international solidarity

<sup>1</sup> [A/HRC/47/31](#).

<sup>2</sup> [A/HRC/38/40](#).

<sup>3</sup> See [A/HRC/41/44](#).

<sup>4</sup> See [A/74/185](#).

<sup>5</sup> See [A/HRC/44/44](#).

<sup>6</sup> See [A/75/180](#).

<sup>7</sup> See [A/76/176](#).

<sup>8</sup> [A/HRC/21/44/Add.1](#), para. 12.

<sup>9</sup> Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights, principles 26–35; Olivier De Schutter and others, “Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights”, *Human Rights Quarterly*, vol. 34 (2012); and Committee on Economic, Social and Cultural Rights, general comment No. 24 (2017), paras. 25–28.

<sup>10</sup> Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework, principle 2; see also [A/75/212](#).

<sup>11</sup> [A/HRC/29/25](#), paras. 18, 25, 36–38 and 72; [A/HRC/28/65](#), paras. 38–72; [A/HRC/27/55](#), paras. 70–72 and 82; [A/HRC/25/53](#), paras. 62–68; and [A/HRC/25/52](#), paras. 35–41.

whenever they apply human rights norms extraterritorially. Section III is focused on the pitfalls of certain ways of expressing international solidarity in the extraterritorial application of human rights norms, paying specific attention to questions of State sovereignty and significant power imbalances (in almost all cases) between countries in the global North and the global South. In section IV, the Independent Expert analyses the prospects for expressing international solidarity through the extraterritorial application of human rights, and points in the direction of best practices in that regard. In section V, he offers some brief conclusions and recommendations for enhancing international solidarity in the extraterritorial application of human rights.

## II. Human rights extraterritoriality as international solidarity?

### A. The extraterritorial application of human rights: human rights beyond national borders

6. Generally speaking, the twin concepts extraterritoriality and extraterritorial jurisdiction refer to a State's competence (or lack thereof) "to make, apply and enforce rules of conduct in respect of persons, property or events beyond its territory"<sup>12</sup> and the ability of a State "via various legal, regulatory and judicial institutions, to exercise its authority over actors and activities outside its own territory".<sup>13</sup> In essence, a State that acts extraterritorially purports to project and exercise legal power beyond its territorial boundaries. Two categories of acts may have an extraterritorial effect: domestic acts done within a particular territory that have effects on subjects outside that territory, and extraterritorial acts done outside a particular territory that have effects on subjects outside that territory.

7. Extraterritoriality within the sphere of international human rights law seeks to give an undoubtedly complex answer to a simple question: Does a State have the obligation to respect, protect and fulfil the human rights of individuals abroad? If so, in which contexts?<sup>14</sup> Furthermore, how should extraterritorial human rights obligations be operationalized,<sup>15</sup> especially given the asymmetrical power relationships between global North and global South States, and the attendant State vulnerabilities of the latter States, which characterize the current state of international relations?<sup>16</sup> There is cause for concern because extraterritoriality sometimes allows powerful States to "put into effect laws that have an extraterritorial effect" in global South States, through processes over which the latter States have little control and which are initiated without their consent in distant places.<sup>17</sup>

8. The international human rights framework was traditionally conceived of as matching universal human rights with territorial State duties. States had (and still have) the primary responsibility to protect and realize human rights within their territories, and to prevent violations of those rights. However, the realities of an increasingly interconnected, interdependent and globalized world have necessitated attempts to reshape notions such as territoriality and sovereignty, and call for a shift from the "State-centric" position to one that acknowledges more deeply that certain types of human rights violations at the domestic level are increasingly being committed by extraterritorial actors – whether State or non-State. In this sense, territorially bound responsibilities of States "thus leave gaps in the protective

<sup>12</sup> Menno T. Kamminga, "Extraterritoriality", *Max Planck Encyclopedia of Public International Law* (2020).

<sup>13</sup> Jennifer A. Zerk, "Extraterritorial jurisdiction: lessons for the business and human rights sphere from six regulatory areas", Corporate Social Responsibility Initiative, Working Paper No. 59 (2010), p. 13.

<sup>14</sup> Marko Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (Oxford, Oxford University Press, 2011), pp. 7–8.

<sup>15</sup> Opeoluwa Adetoro Badaru, "Examining the utility of Third World approaches to international law for international human rights law", *International Community Law Review*, vol. 10 (2008), p. 383.

<sup>16</sup> Olivier De Schutter, "Extraterritorial jurisdiction as a tool for improving the human rights accountability of transnational corporations" (2006), p. 7.

<sup>17</sup> B.S. Chimni, "Third World approaches to international law: a manifesto", *International Community Law Review*, vol. 8 (2006), p. 12.

regime of international (and regional) human rights law”.<sup>18</sup> As Amartya Sen notes: “We are increasingly linked not only by our mutual economic, social and political relations, but also by vaguely shared but far-reaching concerns about injustice and inhumanity.” Thus, there are “few non-neighbors left in the world today”.<sup>19</sup>

9. Consequently, in contemporary times, human rights extraterritoriality now implies that a human rights duty-bearing State or non-State actor can be considered to have extraterritorial obligations towards a (foreign) rights holder provided the State or non-State actor in question exercises some form of control over a potential source of harm to that rights holder.<sup>20</sup> However, the recognition of extraterritorial human rights obligations must not be seen either as diminishing the duties of foreign States in respect of their own people or excessively bolstering the authority of foreign actors, especially within weaker States. As one author has stated: “Extraterritorial duties are complementary and supportive: the primary duty to implement human rights rests with the territorial State.”<sup>21</sup> Additionally, such extraterritoriality should not be (mis)used by advanced capitalist States “to pursue a neo-colonial agenda”.<sup>22</sup>

10. This imperative for extraterritorial human rights obligations is particularly pressing in the area of business and human rights. Contemporary globalization, coupled with the transnational character of business activities, has resulted in the increased use of global value chains, which break up production processes, thus allowing multiple firms spread out across various countries to specialize in specific tasks rather than having one company making the whole product itself.<sup>23</sup> The production processes of many transnational corporations are intimately tied to and significantly anchored in the activities of third-party suppliers abroad.

11. Global value chain structures are complex, with numerous players involved in the process.<sup>24</sup> At the top of the chain is the lead firm, or the transnational corporation, usually incorporated in a global North home State and which coordinates the global value chain.<sup>25</sup> These lead firms exercise control and play a prominent role as leaders “in the distribution of value among suppliers and customers and in the coordination of activities among different actors across the chain”.<sup>26</sup> Consequently, they retain some measure of responsibility for the actions of other actors below them in the chain. Below those firms are the direct and indirect suppliers who contribute to addition of value, usually located in global South “host States”. A caveat is necessary here. The Independent Expert agrees with Upendra Baxi that the concept of “host” in “host State” is too often quite problematic as a matter of accurate scientific description. Consequently, he uses it in the present report merely as a rough descriptor. Given the “plain global fact” that large multinational corporations exist and “command more influence and power than most States in the Global South”, it is more likely than not that “most Global South States are only nominally *host* states but in reality *hostage* states – states held captive by foreign capital and direct foreign investment”.<sup>27</sup>

<sup>18</sup> Lilian Chenwi and Takele Soboka Bulto, eds., *Extraterritorial Human Rights Obligations from an African Perspective* (Cambridge, Intersentia, 2018), p. xi.

<sup>19</sup> Amartya Sen, *The Idea of Justice* (Cambridge, Massachusetts, The Belknap Press, 2009), p. 173.

<sup>20</sup> Samantha Besson, “Due diligence and extraterritorial human rights obligations – mind the gap!” *ESIL Reflections*, vol. 9, No. 1 (April 2020).

<sup>21</sup> Sarah Joseph, *Blame it on the WTO? A Human Rights Critique* (Oxford, Oxford University Press, 2011), pp. 260.

<sup>22</sup> B.S. Chimni, “The international law of jurisdiction: a TWAIL perspective”, *Leiden Journal of International Law*, vol. 35 (2022).

<sup>23</sup> World Bank Group, *Trading for Development in the Age of Global Value Chains* (Washington, D.C., 2020).

<sup>24</sup> José Pla-Barber, Cristina Villar and Rajneesh Narula, “Governance of global value chains after the Covid-19 pandemic: a new wave of regionalization?”, *Business Research Quarterly*, vol. 24, No. 3 (2021), p. 205.

<sup>25</sup> United Nations Conference on Trade and Development, *World Investment Report 2013 – Global Value Chains: Investment and Trade for Development* (2013), p. x.

<sup>26</sup> Pla-Barber, Villar and Narula, “Governance of global value chains”, p. 205.

<sup>27</sup> Upendra Baxi, “Human rights responsibility of multinational corporations, political ecology of injustice: learning from Bhopal thirty plus?”, *Business and Human Rights Journal*, vol. 1, No. 1 (2016), pp. 23 and 28.

12. Paradoxically, despite the proliferation of global value chains, there is a dearth of mandatory regulation of these players, that is, transnational corporations, in both the domestic and the international sphere.<sup>28</sup> This regulatory vacuum has resulted in some transnational corporations unwittingly – or wittingly – contributing to the violation of human rights and environmental abuses within the context of their global value chains, primarily in the host States.<sup>29</sup> Owing to significant power imbalances, such as between transnational corporations, often backed by their global North home States, and the global South States in which they or their suppliers and other global value chain actors operate, it has too often proved difficult for many global South host States to appropriately regulate such transnational corporations, even in the face of massive human rights and environmental abuses.

13. In the present report, the Independent Expert limits his analysis of the relationships among the conceptions and practices of extraterritoriality, human rights and international solidarity to their relevance to two areas: (a) the regulation of global value chains, and (b) the imposition of unilateral coercive measures.

## B. The moral basis for extraterritoriality of human rights

14. The duty – in some circumstances and under certain conditions – to respect, promote and fulfil human rights extraterritorially has both a moral and a legal basis. During the negotiations for the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, global North States argued that international cooperation and assistance, a key component of the international solidarity obligation, was merely a moral rather than a legal obligation under the Covenant, while global South States argued the latter.<sup>30</sup> However, as subsequent sections will show, the extraterritorial application of human rights is both a moral as well as a legal imperative.

15. Human rights are “primarily ethical demands”. Subsequently, even though these rights are now reflected in various national and international laws, this may be argued to be a “further fact, rather than a constitutive characteristic of human rights”.<sup>31</sup> This ethical or moral basis for human rights exists even where they apply extraterritorially. Granted, the recognition of human rights is not an insistence that everyone everywhere rises to help prevent every violation of every human right no matter where it occurs.<sup>32</sup> However, and this is key for extraterritorial human rights obligations, “if one is in a plausible position to do something effective in preventing the violation of such a right” in this regard, then one should.<sup>33</sup> The moral basis for human rights obligations having an extraterritorial effect, at least in the sense in which it is conceived in this report, is premised on the idea that States and other actors, such as transnational corporations, should not be able to do abroad what they are prohibited from doing at home; that is, States and other actors should not cause harm

<sup>28</sup> Caroline Omari Lichuma, “(Laws) made in the ‘First World’: a TWAIL critique of the use of domestic legislation to extraterritorially regulate global value chains”, *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht/Heidelberg Journal of International Law*, vol. 81 (2021), p. 499.

<sup>29</sup> *Ibid.*, p. 502. See also Miriam Saage-Maaß and others, eds., *Transnational Legal Activism in Global Value Chains: The Ali Enterprise Factory Fire and the Struggle for Justice* (Springer, 2021).

<sup>30</sup> E/CN.4/2006/47, paras. 77–86. Western States questioning the necessity of establishing a complaints mechanism relating to international cooperation and assistance included the Netherlands, Spain, Sweden and the United Kingdom of Great Britain and Northern Ireland; Canada stated that international cooperation and assistance was a moral obligation, not a legal one. States from the South that emphasized international cooperation as a legal obligation included Angola, Egypt, Ghana, Indonesia, Iran (Islamic Republic of) and Morocco.

<sup>31</sup> Amartya Sen, “Elements of a theory of human rights”, *Philosophy & Public Affairs*, vol. 32, No. 4 (Autumn, 2004), p. 319.

<sup>32</sup> *Ibid.*, p. 340.

<sup>33</sup> *Ibid.*, pp. 341–342.

or violate the human rights of individuals outside their territories.<sup>34</sup> Simply put, “it is a matter of taking responsibility for one’s own actions or omissions”.<sup>35</sup>

16. Extraterritorial human rights obligations have both a negative as well as a positive dimension. The former means abstaining from conduct that would violate the rights of individuals through direct action by either the foreign State or other actors, while the latter implies an obligation, in certain instances and within internationally specified limits, to contribute to the realization of human rights in other States. The task is to flesh out the acceptable contours of this positive “obligation to contribute” considering the power asymmetries between most of the States who have tended to do so in the past and the States against whom they have acted. The realpolitik that is often at play, the games States play with State sovereignty argumentation, and the vulnerable position in which global South States tend to be in the face of such actions, must also be taken into account.<sup>36</sup> This is a task that can be aided by the right to international solidarity.

### C. The legal basis for extraterritorial human rights obligations

17. While there is virtually no explicit mention of the phrase “extraterritorial obligations” in the various human rights instruments, the existence of such obligations (albeit always within certain limits) can be logically inferred from numerous provisions. The Universal Declaration of Human Rights implicitly provides for extraterritorial obligations in article 22, which recognizes the right to social security and its realization through national effort and international cooperation and in accordance with the organization and resources of each State, and article 28, which provides for a social and international order in which the rights and freedoms set forth in the Declaration can be fully realized. In the Charter of the United Nations, the reference to “international co-operation” in Article 1 (3), and the Article 56 obligation to take joint and separate action in order to achieve the human rights goals set out in Article 55, also logically denote some form and measure of extraterritorial responsibility. Additionally, articles 16–18 of the (non-binding but highly persuasive) articles on responsibility of States for internationally wrongful acts also envisage instances of extraterritorial State responsibility. Here, State responsibility arises if the relevant State aids and abets another in the commission of a wrongful act (art. 16), if a State directs or controls the commission of the wrongful act by another State (art. 17), or if a State coerces another State to commit a wrongful act (art. 18).<sup>37</sup>

18. In addition, extraterritorial human rights obligations may also be analysed within the specific context of key international human rights treaties and instruments dealing with economic, social and cultural rights, civil and political rights and the right to development.

### D. Extraterritorial human rights obligations in the International Covenant on Economic, Social and Cultural Rights

19. The International Covenant on Economic, Social and Cultural Rights does not explicitly identify the obligations within it as having an extraterritorial scope. Nevertheless, several of the articles therein have an explicit international cooperation dimension. Article 2 (1) requires States to progressively realize economic, social and cultural rights through steps taken individually and through international assistance and cooperation. Article 11 (2) also

<sup>34</sup> 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”, *Human Rights Law Review*, vol. 11, No. 1 (2011), p. 6.

<sup>35</sup> Sigrun I. Skogly and Mark Gibney, “Economic rights and extraterritorial obligations”, in *Economic Rights: Conceptual, Measurement, and Policy Issues*, Shareen Hertel and Lanse Minkler, eds. (Cambridge, Cambridge University Press, 2007), p. 268.

<sup>36</sup> Anne Orford, “Regional orders, geopolitics and the future of international law”, *Current Legal Problems*, vol. 74 (2021), pp. 152–153; Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge, Cambridge University Press, 2005), pp. 235–236.

<sup>37</sup> Joseph, *Blame it on the WTO?*, pp. 245–246.

requires States to take the identified measures individually and through international cooperation. Articles 22 and 23 further emphasize international action and cooperation.

20. The Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights are particularly pertinent to the present discussion on extraterritoriality of human rights obligations. While the principles are not legally binding, the introduction to the principles states that they “constitute an international expert opinion, restating the human rights law on [extraterritorial obligations]”. Under the principles, extraterritorial obligations include obligations relating to the acts and omissions of a State, within or beyond its territory, that have effects on the enjoyment of human rights outside of that State’s territory and obligations of a global character that are set out in the Charter of the United Nations and human rights instruments to take action, separately, and jointly through international cooperation, to realize human rights universally.<sup>38</sup>

21. The Maastricht Principles adopt the tripartite classification of obligations to respect, to protect and to fulfil in the context of human rights extraterritoriality.<sup>39</sup> As regards the obligation to respect, States are to refrain from conduct which nullifies or impairs the enjoyment and exercise of economic, social and cultural rights of persons outside their territories.<sup>40</sup> The obligation to protect requires States to regulate the conduct of non-State actors over which they exercise regulatory authority.<sup>41</sup> Principles 28–35 elaborate upon States’ extraterritorial obligation to fulfil, which entails taking deliberate, concrete and targeted steps, separately, and jointly through international cooperation, to create an international enabling environment conducive to the universal fulfilment of human rights.<sup>42</sup>

## **E. Extraterritorial human rights obligations under the International Covenant on Civil and Political Rights**

22. Article 2 (1) of the International Covenant on Civil and Political Rights requires States parties to respect and ensure civil and political rights to all individuals within their territory and subject to their jurisdiction. The Human Rights Committee and other United Nations human rights treaty bodies have confirmed that jurisdiction in this context includes a measure of extraterritorial obligations.<sup>43</sup> In paragraph 10 of its general comment No. 31 (2004), the Human Rights Committee emphasized the extraterritorial effect of the Covenant and urged States to respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State party, even if not situated within the territory of the State party.

## **F. Extraterritorial human rights obligations in the context of the right to development**

23. Article 3 of the Declaration on the Right to Development acknowledges the extraterritorial duty of States to cooperate with each other in ensuring development and eliminating obstacles to development, while article 4 outlines the duty of States to take steps, individually and collectively, to formulate international development policies. While the Declaration is certainly not a treaty, and its legal status remains debatable, “nevertheless, its norms add to the long list of evidence of extraterritorial duties to fulfil human rights”.<sup>44</sup>

24. In its resolution 39/9 of 27 September 2018, the Human Rights Council mandated the Working Group on the Right to Development to begin work on the drafting of a binding instrument on the right to development, the first draft of which was released in January

<sup>38</sup> Principle 8.

<sup>39</sup> Principle 3.

<sup>40</sup> Principle 20.

<sup>41</sup> Principle 24.

<sup>42</sup> Principle 29.

<sup>43</sup> See [CCPR/CO/78/ISR](#); *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion I.C.J. Reports 2004*, p. 136; and [CCPR/C/USA/CO/3](#).

<sup>44</sup> Joseph, *Blame it on the WTO?*, p. 247.

2020.<sup>45</sup> In that first draft, article 3 (g) identified international solidarity as one of the general principles underpinning the draft convention. It also stressed that the principle included the duty to cooperate. Draft article 11 also had an extraterritorial dimension, because it set out a requirement for States parties to adopt and implement all measures necessary to ensure that legal and natural persons within their regulatory control did not impair enjoyment of the right to development within or outside such States' territories. Draft article 12 set out a requirement for States to take measures, individually and through international assistance and cooperation, to advance the right to development, while draft article 13 set out a requirement for States to cooperate with each other through joint and separate action.

## **G. Extraterritorial human rights obligations in the jurisprudence of human rights bodies**

25. Several United Nations human rights treaty bodies,<sup>46</sup> regional human rights bodies and the International Court of Justice have recognized extraterritorial human rights obligations under pertinent international and regional human rights treaties.

### **Extraterritorial human rights obligations in the jurisprudence of United Nations treaty bodies**

26. The Human Rights Committee has confirmed that the reference to “jurisdiction” in the International Covenant on Civil and Political Rights extends a State’s responsibilities under the Covenant beyond its own territory.<sup>47</sup> In this regard, it has found that a Middle Eastern country is under extraterritorial human rights obligations that must govern its conduct in territories under its control<sup>48</sup> and a North American country has similar obligations in relation to its operation of a military base in a Caribbean country,<sup>49</sup> and that such obligations extend to provision of aid to migrants in distress at sea where a State party exercises effective control over the rescue operation.<sup>50</sup>

27. The Committee on the Elimination of Discrimination against Women has also recognized extraterritorial human rights obligations. In its 2016 concluding observations on the situation of human rights in one Northern European country, it recommended that the State party uphold its due diligence obligations to ensure that companies under its jurisdiction or control respected, protected and fulfilled women’s human rights when operating abroad.<sup>51</sup> In addition, the Committee has reiterated, in paragraph 8 of its general recommendation No. 30 (2013), that the obligations of States parties also apply extraterritorially to persons within their effective control, even if not situated within the territory, and that States parties are responsible for all their actions affecting human rights, regardless of whether the affected persons are in their territory.

28. The Committee on Economic, Social and Cultural Rights has clarified the extraterritorial scope of the International Covenant on Economic, Social and Cultural Rights. For instance, in its concluding observations on the situation of human rights in one Northern European country, the Committee expressed its concern about the lack of systematic control by the State party of the investments made abroad by enterprises domiciled under its jurisdiction<sup>52</sup> and recommended that the State improve its extraterritorial protection of human

<sup>45</sup> See [A/HRC/WG.2/21/2/Add.1](#).

<sup>46</sup> Elena Pribytkova, “Extraterritorial obligations in the United Nations System: UN treaty bodies”, in *The Routledge Handbook on Extraterritorial Human Rights Obligations*, Mark Gibney and others, eds. (Routledge, New York, 2022).

<sup>47</sup> Joseph, *Blame it on the WTO?*, p. 248.

<sup>48</sup> See [CCPR/CO/78/ISR](#).

<sup>49</sup> See [CCPR/C/USA/CO/3](#).

<sup>50</sup> *A.S. et al. v. Malta* ([CCPR/C/128/D/3043/2017](#)), para. 6.7.

<sup>51</sup> [CEDAW/C/SWE/CO/8-9](#), para. 35.

<sup>52</sup> [E/C.12/SWE/CO/6](#), para. 11.

rights. The Committee has also reiterated the extraterritorial nature of economic, social and cultural rights obligations in general comments<sup>53</sup> and in its statements on topical issues.<sup>54</sup>

### **Extraterritorial human rights obligations in the jurisprudence of regional human rights bodies**

29. The Inter-American Commission on Human Rights has on numerous occasions held that both the American Declaration of the Rights and Duties of Man and the American Convention on Human Rights implicitly provide for extraterritorial human rights obligations.<sup>55</sup> The Inter-American Court of Human Rights has also recognized extraterritorial human rights obligations in a 2017 advisory opinion.<sup>56</sup>

30. The European Court of Human Rights has also displayed its willingness to apply the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) extraterritorially. According to the Court, States are responsible for human rights violations not only within their national territory, but also in areas outside their territories but subject to their jurisdiction.<sup>57</sup> As early as 2001 the Court stressed that jurisdiction was primarily territorial but left the door open for extraterritorial jurisdiction in exceptional cases.<sup>58</sup> Subsequently, in a seminal 2011 case, the Court went on to clarify the possible existence of extraterritorial jurisdiction where a contracting party exercises effective control over an area outside its national territory (spatial model) and where a contracting party exercises authority and control over individuals outside its territory (personal model).<sup>59</sup> Since then, the Court has in various cases reaffirmed the existence of extraterritorial jurisdiction primarily within the ambit of the personal model<sup>60</sup> and to a lesser extent within the context of the spatial model.<sup>61</sup>

31. Unlike the main legal texts of the regional human rights bodies discussed above, the African Charter on Human and Peoples' Rights does not contain a jurisdiction clause.<sup>62</sup> However, collective action is a central aspect of the African Charter, and extraterritorial obligations are the tool for instrumentalizing cooperation among the States parties. And despite the paucity of jurisprudence within the African human rights system in this specific

<sup>53</sup> General comment No. 3 (1990) on the nature of States parties' obligations, general comment No. 14 (2000) on the right to the highest attainable standard of health and general comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities.

<sup>54</sup> See [E/C.12/2001/10](#) and [E/C.12/2008/1](#).

<sup>55</sup> Inter-American Commission on Human Rights, *Saldaño v. Argentina*, inadmissibility report No. 38/99 (11 March 1999), para. 17; "Report on the situation of human rights in Chile" (1985), para. 80; *Coard et al. v. United States*, Case No. 10.951, report on the merits No. 109/99 (29 September 1999), para. 37; *Aisalla Molina (Ecuador) v. Colombia*, inter-State petition No. IP-02, report on admissibility No. 112/10 (21 October 2010), para. 91. For a detailed analysis, see Clara Burbano-Herrera and Yves Haeck, "Extraterritorial obligations in the inter-American human rights system", in *The Routledge Handbook*, Gibney and others, eds., pp. 110–124.

<sup>56</sup> *The Environment and Human Rights*, Advisory Opinion OC-23/17 (2017), para. 77.

<sup>57</sup> Yves Haeck, Clara Burbano-Herrera and Hannah Ghulam Farag, "Extraterritorial obligations in the European human rights system", in *The Routledge Handbook*, Gibney and others, eds., pp. 125–139; and Conall Mallory, "A second coming of the extraterritorial jurisdiction at the European Court of Human Rights?", *Questions of International Law*, vol. 82 (2021), pp. 31–51.

<sup>58</sup> *Banković and others v. Belgium and others*, Application No. 52207/99, Decision, 12 December 2001, para. 61.

<sup>59</sup> *Al-Skeini and others v. The United Kingdom*, Application No. 55721/07, Judgment, 7 July 2011, paras. 138–140.

<sup>60</sup> *Hirsi Jamaa and others v. Italy*, Application No. 27765/09, Judgment, 23 February 2012, para. 81; *Hassan v. The United Kingdom*, Application No. 29750/09, Judgment, 16 September 2014, para. 80; and *Al-Jedda v. The United Kingdom*, Application No. 27021/08, Judgment, 7 July 2011, para. 86.

<sup>61</sup> *Ukraine v. Russia (Re Crimea)*, Application Nos. 20958/14 and 383314/18, Decision, 14 January 2021, para. 303.

<sup>62</sup> Anne Oloo and Wouter Vandenhoele, "Enforcement of extraterritorial human rights obligations in the African human rights system", in *The Routledge Handbook*, Gibney and others, eds., p. 141; Takele Soboka Bulto, "Patching the 'legal black hole': the extraterritorial reach of States' human rights duties in the African human rights system", *South African Journal on Human Rights*, vol. 27, No. 2 (2011), p. 257.

area, the recognition of extraterritorial human rights obligations can nevertheless be gleaned from some of the decisions of the African Commission on Human and Peoples' Rights,<sup>63</sup> as well as from paragraph 14 of its general comment No. 3 on the African Charter on Human and People's Rights: the right to life (art. 4). In these decisions, the Commission recognized the extraterritorial application of the African Charter where a State assumes effective control of part of another State's territory (spatial jurisdiction) or where a State exercises control or authority over an individual (personal jurisdiction). In the above-mentioned general comment, the Commission specifically emphasized the extraterritorial application of the right to life.

### **Extraterritorial human rights obligations in the jurisprudence of the International Court of Justice**

32. The jurisprudence of the International Court of Justice also confirms the existence of extraterritorial human rights obligations, under certain conditions, in diverse cases. Such conclusions can be found in the Court's 2004 advisory opinion on the legal consequences of the construction of a wall in the Occupied Palestinian Territory, its 2005 judgement in the *Case concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, and its 2008 order indicating provisional measures in the *Case concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*.<sup>64</sup>

### **The burden of extraterritorial human rights obligations: how should responsibilities be distributed?**

33. Due to real life socioeconomic and political power asymmetries, the obligations of States (and other actors) to respect, protect and fulfil human rights extraterritorially are not, and cannot be, equally distributed among the relevant actors. States, depending on their size in terms of territory, population and economy, may be affecting the lives and living conditions of individuals around the world in different ways, and therefore the actual content of a State's obligations may differ.<sup>65</sup> Thus, it is necessary to have a common but differentiated responsibility framework in the extraterritorial realization of human rights, one that apportions responsibility on the basis of factors such as the State's contribution to particular kinds of human rights violations, the relative power or influence enjoyed by that State, the State's ability to offer assistance, and the portion of global wealth and resources enjoyed by the State.

### **Extraterritorial human rights obligations and the expression of international solidarity**

34. The Independent Expert subscribes to and works with the definition of international solidarity contained in the draft declaration on the right to international solidarity,<sup>66</sup> which in draft article 1 defines international solidarity as the expression of a spirit of unity among individuals, peoples, States and international organizations, encompassing the union of interests, purposes and actions and the recognition of different needs and rights to achieve common goals. Within this framework, international solidarity consists of preventive solidarity (collective action to safeguard and ensure the fulfilment of all human rights), reactive solidarity (collective action to respond to the adverse impacts of natural disasters, health emergencies, epidemic diseases and armed conflict) and international cooperation (which rests on the premise that in some cases States may not possess the resources or capacity necessary for the full realization of certain human rights and requires that States in

<sup>63</sup> *Democratic Republic of the Congo v. Burundi, Rwanda and Uganda*, communication No. 227/99, paras. 63, 88 and 91 ; *Association pour la sauvegarde de la paix au Burundi v. Tanzania and others*, communication No. 157/96, para. 78; and *Al-Asad v. Djibouti*, communication No. 383/10, para. 134.

<sup>64</sup> For a detailed analysis see Ralph Wilde, "Human rights beyond borders at the world court: the significance of the International Court of Justice's jurisprudence on the extraterritorial application of international human rights law treaties", *Chinese Journal of International Law*, vol. 12, No. 4 (December 2013).

<sup>65</sup> Sigrun Skogly, "Global human rights obligations", p. 34.

<sup>66</sup> [A/HRC/35/35](#), annex.

a position to do so provide international assistance, whether jointly or separately, to contribute to the realization of human rights in other States).<sup>67</sup> Furthermore, the Independent Expert has previously emphasized that international solidarity is not a State-centric phenomenon and can be expressed, withheld or violated by State and non-State actors alike.<sup>68</sup>

35. The recognition and imposition of extraterritorial human rights obligations can, in some cases, be seen as a legal expression of international solidarity. At its very core, human rights extraterritoriality seeks to ensure that States and other actors perform their respective roles in respecting, fulfilling and protecting the human rights of all human beings regardless of where these right holders reside. However, the fulfilment of the international solidarity obligation is not necessarily contingent on human rights extraterritoriality, and consequently can still be claimed and enjoyed regardless of the extraterritoriality or otherwise of the application of human rights in specific instances.

36. A textual analysis of the draft declaration on the right to international solidarity supports this conclusion. Despite the international solidarity obligation being grounded in the codification and progressive development of freedoms and entitlements contained in international human rights treaties,<sup>69</sup> it is still a stand-alone obligation by which individuals and peoples are entitled, on the basis of equality and non-discrimination, to participate meaningfully in, contribute to and enjoy a social and international order in which all human rights and fundamental freedoms can be fully realized.<sup>70</sup> Individuals and peoples are to thus have the right, individually and in association with others, within or beyond their territories and national boundaries, to claim the right to international solidarity.<sup>71</sup> Additionally, all States, whether acting individually or collectively, have the primary duty to realize the right to international solidarity,<sup>72</sup> a right that international organizations and non-State actors also have a duty to respect, particularly in situations where such actors bear similar and complementary responsibilities to the duties of States.<sup>73</sup> In essence therefore, even though human rights extraterritoriality may, in some circumstances, be seen as a manifestation of international solidarity, international solidarity is a much broader concept.

### **III. Some pitfalls of the extraterritorial application of human rights as a touted form of international solidarity**

37. It would be naïve to assume that international solidarity being expressed through the extraterritorial application of human rights would, by definition, advance global justice and equity.<sup>74</sup> In the present section, the Independent Expert critically interrogates three situations where the extraterritorial application of human rights by States and other non-State actors warrants concern from a genuine international solidarity perspective. The fundamental question here is: As an asserted manifestation of international solidarity, does the extraterritoriality of human rights tend to promise more than it delivers, especially to societies and peoples in challenging situations?

#### **A. Does the unilateral extraterritorial regulation of the global value chains of transnational corporations – using domestic human rights mandatory due diligence laws – infringe host State sovereignty?**

38. In the past 10 years, the use of unilaterally enacted domestic (and regional) legislation to regulate the global value chains of transnational corporations has become commonplace. Examples of these laws include: the California Transparency in Supply Chains Act of 2010,

<sup>67</sup> Draft art. 2.

<sup>68</sup> [A/HRC/47/31](#), para. 6.

<sup>69</sup> Draft art. 4 (2).

<sup>70</sup> Draft art. 4 (1).

<sup>71</sup> Draft art. 5.

<sup>72</sup> Draft art. 6 (1).

<sup>73</sup> Draft art. 6 (2).

<sup>74</sup> Henning Melber, “International solidarity as an emerging norm in the United Nations”, opening speech given at the International Expert Workshop, Berlin, 1 and 2 September 2016, p. 1.

in the United States of America; the Modern Slavery Act 2015, in the United Kingdom of Great Britain and Northern Ireland and the Modern Slavery Act 2018, in Australia (both of which focus on human trafficking and exploitation in global value chains); the Child Labour (Duty of Care) Act, in the Netherlands; Law No. 2017-399, on the corporate duty of vigilance, in France; the Act of 2021 on corporate due diligence in supply chains, in Germany; and Regulation No. 2017/821 of the European Parliament and of the Council, on due diligence relating to minerals from conflict-affected and high-risk areas, which entered into force in January 2021. A proposed European Commission directive on human rights due diligence has been postponed indefinitely.<sup>75</sup>

39. This mushrooming of national and regional legislation can be partly attributed to the paralysis plaguing the international legal and political sphere in establishing rules to regulate transnational corporations extraterritorially. In the international legal order, there is a profound asymmetry between the “rights” enjoyed by transnational corporations and their obligations. For “while they enjoy substantial rights secured through trade and investment agreements, their human rights obligations are less clear and more difficult to enforce”.<sup>76</sup> Transnational corporations have taken advantage of this regulatory vacuum to commit mass violations of human rights and environmental abuses in numerous and diverse global South host countries. For instance, the Permanent People’s Tribunal has received extensive evidence of systematic human rights abuses by European transnational corporations operating in Latin America and the Caribbean.<sup>77</sup> Transnational corporations and the human rights violations committed in their global value chains were further thrust into the limelight by the 2012 factory fires in the Tazreen Fashions factory in Bangladesh and the Ali Enterprises factory in Pakistan, as well as the 2013 collapse of a garment factory – Rana Plaza – in Dhaka.<sup>78</sup>

40. In one sense, the unilateral enactment of domestic supply-chain laws could be viewed as a legitimate expression of pro-human rights international solidarity by the global North home States that enact them, their intentions being to contribute to the extraterritorial protection of human rights in global South host States, in reaction to abuses that may have already occurred in those States, or in an attempt to prevent further abuses. However, despite such ostensibly good intentions, some serious concerns linger. For example, if such supply chain laws are to truly serve the purpose of holding transnational corporations accountable for violations within their global value chains, there is a need for a higher level of “self-awareness” on the part of the stronger global North States that choose to enact them regarding the asymmetrical power dynamics that tend to exist between the global North and the global South in the real world. Extraterritorial regulation of the global value chains of transnational corporations by powerful global North home States has the possibility of resulting in an infringement of already weakened host State sovereignty,<sup>79</sup> while bolstering global North power (howsoever unintended). This is particularly apparent when the historical context of State sovereignty and the power imbalances between typically global North home States and global South host States are taken into more serious account.<sup>80</sup>

<sup>75</sup> European Trade Union Confederation, “Human rights law disappears from Commission’s plans”, 1 December 2021.

<sup>76</sup> Ionel Zamfir, “Towards a binding international treaty on business and human rights”, cited in Lichuma, “(Laws) made in the ‘First World’”, p. 515.

<sup>77</sup> The Transnational Institute, “Permanent Peoples’ Tribunal: sessions on neo-liberal policies and European transnationals in Latin America and the Caribbean” (2008); and Permanent Peoples’ Tribunal, *The European Union and Transnational Corporations in Latin America: Policies, Instruments and Actors Complicit in Violations of the Peoples’ Rights* (2010). See also [A/HRC/47/39/Add.3](#), in which the Working Group on the issue of human rights and transnational corporations suggested that national human rights institutions should have the competence to deal with extraterritorial complaints against companies domiciled within their respective territories.

<sup>78</sup> Peer Zumbadsen, “Introduction: transnational law and advocacy around labour and human rights litigation”, in *Transnational Legal Activism*, Saage-Maaß and others, eds., p. 1.

<sup>79</sup> Rachel Chambers, “An evaluation of two key extraterritorial techniques to bring human rights standards to bear on corporate misconduct: jurisdictional dilemma raised/created by the use of the extraterritorial techniques”, *Utrecht Law Review*, vol. 14, No. 2 (2018), p. 26.

<sup>80</sup> Lichuma, “(Laws) made in the ‘First World’”, p. 519, and Anghie, *Imperialism, Sovereignty and the Making of International Law*. See also [A/HRC/38/20/Add.2](#).

41. Such potential or actual violations of the sovereignty of weaker States could, and do, occur when global North States undertake unilateral actions such as enacting domestic supply-chain laws seemingly aimed at human rights and environmental protection without the participation and involvement of potentially affected global South States, peoples and individuals. In this context, some have expressed “a justifiable scepticism” that the strongest cannot always “be the best custodians of third State interests in the absence of a framework of international [i.e. multilateral] oversight”.<sup>81</sup> This kind of infringement of host State sovereignty is particularly apparent where the unilateral passing of global value chain laws by a powerful home State in practice compels certain actions on the part of the host State. In this regard, section 1502 of the Dodd-Frank Wall Street Reform and Consumer Protection Act passed by the United States is particularly illustrative. On paper, pursuant to the Act, domestic and foreign companies under an obligation to file reports with the Securities and Exchange Commission under section 13 (a) or section 15 (d) of the Exchange Act must provide evidence of due diligence steps taken to ensure that certain minerals sourced from the Democratic Republic of the Congo and neighbouring countries have not been obtained from rebels or in a manner that supports armed conflict.<sup>82</sup> On the ground, however, in order for such companies to comply with these requirements, the Democratic Republic of the Congo was “indirectly compelled” to “put in place a patchwork of regulatory infrastructure” as a necessary condition for accessing the United States market.<sup>83</sup>

42. Consequently, the ostensible expression of international solidarity through the enactment of domestic supply-chain laws, in a bid to contribute to human rights protection abroad, may still amount to an unjustifiable infringement on the host State’s sovereignty, where such unilaterally enacted laws have the impact of compelling certain regulatory or other governmental acts on the part of the respective host State. This may also occur where the extraterritorial legislation in question imposes regulatory duties on already relatively more powerful global North transnational corporations, by requiring them to regulate the suppliers in their value chain, thus conferring on these corporations what is essentially a public governance duty normally borne by the relevant (already weak) global South host State. This can amount to an indirect and not always helpful augmentation of the historical tendency of outside forces to take over global South governance power – an experience that these States tend to have very good reasons to be sensitive about.

## **B. Human rights extraterritoriality can contribute to the delocalization of justice to the detriment of global South States and peoples**

43. In most cases in which extraterritorial human rights obligations are imposed on States and other actors, even though the violations in question mostly occur in global South States, redress can usually only be sought and secured in the global North home States. This brings to light concerns about the potential of human rights extraterritoriality praxis to augment global hegemony, as well as to crowd out other valuable, and perhaps even more emancipatory, strategies.<sup>84</sup> Consequently, in the quest to evince a certain kind of international solidarity by imposing extraterritorial human rights obligations, powerful global North States and other actors can end up detracting from the construction of other promising but more localized or regional solutions.

44. Delocalized justice describes situations where there is a transfer of the site of justice away from the community where the harm was suffered. In such cases, for example, wrongs have been suffered on the African continent, or another global South location “and yet European or American judicial and non-judicial institutions have been asked to deliver

<sup>81</sup> Phoebe Okowa, “The pitfalls of unilateral legislation in international law: lessons from conflict minerals legislation”, *International and Comparative Law Quarterly*, vol. 69, No. 3 (July 2020), p. 689. See also [A/HRC/28/65](#), in which issues related to extraterritorial obligations in relation to the justiciability of the right to food are addressed.

<sup>82</sup> Securities and Exchange Commission, final rule on conflict minerals.

<sup>83</sup> Okowa, “The pitfalls”, p. 707.

<sup>84</sup> David Kennedy, “The international human rights movement: part of the problem?” *Harvard Human Rights Journal*, vol. 15 (2002), p. 108.

justice”<sup>85</sup> (often for understandable reasons). Specific examples abound of cases brought in global North forums to obtain redress for violations committed in the global South: *Kiobel et al. v. Royal Dutch Petroleum Company et al.*, brought before the Supreme Court of the United States; *Nevsun Resources Ltd. v. Araya*, brought before the Supreme Court of Canada; *Vedanta Resources PLC and another (Appellants) v. Lungowe and others (Respondents)*, and *Okpabi and others (Appellants) v. Royal Dutch Shell PLC and another (Respondents)*, brought before the Supreme Court of the United Kingdom; and the recent case brought against *Total* in France.<sup>86</sup>

45. The pursuit of delocalized justice based on extraterritorial human rights obligations is a rocky road, that for all too many victims often leads nowhere. Unfortunately, “only a small minority of claimants have (access to) the necessary transnational socioeconomic resources and will to undergo an (almost) never-ending delocalized judicial process, with little hope for success”.<sup>87</sup> Additionally, even when the necessary resources are available, claimants must contend with “the ‘burden’ of the burden of proof”, which makes it difficult for the “often extremely vulnerable victim of this kind of violation, to prove damage caused within the [global value chain] of a [transnational corporation], before they can be able to secure compensation”.<sup>88</sup> Ultimately, such delocalized justice all too often leaves victims of human rights violations without a positive outcome.

### C. The imposition of economic and other sanctions

46. Numerous United Nations bodies, including special procedures of the Human Rights Council, have expressed concerns about the extraterritorial nature, and overly negative impacts, that many unilateral coercive measures have on the enjoyment of human rights by the civilian populations of targeted States.<sup>89</sup> For instance, in its resolution 73/8, adopted in 2018, the General Assembly stressed the necessity of ending the economic, commercial and financial embargo long imposed by a powerful North American State on one small Caribbean State. The Human Rights Council has also overwhelmingly condemned unilateral coercive measures<sup>90</sup> and has even held a panel discussion on the issue under the theme “Unilateral sanctions: jurisdiction and extraterritoriality”.<sup>91</sup>

47. The Special Rapporteur on the negative impact of unilateral coercive measures on the enjoyment of human rights has noted that while there is no clear definition of the general notion of “sanctions” in international law, many sanctions are introduced to pursue human rights protection and other similar purposes.<sup>92</sup> Further, she has emphasized the concern that the extraterritorial effect of sanctions impedes the full realization of human rights.<sup>93</sup> The United Nations High Commissioner for Human Rights has pointed out that where sanctions target an entire country or address entire economic sectors, it is the most vulnerable members of the population of that country who are likely to suffer the worst harm.<sup>94</sup>

<sup>85</sup> Antoine Duval and Misha Plagis, “Delocalized justice: the delocalization of corporate accountability for human rights violations originating in Africa”, *Afronomicslaw* blog, 12 October 2021.

<sup>86</sup> Business & Human Rights Resource Centre, “French Court of Appeal remands case against Total over alleged failure to respect duty of vigilance law in Uganda to commercial court”, 10 December 2020.

<sup>87</sup> Duval and Plagis, “Delocalized justice”.

<sup>88</sup> Lichuma, “(Laws) made in the ‘First World’”, p. 527.

<sup>89</sup> See Committee on Economic, Social and Cultural Rights, general comment No. 8 (1997), Human Rights Council resolution 27/21, and [A/HRC/48/59](#) and [A/HRC/48/59/Corr.1](#).

<sup>90</sup> Joseph Schechla, “Extraterritorial human rights obligations in the context of economic sanctions”, in *The Routledge Handbook*, Gibney and others, eds., p. 258. See also Human Rights Council resolutions 37/21, 40/3 and 43/15.

<sup>91</sup> See

<https://www.ohchr.org/EN/HRBodies/HRC/Pages/NewsDetail.aspx?NewsID=27480&LangID=E>.

<sup>92</sup> [A/HRC/48/59](#) and [A/HRC/48/59/Corr.1](#), paras. 19–20.

<sup>93</sup> *Ibid.*, para. 61.

<sup>94</sup> See <https://www.ungeneva.org/en/news-media/meeting-summary/2021/09/mme-bachelet-demande-aux-pays-concernes-de-reevaluer-leur>.

48. The imposition of sanctions may, sometimes justifiably, be presented by the imposing State(s) as an expression of international solidarity of some sort because sanctions are often viewed as a traditional means of international intercourse aimed at protecting “common goods”, including international peace and security, national security, the promotion of democracy and the protection of human rights, and as a softer and publicly acceptable alternative to the use of force.<sup>95</sup> However, the assertion of this kind of “solidarity” may, in many cases, still be problematic, especially where it significantly exacerbates human rights-adverse impacts in the target State or society. The imposition of sanctions in order to remedy human rights abuses in the sanctioned State may in fact augment, rather than mitigate, human rights violations there, even in the long run.

49. In light of the foregoing, the Independent Expert would like to express serious misgivings regarding the widespread practice of the imposition of broadly targeted sanctions, where such sanctions adversely affect the human rights of already vulnerable or violated peoples. He subscribes to the view that, for that reason, such types of overbroad coercive measures should – as much as is practicable – not be implemented. However, where such sanctions are unavoidable, and authorized by a competent multilateral body acting within its sphere of authority, they should be genuinely “smart” sanctions. That is, they should always be time-bound, they must not significantly augment human rights violations of any kind against vulnerable members of the target population, and they must not contribute to significant imbalances in income distribution.<sup>96</sup>

#### **IV. Prospects for the utilization of the extraterritorial protection of human rights as a form of international solidarity**

50. Further to the analysis in section III above, the Independent Expert would like to reiterate that not all deployments of the extraterritorial protection of human rights as a manifestation of international solidarity will be problematic. In fact, under certain conditions and in certain instances, such acts of solidarity by States and non-State actors can contribute to the fuller realization of human rights. More specifically, for the deployment of human rights extraterritoriality in furtherance of international solidarity to be normatively acceptable and practically defensible, a number of general conditions should be present. For example, the extraterritorial application of human rights measures should not disproportionately exacerbate the human rights situation in the target State. Furthermore, the meaningful involvement of the States, peoples and individuals who are expected to benefit from the ostensible exercise of international solidarity must – as far as is feasible – be secured. Additionally, to the extent possible, mechanisms allowing for multilateral expressions of international solidarity should be preferred over their unilateral alternatives. International oversight of such extraterritorial measures is also to be much preferred over its non-existence.

51. In the present section, the Independent Expert will briefly describe a few examples of existing and possible human rights extraterritoriality good practices that tend to align with these general principles.

##### **A. The draft binding treaty on business and human rights and its extraterritorial regulation of human rights as a manifestation of international solidarity**

52. Extraterritorial human rights obligations are “at the heart of the draft international business and human rights treaty currently under negotiation”<sup>97</sup> at the United Nations. A resolution tabled by Ecuador and South Africa, and co-sponsored by Bolivia (Plurinational State of), Cuba and Venezuela (Bolivarian Republic of), culminated in the establishment of an open-ended intergovernmental working group to elaborate an international legally binding

<sup>95</sup> A/HRC/48/59 and A/HRC/48/59/Corr.1, para. 97.

<sup>96</sup> Schechla, “Extraterritorial human rights obligations”, p. 263; see also A/76/174/Rev.1.

<sup>97</sup> Daniel Augenstein, “Home State regulation of corporations”, in *The Routledge Handbook*, Gibney and others, eds., p. 289.

instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises.<sup>98</sup> A total of 20 member States were in favour, 14 member States were against, including the United States and States of the European Union, and 13 member States abstained.<sup>99</sup> The working group has since made numerous strides in the drafting journey of the binding treaty. On 17 August 2021, the third revised draft was circulated,<sup>100</sup> following a number of earlier versions:<sup>101</sup> the second revised draft (2020),<sup>102</sup> the revised draft (2019)<sup>103</sup> and the zero draft (2018).<sup>104</sup>

53. Certain provisions of the third revised draft are intended to promote positive international solidarity within this multilateral context, including through the extraterritorial application of human rights. For instance, in the draft preamble, it is stressed that States must protect against human rights abuses by third parties, including business enterprises, within their territory, jurisdiction, or otherwise under their control. Relatedly, the draft preamble also implicitly stresses that all transnational corporations have extraterritorial human rights obligations regardless of their size, sector and location. Draft article 1.4 defines “business activities of a transnational character” to include business activities that have extraterritorial effects. Together with draft article 1.2, which includes in the definition of “human rights abuse” direct or indirect harm in the context of business activities, these provisions cumulatively recognize extraterritorial human rights obligations. Draft article 2.1 (e) identifies the facilitation and strengthening of mutual legal assistance and international cooperation to prevent and mitigate human rights abuses as one of the purposes of the draft treaty. Draft article 13, on international cooperation, reiterates the need for cooperation in this area.

## **B. The Global Deal initiative as a manifestation of international solidarity in the extraterritorial protection of human rights**

54. Launched in 2016 by Sweden, in partnership with the International Labour Organization and the Organisation for Economic Co-operation and Development,<sup>105</sup> the Global Deal, a first-of-its-kind initiative, brings together various actors to engage in social dialogue aimed at creating favorable conditions for collaboration between employers, workers and Governments within the framework of the 2030 Agenda for Sustainable Development.<sup>106</sup> It is a multi-stakeholder partnership in line with Sustainable Development Goal 17, and seeks to address the challenges in the global labour market in order to enable all people, wherever they may be, to benefit from globalization, primarily by achieving decent work and steadily improving job quality, thus contributing to inclusive growth and shared prosperity,<sup>107</sup> all of which would be important and positive human rights-friendly outcomes. More specifically, the initiative contributes to the realization of Sustainable Development Goal 8, on decent work and economic growth,<sup>108</sup> but it also has the potential to

<sup>98</sup> Human Rights Council resolution 26/9.

<sup>99</sup> Ibid.

<sup>100</sup> See <https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session6/LBI3rdDRAFT.pdf>.

<sup>101</sup> Business & Human Rights Resource Centre, “Binding treaty: a brief overview”.

<sup>102</sup> See

[https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session6/OEIGWG\\_Chair-Rapporteur\\_second\\_revised\\_draft\\_LBI\\_on\\_TNCs\\_and\\_OBEs\\_with\\_respect\\_to\\_Human\\_Rights.pdf](https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session6/OEIGWG_Chair-Rapporteur_second_revised_draft_LBI_on_TNCs_and_OBEs_with_respect_to_Human_Rights.pdf).

<sup>103</sup> See

[https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/OEIGWG\\_RevisedDraft\\_LBI.pdf](https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/OEIGWG_RevisedDraft_LBI.pdf).

<sup>104</sup> See <https://www.ohchr.org/sites/default/files/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/DraftLBI.pdf>.

<sup>105</sup> See [A/HRC/41/44/Add.1](#).

<sup>106</sup> See <https://www.theglobaldeal.com/about/>.

<sup>107</sup> See Global Deal, “Declaration of support – a Global Deal: enhanced social dialogue for decent work and inclusive growth”.

<sup>108</sup> Global Deal Newsletter, No. 1, September 2017, p. 1. Available at <http://globaldeal.azurewebsites.net/wp-content/uploads/2017/09/Global-Deal-newsletter-No-1-September-2017.pdf>.

contribute directly to the realization of several other Goals, including Goal 1 (ending poverty), Goal 3 (good health and well-being), Goal 5 (gender equality) and Goal 10 (reduced inequalities).<sup>109</sup> The Global Deal currently includes 123 participants in various parts of the world: 23 States, 35 trade unions, 45 businesses, business organizations and employer organizations, and 20 other stakeholders.<sup>110</sup>

55. Despite the voluntary nature of the Global Deal, the Independent Expert recognizes this initiative as a genuine manifestation of positive international solidarity, geared towards the extraterritorial protection of the human rights of workers around the world. He applauds the multilateral nature of the initiative, particularly its inclusion of workers – the very group that the initiative aims to uplift – in social dialogue processes, such as negotiations, consultations and other exchanges of information, that have the possibility of contributing to the improvement of the human rights conditions of workers around the world. Furthermore, by providing a public forum for the exchange of ideas and the promotion of concrete initiatives, as well as facilitating voluntary commitments in support of the above-mentioned objectives, the Global Deal sets the stage for the manifestation of further international human rights solidarity by numerous and diverse actors in its area of concern.

56. The Independent Expert also notes the positive tangible impacts that numerous Global Deal initiatives have already had on the lived realities of rights holders. These include<sup>111</sup> Fairtrade International's monitoring and remediation system, referred to as the Youth Inclusive Community Based Monitoring and Remediation System.<sup>112</sup> The aim of this system is to prevent child labour by tackling its root causes. Launched in 2015, the System has been implemented in the sugarcane production sector in Belize and has contributed to declining incidences of child labour there.<sup>113</sup> Another positive manifestation of this kind of international solidarity is reflected in the framework agreement signed by a global concession and construction player based in France, VINCI, to ensure that the rights of its construction workers in Qatar are extraterritorially upheld.<sup>114</sup> A final example worth mentioning is the French Platform for the Global Deal, a government-led initiative located within the ministry responsible for labour and comprising numerous stakeholders drawn from companies, trade unions, local and regional administrations.<sup>115</sup> The French Platform centres social dialogue extraterritorially as a means of advancing good human rights practices, and creates a forum for the participation of geopolitically diverse stakeholders in labour issues that affect them.

## V. Conclusions and recommendations

57. **The extraterritorial application of human rights can have both positive and negative implications from an international solidarity viewpoint. On the one hand, the extraterritoriality of human rights can play an important role in filling the protection gap caused by a largely territorial international human rights regime. On the other hand, however, the extraterritorial protection of human rights as a touted manifestation of international solidarity may in certain instances cause more harm than good to vulnerable individuals and peoples in (mostly) global South States, in light of the very real realities of power asymmetries that characterize the global order, and the historical, socioeconomic and political contexts within which extraterritoriality must be properly understood. Consequently, international solidarity in the context of human rights extraterritoriality necessitates a proper balancing of interests and conduct by both the States and non-State actors charged with extraterritorial obligations.**

<sup>109</sup> A/HRC/41/44/Add.1, para. 20.

<sup>110</sup> See [www.theglobaldeal.com/partners/](http://www.theglobaldeal.com/partners/).

<sup>111</sup> For the full list of good practices, see <https://www.theglobaldeal.com/good-practices/>.

<sup>112</sup> See Fairtrade International, "Involvement and working conditions of youth in sugar cane cutting in Belize" (July 2018).

<sup>113</sup> Global Deal, "Good practice: eliminating child labour – lessons learned from Belize's sugar cane sector" (November 2021).

<sup>114</sup> See <http://globaldeal.azurewebsites.net/wp-content/uploads/2018/12/Framework-Agreement-QDVC-VINCI-BWI.pdf>.

<sup>115</sup> See <https://www.theglobaldeal.com/good-practices/thefrenchplatformfortheglobaldeal/>.

58. In light of the foregoing analysis, the Independent Expert urges States and other relevant actors to consider the following recommendations in order to enhance the prospects of advancing international solidarity in the extraterritorial application of human rights:

(a) States should, as much as possible, refrain from unilaterally enacting domestic laws geared towards the regulation of the global value chains of transnational corporations, especially where such domestic laws infringe, or have the effect of infringing, upon the sovereignty of the affected host States, by directly or indirectly compelling them to take certain measures;

(b) Where such unilateral extraterritorial laws are to be enacted, home States should endeavor to provide for the adequate and meaningful participation in the law-making and implementation process of the targeted, or likely to be affected, individuals, communities and States;

(c) States should fully support efforts to adopt a business and human rights treaty, in order to help move the binding legal regulation of global value chains of transnational corporations from the unilateral to the multilateral sphere;

(d) Given the disproportionate impacts that economic sanctions tend to have on vulnerable right holders in the target territories, States should not impose unilateral coercive sanctions that are too broadly framed, even when such measures are presented as an expression of international human rights solidarity and are aimed at protecting human rights extraterritorially;

(e) States and other public authorities should make much more effort to comply with their duties to cooperate closely in incorporating more robustly into their domestic laws and regulations the requirement that transnational corporations respect human rights norms when they operate extraterritorially;

(f) Without prejudice to the preference that they should show for global arrangements in this area, States and other non-State actors should continue to encourage and actively participate in social dialogue aimed at improving the human rights conditions of workers around the world, including within the ambit of multi-stakeholder initiatives such as the Global Deal.

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