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## **State Responsibilities to Regulate and Adjudicate Corporate Activities under the United Nations' core Human Rights Treaties**

Individual report on the International Covenant on Civil and Political Rights

Report No. III

Prepared for the mandate of the Special Representative of the United Nations  
Secretary-General (SRSG) on the issue of Human Rights and Transnational  
Corporations and Other Business Enterprises

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## PREFACE

The following report is part of a series examining States' obligations in relation to corporate activity under the United Nations' core human rights treaties.<sup>1</sup> A report summarizing the main findings and trends from the treaty-specific reports was submitted to the fourth session of the Human Rights Council.<sup>2</sup>

The series of reports map the scope and content of States Parties' responsibilities to regulate and adjudicate the actions of business enterprises under the treaties and as elaborated by the respective treaty bodies.<sup>3</sup> This mapping supports the work of the Special Representative of the United Nations Secretary-General (SRSG) on the issue of human rights and transnational corporations and other business enterprises. The (then) United Nations Commission on Human Rights mandated the SRSG, *inter alia*, to:

“(b) elaborate on the role of States in effectively regulating and adjudicating the role of transnational corporations and other business enterprises with regard to human rights, including through international cooperation.”<sup>4</sup>

The reports analyze a representative sample of primary materials associated with each treaty:<sup>5</sup> the actual treaty provisions; General Comments or Recommendations by the Committees; Concluding Observations on States Parties' periodic reports; and Decisions on Communications and under Early Warning Measures and Urgent Procedures.<sup>6</sup>

The reports are based on references by the treaties and treaty bodies to States Parties' duties to regulate and adjudicate corporate activities.<sup>7</sup> However, as it is less common for the treaty bodies to refer explicitly to corporations, the reports also highlight more general references to State obligations regarding acts by non-State actors, especially where they help identify patterns and measures relevant to business enterprises. The reports do not document references to non-State actors that are unrelated to the mandate, such as armed groups,

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<sup>1</sup>The following treaties were considered as part of this series: the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD); the International Covenant on Civil and Political Rights (ICCPR); the International Covenant on Economic, Social and Cultural Rights (ICESCR); the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW); the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), the Convention on the Rights of the Child (CRC); and the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (ICRMW). The International Convention on the Rights of Persons with Disabilities (ICRPD) (adopted by the General Assembly in Dec. 2006) and the International Convention for the Protection of All Persons from Enforced Disappearances, which had not entered into force at the time of completing the research, have not been included. All reports will be made available as they are completed at <http://www.business-humanrights.org/Gettingstarted/UNSpecialRepresentative>.

<sup>2</sup> A/HRC/4/35/Add.1.

<sup>3</sup> The human rights treaty bodies are committees of independent experts that monitor implementation of the core international human rights treaties. They are created in accordance with the provisions of the treaty that they monitor.

<sup>4</sup> Commission on Human Rights Resolution 2005/69, paragraph (b). The SRSG now reports to the UN Human Rights Council.

<sup>5</sup> The ICRMW report relies to some extent on secondary sources because of the scarcity of primary sources from the recently established Committee on Migrant Workers (CMW).

<sup>6</sup> The ICCPR, CAT, ICERD, CEDAW and ICRMW all have associated individual complaints mechanisms. CEDAW and CAT also have procedures for urgent inquiries. ICERD has an early warning procedure.

<sup>7</sup> Drawing on the SRSG's mandate, this report uses “regulation” to refer to treaty body language recommending legislative or other measures designed to prevent or monitor abuse by business enterprises, and “adjudication” to refer to judicial or other measures to punish or remediate abuse.

educational institutions, family members and religious leaders. Further, the reports focus on States' obligations in relation to rights impacted by corporate activities, rather than on corporate entities as possible rights-holders.<sup>8</sup>

The decision to focus the research on the treaties reflects the global importance of the United Nations' human rights treaty machinery. Due to time and resource constraints, other domains of human rights law, such as the regional human rights systems and international customary law, have not been included in this particular series, though they are referenced briefly in the SRSG's report to the fourth session of the Human Rights Council.<sup>9</sup> The same is true of other branches of international law that are relevant to the mandate, such as labor law.

Any views or recommendations expressed in this series do not necessarily represent the views of the SRSG, the Office of the United Nations High Commissioner for Human Rights or the various treaty monitoring bodies.

The reports are numbered chronologically according to the date of adoption of each treaty.

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<sup>8</sup> The UN human rights treaties have not been interpreted to protect the rights of corporate bodies. This is in contrast to e.g. the European Convention on Human Rights, many rights of which have been extended to benefit companies or other non-State legal entities.

<sup>9</sup> A/HRC/4/35.

## EXECUTIVE SUMMARY

### *1. The duty to protect*

Under Art. 2(1) of the International Covenant on Civil and Political Rights (ICCPR), a State Party undertakes to “respect and ensure” all of the Covenant rights to “all individuals within its territory and subject to its jurisdiction.” The Human Rights Committee (HRC) considers that the term “ensure,” read with the rest of the Covenant, requires States Parties to protect against violations by both State agents and private persons or entities. The obligation is one of means rather than result - States Parties should act with “due diligence” to take appropriate steps to prevent, punish, investigate and redress harm by private entities.

The HRC indicates that the duty to protect applies to all rights “so far as they are amenable to application between private persons or entities.” However, it also appears that the Committee will assess the specific nature of this duty depending on the right in question, especially where the Covenant expressly states that a particular right should be protected by law.

The HRC has discussed the importance of protecting individuals against third party interference with their rights in its General Comments, Concluding Observations and views formulated under the First Optional Protocol (Decisions).

Recent General Comments increasingly suggest support for the existence of a duty to protect. In fact, examination of the General Comments shows steady growth in references to this duty from 1988 to the most recent General Comment 31 in 2004. General Comment 31 contains the HRC’s clearest pronouncement on the positive obligations associated with the duty to protect, including the obligation to act with due diligence.

For a communication to be admissible under the Optional Protocol, it has to allege a violation of the Covenant *by the State* and not simply by a private party. In relation to communications which include wrongdoing by a business enterprise, the Committee has rejected arguments by States Parties that such communications should be inadmissible in situations where the company’s acts cannot be directly attributed to the State. It has emphasized that even where direct attribution is not possible, there may still be a violation by the State if it failed to protect against the abuse. In other words, the Committee considers States Parties to the Optional Protocol as answerable for situations where they have failed to take steps to prevent, investigate, punish or redress wrongdoing by private actors, including business enterprises.

The Committee’s discussions about corporate activities focus on the duty to protect, with some statements about the duty to promote in the context of encouraging human rights education for private actors. More guidance from the HRC would be helpful on the relevance, if any, of the duties to respect and fulfill in relation to corporate activities.

General Comment 31 also encourages States Parties to call on other States Parties to comply with their Covenant obligations, asserting that drawing attention to possible violations should not be seen as “an unfriendly act” but rather a “reflection of legitimate community interest.” At the very least, this appears to be an endorsement of the HRC for States to dialogue with other States Parties regarding compliance with all Covenant duties, including the duty to protect.

## **2. *References to business enterprises***

The Covenant does not contain any explicit references to business enterprises and unlike some of the other human rights treaties, it also does not refer to the need to prohibit certain acts by “groups,” “organizations” or “enterprises.” The HRC tends not to expressly use the terms business enterprises, companies or corporations when discussing the duty to protect against private abuse. It more commonly refers to broader terms such as private entities, legal persons, private bodies or employers – terms which, by their nature, encompass a broad range of business enterprises. It also discusses the importance of State protection in certain contexts usually involving business enterprises - such as the labor market and major extractives and infrastructure projects - where it would seem difficult for the State to follow its recommendations without regulating corporate activities.

As discussed below, Concluding Observations in the research sample more commonly reference certain sectors when discussing States Parties’ duties to protect against third party interference, particularly when discussing rights affected in the course of employment or major extractives or infrastructure projects. The HRC has referred to the commercial and agricultural sectors when discussing ways to combat child labor. It has also discussed publicly listed companies when considering non-discrimination in the labor market and expressed concern about logging and mining concessions affecting indigenous peoples.

## **3. *Measures States are required to take***

### **Regulation**

Under Art. 2(2) of the Covenant, States Parties undertake to take the necessary steps to adopt legislative or other measures to give effect to the Covenant rights. Some provisions contain more guidance on steps States should take; for example, some specifically require States to protect rights by law and/or to prohibit certain acts by law.

In line with the Covenant, the HRC recognizes that States Parties have latitude in deciding how to fulfill their Covenant obligations. Therefore, while it is common for it to recommend that States Parties take measures to regulate private acts, it is rare for it to specify what those measures should entail.

While the HRC clearly sees legislative frameworks as key to protecting rights, particularly in relation to those provisions specifically requiring protection by the law, it recognizes that other forms of regulation may complement legislative measures, such as monitoring and reporting mechanisms. For example, there are indications in the HRC’s commentary that it considers that States Parties might need to monitor private entities’ use of private information, as well as how extractives and property development companies treat communities affected by their actions. Further, the HRC has specifically requested oversight mechanisms when private contractors provide government services.

Whatever measures States Parties choose in order to protect against abuse, it is clear that the HRC intends for such measures to be effective in form and substance – it is not enough to simply have legislation “on the books.”

### **Adjudication**

Under Art. 2(3) States Parties undertake to ensure that a person whose rights are violated has an effective remedy and that a person claiming such a remedy has his/her right determined by competent authorities provided by the State’s legal system. States Parties

also undertake to develop the possibility of judicial remedies and to ensure remedies are enforced.

The HRC has interpreted this provision to mean that States Parties should exercise due diligence to investigate, redress and punish abuse by private actors, and has expressed a preference for judicial remedies in this regard. For example, Concluding Observations regularly call for sanctions against employers for discriminatory practices and criminal penalties for practices such as slave labor, child labor and trafficking. The Committee has also called for private contractors to be prosecuted for abuses in detention centers.

The Committee considers that an effective remedy also requires some form of reparation, including compensation where appropriate. However, the Committee is less clear on what type of remedy is preferred, and who States Parties should hold accountable for rights violations – legal persons or individuals or both. Lack of detailed guidance to States on these issues is not surprising considering the discretion provided by the Covenant.

#### **Promotional measures**

The HRC also encourages States Parties to introduce promotional measures for non-State actors in order to assist in preventing abuse. The sample does not include any express directions to promote human rights amongst the business community but the HRC does highlight its support for educating both State and private actors more generally as to the content of Covenant rights. Several Concluding Observations discuss the importance of public education in eradicating discriminatory and harmful employment practices.

#### **4. *Business and rights specific information***

The HRC's commentaries imply that the duty to protect extends to actions by all types of business entities in relation to all Covenant rights which could be violated by private actors. Nevertheless, the sample highlighted some trends suggesting that to date, the HRC mentions certain sectors more than others. This simply suggests current trends and does not indicate that the HRC may or will focus only on certain types of abuses by certain types of business enterprises.

In its Concluding Observations, the Committee has referred to specific types of employers as requiring regulation in certain situations, including publicly listed corporations and the extractives, commercial and agricultural sectors. The Committee has implied that segments of the media may sometimes require regulation to restrict discriminatory and harmful speech, and has suggested that States Parties should monitor and regulate the media market to ensure that corruption, conflicts of interest and even market concentration do not jeopardize freedom of expression.

The Committee has expressed regret regarding situations where logging and mining concessions are provided without the effective participation of affected groups. Several Decisions concern State acts or omissions regarding the activities of extractives and property development companies.

Thus it is unsurprising that the rights the HRC most commonly discusses with regard to State obligations concerning corporate activities are minority rights, non-discrimination, labor rights (including the prohibitions against slavery and forced labor), and rights enjoyed by indigenous peoples, including cultural rights.

## **5. *State controlled enterprises and privatization***

In line with broader concepts of international law, the Committee sees States Parties as having the same types of obligations regarding both State and non-State owned companies – the differentiating factor is government control rather than ownership. In certain situations of government control, the Committee clearly considers that the company's acts may be directly attributed to the State. However, it is not always clear how the State's obligations in such situations may differ, if at all, to those under situations where it is required to act with due diligence to protect against private abuse.

Further, it is sometimes unclear, particularly in relation to communications concerning alleged abuse by government controlled entities, whether the Committee is focusing on direct attribution or the duty to protect when considering State responsibility. However, it is at least clear that when discussing direct attribution in relation to such enterprises, the Committee concentrates on control rather than ownership. And regardless of the basis for responsibility, the Committee expects States Parties to act to prevent corporate abuse.

It may be that General Comment 31 also provides guidance in relation to accountability for State-controlled enterprises. It says that States Parties should take care to ensure that “their agents” are held accountable for violations. In principle this direction could also apply to situations where companies, or individual directors of companies, are acting under the direction or control of the State, or follow the State's instructions in committing the particular act, since they are then de facto agents of the State under international law. However, it is unknown if the Committee shares this view.

The HRC has also expressed concerns about the lack of accountability which could result from the privatization of certain governmental functions, when these are delegated by the State to private companies. In particular, Concluding Observations have expressed concern about the lack of monitoring mechanisms for private prisons, and the failure to hold accountable private contractors suspected of torture or cruel, inhuman or degrading treatment at detention and interrogation centers.

## **6. *Extraterritorial application of Covenant Obligations***

Under Art. 2(1) of the Covenant, States Parties undertake to respect and ensure the Covenant rights to all individuals within their territory and subject to their jurisdiction. The HRC considers this to mean that a State party must respect and ensure the Covenant rights to all individuals within the “power or effective control” of that State Party, even if they are not within the State Party's national territory.

So far, the HRC has most commonly discussed the concept of “power or effective control” in relation to States' deployment of security forces abroad, particularly when such forces participate in peacekeeping operations. For example, General Comment 31 provides that the concept applies whenever the “forces of a State Party” exercise power or effective control over individuals outside the State Party's territory, “regardless of the circumstances in which such power or effective control was obtained.” Concluding Observations speak of the State exercising control through its “agents.” According to the HRC, States Parties are also considered to have jurisdiction where they control detention facilities abroad – including when private contractors operate these facilities on the State's behalf.

The HRC has not explicitly addressed the situation where a corporation acts on the State's behalf (exercising elements of governmental authority or acting under the instructions, direction or control of the State) outside the national territory, and exercises a degree of control over individuals such that, were such control to be exercised by State agents, the State's Covenant obligations would apply in full. Thus more guidance from the HRC would be helpful regarding such a situation.

#### **7. *Laws with extraterritorial effect***

A different question is whether States Parties have any duties under the Covenant to regulate corporate activities which affect individuals who are both outside their national territory and effective control. Unlike the Convention Against Torture, the Covenant does not expressly ask States to exercise jurisdiction over their nationals, and the Committee does not appear to have given significant guidance on this issue. It has said that States Parties should assist other States to bring perpetrators of certain violations to justice, but has not specified whether such "assistance" should include extraterritorial regulation, or whether such regulation should extend to corporate acts. Some Decisions require States to protect persons within their effective control from being exposed to foreseeable harm abroad but do not yet shed light on any obligations which States Parties may have concerning persons outside their jurisdiction, even where the State may influence the situation.

More guidance from the HRC on this issue could help States Parties to better understand whether it believes the Covenant requires extraterritorial regulation or other action to curb abuse abroad, and if so, whether action is required only in relation to their nationals or whether there are more general requirements under the concept of universal jurisdiction.

Assorted statements in the General Comments and Decisions at least suggest that the HRC *might* encourage such regulation or some other form of legal or political action by States but these statements could also benefit from further elaboration and clarification. Further, the research did not suggest that the HRC believes extraterritorial regulation is *not* permitted under the Covenant, though the Committee has indicated that actions in relation to situations outside the State's territory and effective control should comply with the UN Charter and other relevant principles of international law.

#### **8. *Conclusions: issues for further elaboration***

This report shows that the Committee has increasingly thought about and provided guidance concerning States Parties' duties in relation to corporate activities. It is clear that it considers States Parties to have a duty to act with due diligence to prevent, punish, investigate and redress private abuse of all rights capable of being violated by private actors. And it has discussed this duty in the context of corporate activities on numerous occasions. At the very least it is clear that the HRC views this duty as applying to protect individuals within States Parties' territory or jurisdiction – that is, those within their power or effective control.

While the Committee does not often prescribe exactly what measures States should take in order to fulfill the duty in relation to corporate activities, it is clear it considers legislative, administrative, judicial and educative tools to be of significant importance. In actual fact, the lack of detailed guidance to States on some issues is not surprising considering the discretion provided by the Covenant.



Nonetheless, set out below are several areas which are both key to the SRSG's mandate and which with greater elaboration could assist all stakeholders to better understand the State duty to protect against corporate abuse. No judgment is made as to whether and how the HRC should consider all or some of these issues – they are highlighted as much to indicate how far the HRC has progressed on this issue as to point out areas which could potentially pose difficult questions for States Parties, businesses, individuals and civil society:

- (1) the scope of the duty to protect in relation to corporate activities, i.e., the extent of due diligence required for a State Party to comply with its duty bearing in mind that States Parties retain discretion under the Covenant in terms of implementation;
- (2) the interaction of the duty to protect with obligations to ensure effective participation by communities, especially indigenous communities, in decisions affecting them where such decisions relate to commercial projects, i.e., whether the Committee supports States taking steps to require or encourage participating companies to undertake human rights impact assessments in relation to such activities.
- (3) when the HRC considers that a company, while not part of the State apparatus, may nevertheless be considered to engage directly the responsibility of the State because it acts under the State's direction, control or instructions, and whether, if responsibility can be directly attributed, the State will be held to a different standard than under the duty to protect – i.e. whether it may be held responsible even if it acted with due diligence to prevent, punish, investigate and redress the abuse;
- (4) whether the HRC considers that the duty to protect in business contexts requires States Parties to take steps targeted at the business enterprise itself or whether it is sufficient to target individuals within that business enterprise;
- (5) how the HRC might deal with the situation where a corporation acts on the State's behalf (exercising elements of governmental authority or acting under the instructions, direction or control of the State) outside the national territory, and exercises a degree of control over individuals such that, were such control to be exercised by State agents, the State's Covenant obligations would apply in full;
- (6) whether the HRC supports or is likely to support an interpretation of the Covenant which would require States to regulate the activities of their "nationals" abroad, including corporations, in situations where the State does not have power or effective control over the relevant individuals affected by such activities; and
- (7) the significance of the HRC's encouragement for States Parties to call on others to comply with their Covenant obligations, i.e. whether the HRC expects actions by States Parties apart from inter-State dialogue in order to note their concern, such as taking steps to prevent abuse in other States Parties by their own nationals (including corporations) or making loans and development assistance conditional upon human rights protection.

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## INTRODUCTION

1. This report outlines the nature of States Parties' obligations under the International Covenant on Civil and Political Rights (ICCPR) in relation to corporate activities, with a focus on the provisions themselves and commentaries by the Human Rights Committee (HRC). Part IV of the Covenant established the Committee to carry out functions such as studying States Parties' periodic reports and providing "such general comments as it considers appropriate." Since the Covenant entered into force, the Committee has amassed a significant amount of commentary on States Parties' implementation of their Covenant obligations and is generally viewed as having competence to provide guiding if not authoritative interpretations of the Covenant.

2. Accordingly, this report is based not only on the ICCPR's provisions but also an examination of primary materials from the HRC, namely General Comments; Concluding Observations on States' periodic reports; and Views on Communications under the First Optional Protocol (Decisions). Secondary sources are referenced where further interpretive tools were deemed necessary. Thus this report is not designed as an in-depth study of State responsibility for human rights abuses related to corporate activities per se, but instead focuses on the HRC's guidance in relation to obligations under the ICCPR.

3. The research methodology for this report was as follows:

- (a) General Comments were examined in their entirety;
- (b) Due to time and resource constraints, only Concluding Observations from Sessions 80 through 87 of the HRC were part of the research sample;<sup>10</sup>
- (c) Concluding Observations in these sessions were then searched for certain terms, ranging from general terms such as "business," "company," "corporation," "protect" and "private" to more specific terms after it became apparent that the HRC regularly mentions certain sectors in discussing corporate activities.<sup>11</sup>
- (d) Due to further time constraints, the research sample includes only Decisions from June 2004 to May 2006. It also includes any Decisions up to May 2006 which mention the words "corporation(s)" or "company." It is therefore not possible to say with certainty whether there are more Decisions concerning business enterprises.

4. This report focuses on the HRC's commentary on State obligations regarding business enterprises, with some reference to broader discussions about non-State actors where relevant.

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<sup>10</sup> These sessions span from 2004 to July 2006. Concluding Observations from other sessions were included only where they were identified as containing particularly relevant guidance. See <http://www.ohchr.org/english/bodies/hrc/sessions.htm> for a complete list of the HRC's sessions.

<sup>11</sup> The main sources used for searching the HRC's documentation were the United Nations Treaty Bodies Database, available at <http://www.unhchr.ch/tbs/doc.nsf>, and the Human Rights Index of United Nations Documents, provided by the Faculty of Law – Institute of Public Law at the University of Bern, available at <http://www.universalhumanrightsindex.org/>.

5. Part I of this report examines the HRC’s discussion of the duty to protect generally while Part II looks more closely at the HRC’s explanation of the duty to protect in contexts involving business enterprises. Part III explores the steps that the HRC has recommended States Parties take in order to fulfill the duty to protect against harm by private entities, specifically focusing on measures to both regulate and adjudicate acts by business enterprises.<sup>12</sup> Part IV provides more detail on the HRC’s guidance regarding specific types of corporate actors, including media groups and business enterprises involved in major commercial projects affecting indigenous peoples. Part V discusses specific issues related to State controlled enterprises. Part VI looks at whether HRC commentary on the Covenant’s extraterritorial application could mean that States Parties’ obligations apply to situations where corporations acting under the State’s instructions, direction or control exercise power or effective control over individuals outside the State’s territory. Part VII asks whether the HRC has provided guidance on whether States Parties have obligations to regulate overseas acts by their nationals, including corporations, where the State has no effective control over affected individuals.<sup>13</sup> Finally, Part VIII discusses issues which could benefit from further consideration. Annex 1 contains the substantive articles of the ICCPR and Annex 2 lists States Parties to both the ICCPR and the First Optional Protocol.

6. References to *private actors, business enterprises or entities* or similar phrases using the word *private* should be understood as references to non-State actors. Use of the word *private* is not intended to denote the private/public distinction in the sense of private/proprietary companies versus publicly listed/owned companies. The phrase *non-State actor* is understood as any actor that is not a State agent and which may indirectly or directly violate human rights (as enshrined in the relevant treaty).

## **PART I – THE DUTY TO PROTECT**

7. Similar to the other treaty bodies, the HRC focuses on the duty to protect when discussing States Parties’ duties regarding private or corporate activities. The Committee considers States Parties to have duties beyond abstaining from abuse (i.e. what is usually considered as the duty to respect); among other duties they also have duties to protect against abuse, i.e. to take positive steps to prevent, punish, investigate and redress abuse by non-State actors.

### **A. Art. 2 of the ICCPR**

8. Art. 2(1) provides that each State Party “undertakes to respect and *ensure* to all individuals within its territory and subject to its jurisdiction” all of the Covenant rights without any distinctions “such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.” (emphasis added) Art. 2(1) does not expressly mention the need to regulate and adjudicate abuses committed by private actors or even the duty to protect. However, as detailed below the HRC considers

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<sup>12</sup> This focus is in line with paragraph (b) of the SRSG’s mandate: see preface for a discussion of the understanding of “regulate” and “adjudicate” for the purposes of this report.

<sup>13</sup> Note though that questions relating to international cooperation are beyond the scope of this report[0].

it as implying that States can only “ensure” rights by taking positive steps to protect against both State and non-State abuse.

9. Under Art. 2(2) States Parties undertake to adopt legislative or other measures as necessary to give effect to the Covenant rights. In Art. 2(3), States Parties undertake to ensure that (a) any persons whose rights are violated have an effective remedy, even if the violation was committed by a person in an official capacity; (b) any person claiming a remedy has his/her right to a remedy determined by “competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;” and (c) the competent authorities enforce remedies which are granted.<sup>14</sup> As set out below, the HRC considers that these provisions require States Parties to take steps to prevent and address abuses by both State and non-State actors, including corporations.

#### **B. Covenant provisions expressly requiring protection**

10. At the outset, it is important to note the various Covenant provisions expressly requiring protection generally as well as more specifically protection or prohibition “by the law.” These provisions are regularly discussed by the HRC when it refers to the duty to protect against private abuse.

11. The provisions include: Art. 6(1), which requires that the right to life be protected by law; Art 17(2) which gives everyone the right to protection of the law against arbitrary or unlawful interferences with their privacy, family, home or correspondence or unlawful attacks on their honor or reputation; Art. 20 which requires the prohibition by law of war propaganda and advocacy of national, racial or religious hatred; Art. 23 which says that the family is entitled to the State’s protection; Art. 24 which entitles every child, without discrimination, the right to measures of protection; and Art. 26 which entitles all persons to equal protection of the law. In particular, Art. 26 says that “the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

12. Art. 8(1) provides that “no one shall be held in slavery” and that “slavery and the slave-trade in all their forms shall be prohibited.” It is usually treated by the Committee as being similar to the prohibitions in Art. 20, in that prohibitions by law are seen as necessary.

13. As discussed throughout this report, the HRC often interprets these provisions as requiring the State to criminalize acts by State and non-State actors which could interfere with the relevant rights.

#### **C. General Comment No. 31 and Due Diligence**

14. General Comment No. 31 on the nature of the general legal obligation imposed on States Parties (General Comment 31) contains the strongest and most recent message interpreting Art. 2 and several substantive provisions as requiring States Parties to protect

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<sup>14</sup> See paragraphs (a), (b) and (c) of Art. 2(3) respectively.

against abuse by private entities.<sup>15</sup> It provides that “the positive obligations on States Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by **private persons or entities** that would impair the enjoyment of Covenant rights in so far as they are amenable to application between private persons or entities.”<sup>16</sup> (emphasis added) It goes on to say, “there may be circumstances in which a failure to ensure Covenant rights as required by Article 2 would give rise to violations by States Parties of those rights, as a result of States Parties permitting or failing to take appropriate measures or to exercise **due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities.**”<sup>17</sup> (emphasis added)

15. The HRC refers to the “interrelationship” between these “positive obligations” and the duty to provide effective remedies in Art. 2(3), implying that it believes remedies should be provided for all breaches, including those where the State has failed to abide by its obligations to ensure private persons or entities do not abuse rights. It also suggests that provisions such as Art. 17 represent specific examples of positive State obligations to regulate private actors. Art. 7, regarding the prohibition on torture or cruel, inhuman or degrading treatment, and Art. 26, regarding equal and effective protection against discrimination, are also mentioned in this regard.<sup>18</sup> General Comment 31 thus implies that these provisions would have little meaning without an obligation to protect against abuse by private actors, including business enterprises.<sup>19</sup>

16. While General Comment 31 does not explicitly refer to business enterprises, the terms “private persons or entities” clearly include all forms of private business enterprises, from large corporations to smaller enterprises. Further, the HRC interprets Art. 26 to require States Parties to protect against discrimination in everyday life, such as in work or housing situations.<sup>20</sup> It would seem difficult for States to take steps to combat discrimination in the labor market without regulating all employers in some way, including business enterprises.

17. General Comment 31’s reference to exercising “due diligence” to prevent, investigate, punish and redress harm by private entities suggests that the HRC supports both regulation and adjudication of activities by such entities. It also implies that the obligation is one of means rather than result. States will not be considered to have

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<sup>15</sup> Part II contains examples of General Comments which more implicitly discuss State obligations to regulate and adjudicate actions by non-State actors.

<sup>16</sup> General Comment No. 31, ‘The Nature of the General Legal Obligation Imposed on States Parties to the Covenant,’ adopted 29 March 2004 (80<sup>th</sup> Session), at para. 8, (hereinafter General Comment 31) reproduced in ‘Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies,’ UN Doc. HRI/GEN/1/Rev.7, 12 May 2004, at 192 (hereinafter UN Human Rights Compilation).

<sup>17</sup> *Id.*

<sup>18</sup> Art. 7 says, among other things, that “no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”

<sup>19</sup> See also Art. 6 on the right to life and Art. 20 on the prohibition of hate speech.

<sup>20</sup> General Comment 31, *supra note 16*, at para. 8.

violated their Covenant obligations simply because a private actor has abused rights — there must be some act or omission by the State that evidences a failure to exercise due diligence in fulfilling the duty to protect. The research did not uncover further explanation of the phrase “due diligence” so it is not clear exactly what steps States should carry out to establish that they have acted in accordance with the concept.<sup>21</sup> No Concluding Observations in the sample mention the concept and the only Decisions mentioning due diligence concern State duties to prevent torture and breaches of the right to life and are less relevant to corporate activities.<sup>22</sup>

18. General Comment 31 highlights the HRC’s view that the duty to protect applies to all of the rights in the Covenant which private persons or entities could breach. Similar sentiments appear in General Comment 3, where the Committee points out “the fact that the obligation under the Covenant is not confined to the respect of human rights, but that States parties have also undertaken to ensure the enjoyment of these rights to all individuals under their jurisdiction. This aspect calls for specific activities by the States parties to enable individuals to enjoy their rights. This is obvious in a number of articles (e.g. art. 3 which is dealt with in General Comment 4 below), but in principle this undertaking relates to all rights set forth in the Covenant.”<sup>23</sup> Nevertheless, it also appears that the Committee will assess the nature of any positive obligations associated with the duty to protect for each right depending on the characteristics and background of that right.<sup>24</sup> As noted throughout this report, the HRC often provides more detailed guidance in relation to Covenant rights which expressly refer to protection, including Articles 6 and 26 discussed above.

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<sup>21</sup> The concept of “due diligence” as applied to human rights law is generally associated with the Inter-American Court of Human Rights’ decision in *Velasquez Rodriguez* which confirmed that States could be held responsible for private acts where they fail to act with “due diligence” to prevent or respond to violations. *Velasquez Rodriguez Case*, Judgment of July 29, 1988, Inter-Am.Ct.H.R. (Ser. C) No. 4 (1988) paragraphs 166 - 174. The case concerned violations by State sponsored forces but the opinion notes that States have similar obligations to prevent or respond to private acts not directly attributable to the State.

<sup>22</sup> See for example, *Ahani v Canada*, Communication 1051/2002, UN Doc. CCPR/C/80/D/1051/2002, 15 June 2004, at para. 10.7 (hereinafter *Ahani v Canada*). This communication, discussed in more detail in Part VII below, concerned an Iranian national who claimed he would be tortured and/or killed by government agents if he was returned to Iran. The HRC said that Canada was obliged to “take steps of due diligence to avoid a threat to an individual of torture from third parties.”

<sup>23</sup> General Comment No. 3, ‘General Comment No. 3: Article 2 (Implementation at the National Level),’ 29 July 1981 (13<sup>th</sup> Session) at para. 1, UN Human Rights Compilation at 126.

<sup>24</sup> See generally also Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (2<sup>nd</sup> rev ed, 2005) at 38. Nowak says the following about the duty to ensure, which he interprets as including the duties to protect and fulfill: “As in the case of the obligation to respect, this duty of performance depends on the formulation of the given right; however, the wording of Art. 2(1) indicates that it is basically applicable to all Covenant rights.” See also p. 39 where Nowak mentions the express provisions in the Covenant requiring protection and states “but the obligation to protect individuals against undue interference by private parties applies, in principle, to all human rights.”

## D. Decisions

### *Admissibility*

19. For a communication to be admissible under the Optional Protocol, there must be an allegation of a *violation by the State* and not simply by a private party.<sup>25</sup> In relation to communications which include wrongdoing by a business enterprise, the Committee has rejected arguments by States Parties that such communications should be inadmissible in situations where the company's acts cannot be directly attributed to the State. It has emphasized that even where direct attribution is not possible, there may still be a violation by the State if it failed to protect against the abuse. In other words, the Committee considers States Parties to the Optional Protocol as answerable for situations where they have failed to take steps to prevent, investigate, punish or redress wrongdoing by private actors, including business enterprises.<sup>26</sup> What is sometimes confusing is whether these discussions center around direct attribution issues or a failure to fulfill positive duties, including the duty to protect.<sup>27</sup> Either way, it is clear that the HRC is not opposed to hearing communications which concern the State's failure to act against business abuse.

20. For example, in *Arenz v Germany*, the authors accused Germany of failing to protect against abuse by private political parties. The communication was held inadmissible on other grounds but the HRC clearly believed claims relating to private acts could be admissible, stating, "with regard to the State party's argument that it cannot be held responsible for the authors' exclusion from the CDU, this being the decision not of one of its organs but of a private association, the Committee recalls that under article 2, paragraph 1, of the Covenant, the State party is under an obligation not only to respect but also to ensure to all individuals within its territory and subject to its jurisdiction all the rights recognized in the Covenant."<sup>28</sup>

21. In *Cabal v Australia*, the authors claimed violations arising from ill-treatment in a private prison. Even though Australia did not argue inadmissibility based on the prison's

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<sup>25</sup> Art. 1 of the Optional Protocol provides that the HRC may only consider communications from individuals subject to a State Party's jurisdiction who claim to be victims of State violations of any of the Covenant rights.

<sup>26</sup> See generally also Nowak, *supra* note 24, at 826 – 827: "Pursuant to Art. 2 of the Covenant, States parties are obligated not only to respect Covenant rights but also to *ensure* them without discrimination to all individuals subject to their jurisdiction. This gives rise to positive obligations on the part of the State, which may take different forms depending on the given Covenant right. ... Failure to take such measures may represent a State violation of the given right in the sense of Art. 1 OP and may be remedied by means of an individual communication."

<sup>27</sup> See Part V below for a brief explanation of issues related to direct attribution. As illustrated in Part V, it is unsurprising that the Committee tends to speak about direct attribution in relation to acts by business enterprises under government control and the duty to protect in relation to acts by privately controlled businesses.

<sup>28</sup> *Arenz et al v Germany*, Communication 1138/2001, UN Doc. CCPR/C/80/D/1138/2002, 29 April 2004, at para 8.5 It appears that Germany rejected admissibility based on a direct attribution of the political party's acts to the State but was prepared to consider admissibility if the claim concerned failure to abide by the duty to protect. It then seemed to argue that such a complaint would fail on the merits because it had satisfied the duty.



private status, the HRC addressed the issue, confirming that Art. 1 of the Optional Protocol may be satisfied even where the primary act is carried out by a non-State actor, particularly in privatization situations where “core” State activities are contracted out to the “private commercial sector.”<sup>29</sup>

#### *Views on the merits*

22. As detailed throughout this report, several Decisions in the sample discuss the importance of the State taking steps to end harm by private actors, including discrimination in the labor market and violations of cultural rights belonging to indigenous peoples. These Decisions suggest that the HRC is unlikely to find a violation based on failure to protect where the State has taken reasonable steps to regulate or adjudicate the private actor’s activities. Consistent with its remarks in General Comment 31, the HRC does not tend to declare a breach of the Covenant simply because a private actor has abused rights.

23. Several Decisions highlight the importance of States Parties investigating all allegations of breaches of the Covenant and providing effective remedies. In particular, the HRC has interpreted Art. 9(1) of the Covenant as requiring the State to protect “the right to security of person also outside the context of formal deprivation of liberty.”<sup>30</sup> It has said that “the interpretation of article 9 does not allow a State party to ignore threats to the personal security of non-detained persons subject to its jurisdiction.”<sup>31</sup>

24. Decisions dealing with Art. 9 generally call for investigation and punishment of all actors responsible for violations of the rights contained within the provision. These Decisions tend to involve detention by police, other State agents and sometimes non-State armed groups – the sample did not uncover any examples of threats to security of the person arising from corporate behavior. Nevertheless, it seems that the HRC’s comments in these Decisions would apply to threats to security of the person from other sources. Indeed, the HRC’s broad references in these Decisions to the duty to protect

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<sup>29</sup> *Cabal and Pasini Bertran v Australia*, Communication 1020/2001, UN Doc. CCPR/C/78/D/1020/2001, 19 September 2003, at para. 7.2. It is unclear if the HRC based its admissibility view on direct attribution. For examples of a State Party arguing that a communication based on private acts was inadmissible see (a) *Nahlik v Austria*, Communication 608/1995, UN Doc. CCPR/C/57/D/608/1995, 19 August 1996, at para. 8.2, where the author complained about discrimination in a collective bargaining agreement. The State claimed it could not be held responsible for discrimination in a private agreement. In finding the claim admissible, the HRC said that one of the reasons it could not agree with the State was because of the duty to ensure rights under Art. 2(1). It said that given this duty, “.. the courts of States parties are under an obligation to protect individuals against discrimination, whether this occurs within the public sphere or among private parties in the quasi-public sector of, for example, employment;” and (b) *Czyklin v Canada*, Communication 741/1997, UN Doc. CCPR/C/66/D/741/1997, 5 August 1999, at para. 4.7 (hereinafter *Czyklin v Canada*). The communication involved complaints about employment discrimination by a private railway corporation. Canada argued that the complaint was inadmissible because the corporation’s acts could not be attributed to Canada. The HRC found the complaint inadmissible for failure to exhaust domestic remedies and said it was unnecessary to consider other admissibility arguments. See Part V for more detail.

<sup>30</sup> *Rajapakse v Sri Lanka*, Communication 1250/2004, UN Doc. CCPR/C/87/D/1250/2004, 5 September 2006, at para. 9 (hereinafter *Rajapakse v Sri Lanka*).

<sup>31</sup> *Id.*

support its view in General Comment 31 that the State must take steps to prevent, investigate, punish and redress abuse by a wide range of actors.

#### **E. Inter-State dialogue**

25. It is clear from General Comment 31 that the HRC may consider a failure to exercise due diligence to protect against harm as a violation of a State Party's obligations. It also appears that the HRC considers that other States Parties, upon learning about such breaches, should call on the "offending State" to comply. It says that: "while article 2 is couched in terms of the obligations of State Parties towards individuals as the right-holders under the Covenant, every State Party has a legal interest in the performance by every other State Party of its obligations. This follows from the fact that the 'rules concerning the basic rights of the human person' are *erga omnes* obligations and that, as indicated in the fourth preambular paragraph of the Covenant, there is a United Nations Charter obligation to promote universal respect for, and observance of, human rights and fundamental freedoms. Furthermore, the contractual dimension of the treaty involves any State Party to a treaty being obligated to every other State Party to comply with its undertakings under the treaty."<sup>32</sup>

26. The Committee then reminds States Parties of the "desirability" of making the necessary declarations under Art. 41 to recognize the HRC's competence in hearing inter-State complaints. However, it also says that this "does not mean that this procedure is the only method by which States Parties can assert their interest in the performance of other States Parties."<sup>33</sup>

27. As discussed, General Comment 31 suggests that Covenant obligations include a duty to protect. Combined with the HRC's comments that States Parties may complain about abuses by other States Parties, it seems States Parties could use the voluntary inter-State complaints mechanism to complain about other States Parties' failures to fulfill the duty to protect against corporate abuse.<sup>34</sup>

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<sup>32</sup> General Comment 31, *supra* note 16, at para. 2.

<sup>33</sup> *Id.* While beyond the scope of this report, readers should note that a breach of *erga omnes* obligations could allow a State Party to the ICCPR to complain under broader State responsibility principles under customary international law, even if the complaining State did not suffer any harm. Where there is a *jus cogens* violation, it could even be possible under customary international law to complain about a State that is not a party to the treaty. Indeed, Crawford and Olleson have suggested that para. 2 of General Comment 31 was written in light of the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts, adopted by the ILC in 2001 and generally viewed as reflecting customary international law (discussed more in Part V below). Article 48(1) of the ILC Articles provide that States may take action against another State's violations of international obligations where (a) the breaching State owes an obligation to a group of States (including the complaining State) and that obligation was created in the group's common interest (such as obligations from multilateral human rights treaties) or (b) the obligation is owed to the entire international community (such as *jus cogens* obligations). See James Crawford and Simon Olleson, *The Continuing Debate on a UN Convention on State Responsibility*, 54 *International and Comparative Law Quarterly* 959-971, 969 (2005); see also Andrew Clapham, *Human Rights Obligations of Non-State Actors* (Oxford University Press, 2006), 96-97.

<sup>34</sup> Note that to date, the voluntary inter-state complaints procedure under Art. 41 has not been used.

28. At the very least, the HRC seems to encourage States to take an interest in other States Parties' compliance with the Covenant.<sup>35</sup> The HRC emphasizes that "to draw attention to possible breaches of Covenant obligations by other States Parties and to call on them to comply with their Covenant obligations should, far from being regarded as an unfriendly act, be considered as a reflection of legitimate community interest."<sup>36</sup> Thus it appears the Committee supports such dialogue for all possible breaches of the Covenant, including when a State Party has concerns about the failure of other States Parties to take adequate steps to regulate and adjudicate corporate activities so as to protect against abuse of Covenant rights.

29. More guidance would be helpful on whether the HRC expects other actions by States Parties apart from dialogue in order to note their concern with other States Parties' human rights practices, such as limiting abuse in such States by their own nationals (discussed in Part VII below), or making loans and development assistance conditional upon human rights protection.

#### **F. Other State Duties**

30. The preceding discussion does not suggest that other State duties usually associated with human rights, such as the duties to respect, promote and fulfill, are irrelevant to strengthening corporate responsibility and accountability. Nevertheless, while the HRC has advocated various promotional activities as part of the quest to educate society, including business, about human rights, (see Part III) the research sample did not uncover specific recommendations regarding the duties to respect and fulfill.<sup>37</sup> Accordingly, more guidance from the HRC on the relevance of duties other than the duty to protect would be helpful.

## **PART II – REFERENCES TO BUSINESS ENTERPRISES**

31. The ICCPR does not contain any explicit references to business enterprises and unlike some of the other human rights treaties, it also does not refer to the need to prohibit certain acts by "groups," "organizations" or "enterprises."<sup>38</sup> Nevertheless, as suggested above, the HRC has interpreted the Covenant as requiring States to regulate and adjudicate private activities in order to protect against abuse, including corporate acts. This Part explores specific examples of the HRC discussing corporate activities in

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<sup>35</sup> See generally Clapham, *supra* note 33, at 98. Clapham suggests that pressure from States might legitimately range from sanctions and cancellation of contracts to public condemnation. He comments that "...international law has evolved to a point where it is admitted that human rights violations are matters of 'legitimate concern' which may be discussed without this discussion being construed as interference in internal affairs."

<sup>36</sup> General Comment 31, *supra* note 16, at para. 2.

<sup>37</sup> See A/HRC/4/35/Add.1, at para. 10 for CESCR's explanation of how States Parties may breach the duty to respect by failing to consider human rights obligations when contracting with multinational entities.

<sup>38</sup> See A/HRC/4/35/Add.1 for a brief discussion of the other treaties, including ICERD and CEDAW. Note also that there are references in the Covenant to individuals in preambular paragraph 5 and individuals and groups in Art. 5(1) but neither provision appears to have been specifically interpreted by the Committee as supporting the existence of a State duty to protect. It appears that Art. 5(1) was intended primarily to prevent individuals or groups from relying on any rights they might have under the Covenant to abuse the rights of others. See Nowak, *supra* note 24, at 111-119.

the context of the duty to protect. It also maps more general discussions about private acts which implicitly encompass corporate acts.

32. Parts III and IV provide more detail on the steps the HRC considers States Parties are required to take in relation to corporate activities. They also give more examples of the HRC discussing particular types of corporate actors.

#### **A. General Comments**

33. As detailed above, General Comment 31 expresses the HRC's view that States must act with due diligence to prevent, investigate, punish and redress abuse by "private persons or entities."<sup>39</sup> However, there are no explicit references to business enterprises or corporations in General Comment 31 or any of the other General Comments. Rather, the General Comments tend to use broader terms when discussing non-State actors. For example, the HRC refers to "private persons or entities," "natural or legal persons," "private actors" and the "private sector" - terms which encompass a wide range of business enterprises. The HRC's consistent message is that States Parties must protect against interferences by such actors with the enjoyment of rights.

34. General Comment 28 on equality of rights between men and women provides that States should prohibit sex discrimination in both the public and "private sectors."<sup>40</sup> In particular, the HRC considers that States should protect women from interference with their privacy from public and "private actions."<sup>41</sup> The General Comment also considers that Art. 26 requires States to "act against discrimination by public and private agencies in all fields."<sup>42</sup> Further, the HRC asks States to prohibit discrimination by "private actors" in areas including employment, accommodation and goods and services.<sup>43</sup> General Comment 17 on the rights of child also discusses the labor market. The HRC considers that in relation to children, "every possible economic and social measure should be taken .. to prevent them from being subjected to acts of violence and cruel and inhuman treatment or from being exploited by means of forced labor or prostitution, or by their use in the illicit trafficking of narcotic drugs or by any other means."<sup>44</sup> It also states that children should be protected from discrimination.<sup>45</sup>

35. In General Comment 23 on minority rights, the HRC considers that positive measures of protection are required against both State acts and the acts of "other persons within the State party."<sup>46</sup> General Comment 27, regarding the right to freedom of

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<sup>39</sup> General Comment 31, *supra note 16*, at para. 8.

<sup>40</sup> General Comment No. 28, 'General Comment No. 28: Article 3 (The equality of rights between men and women),' adopted 29 March 2000 (68<sup>th</sup> Session), at para. 4, UN Human Rights Compilation at 178 (hereinafter General Comment 28).

<sup>41</sup> *Id.* at para. 20.

<sup>42</sup> *Id.* at para. 31.

<sup>43</sup> *Id.*

<sup>44</sup> General Comment No. 17, 'General Comment No. 17: Article 4 (Rights of the Child),' adopted 7 April 1989 (35<sup>th</sup> Session), at para. 3, UN Human Rights Compilation at 144.

<sup>45</sup> *Id.* at para. 5.

<sup>46</sup> General Comment No. 23, 'General Comment No. 23: Article 27 (Rights of minorities),' 8 April 1994 (50<sup>th</sup> Session), at para. 6.1, UN Human Rights Compilation at 158 (hereinafter General Comment 23).

movement, provides that States must protect Art. 12 rights from public and “private interference.”<sup>47</sup> General Comment 16, concerning the right to privacy, mentions the HRC’s view that States must prohibit interference and attacks on privacy and reputation “by State authorities or from natural or legal persons.”<sup>48</sup>

36. General Comment 18, regarding non-discrimination, includes a request for further information on legal provisions and administrative measures to eliminate discrimination by public authorities, the community or “private persons or bodies.”<sup>49</sup> General Comment 20, focusing on the prohibition on torture and cruel treatment or punishment, highlights the HRC’s view that States must prevent and punish abuse by persons acting in a State or “private capacity”<sup>50</sup> and that periodic reports should include all legislative, administrative, judicial and other measures taken to “prevent and punish acts of torture and cruel, inhuman and degrading treatment in any territory under their jurisdiction.”<sup>51</sup> Further, the HRC points out that States should be aware that the prohibition in Art. 7 extends to corporal punishment, “including excessive chastisement ordered as punishment for a crime or as an educative or disciplinary measure,”<sup>52</sup> especially in teaching and medical institutions.

37. The HRC’s recent General Comments more often directly refer to the duty to protect against abuse by private actors and entities, with the HRC’s most recent General Comment 31 in 2004 providing the most detailed explanation of this duty. Indeed, a number of earlier General Comments, including those relating to torture and the equality of rights between men and women, have been replaced by later comments explicitly referring to States Parties’ obligations to protect against private abuse.<sup>53</sup> The HRC seems to consider that the most up-to-date interpretation of the ICCPR requires States Parties to take steps to regulate and adjudicate the activities of non-State actors, including business enterprises, in order to fulfill their Covenant obligations.

## **B. Concluding Observations**

38. Numerous Concluding Observations provide further evidence of the HRC’s belief that States Parties have a duty to protect against private abuse. Indeed, in recent Concluding Observations, the HRC has noted with concern a State Party’s “failure to take fully into consideration its obligation under the Covenant not only to respect, but also to

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<sup>47</sup> General Comment No. 27, ‘General Comment No. 27: Article 12 (Freedom of movement),’ 2 November 1999 (67<sup>th</sup> Session), at para. 6, UN Human Rights Compilation at 173.

<sup>48</sup> General Comment No. 16, ‘General Comment No. 16: Article 17 (Right to privacy),’ 8 April 1988 (32<sup>nd</sup> Session), at para. 1, UN Human Rights Compilation at 142 (hereinafter General Comment 16).

<sup>49</sup> General Comment No. 18, ‘General Comment No. 18: Non-discrimination,’ 10 November 1989 (37<sup>th</sup> Session), at para. 9, UN Human Rights Compilation at 146.

<sup>50</sup> General Comment No. 20, ‘General comment No. 20: Article 7 (Prohibition of torture, or other cruel, inhuman or degrading treatment or punishment),’ 10 March 1992 (44<sup>th</sup> Session), at para. 2, UN Human Rights Compilation at 150 (hereinafter General Comment 20).

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at para. 5.

<sup>53</sup> For example compare General Comment 20, *supra* note 50, to General Comment No. 7, ‘General Comment No. 7: Article 7 (Prohibition of torture or cruel, inhuman or degrading treatment or punishment),’ 30 May 1982 (16<sup>th</sup> Session), UN Human Rights Compilation at 129 (hereinafter General Comment 7). General Comment 20 replaced General Comment 7.

ensure the rights prescribed by the Covenant.”<sup>54</sup> The Committee said that the State should interpret the Covenant “in good faith” and “take positive steps, when necessary, to ensure the full implementation of all rights prescribed by the Covenant.”<sup>55</sup>

39. In some cases it is more common for the Committee to express general concern about certain corporate activities without specifying whether or how States are expected to regulate or adjudicate the entities behind those activities. Yet such expressions of concern imply that it could be difficult for States Parties to protect and promote rights without taking steps to regulate and adjudicate the acts of business enterprises involved in such activities.

40. More specific guidance is provided in relation to regulation of the labor market. For example, Concluding Observations highlight the HRC’s view that States Parties are responsible for taking steps to eradicate harmful practices by employers and other private actors, including discrimination, trafficking and slave labor.<sup>56</sup>

41. The HRC has specifically referred to publicly listed companies in discussing non-discrimination in the labor market,<sup>57</sup> as well as the commercial and agricultural sectors regarding child labor in high risk sectors.<sup>58</sup> It has also expressed concern at how logging and mining concessions might detrimentally affect rights enjoyed by indigenous peoples.<sup>59</sup> Part IV discusses these Concluding Observations in more detail.

### **C. Decisions**

42. As detailed in Part I, the HRC has rejected inadmissibility arguments from States based on claims that they cannot be held responsible for private acts, including actions by business enterprises.

43. Communications concerning business enterprises tend to involve the State’s failure to take steps to end discrimination by companies in their roles as employers. They also relate to States Parties’ failures to take steps to prevent or redress interference with the

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<sup>54</sup> Concluding Observations, United States, UN Doc. CCPR/C/USA/CO/3/Rev.1, 18 December 2006, at para. 10 (hereinafter US Concluding Observations).

<sup>55</sup> *Id.*

<sup>56</sup> See for example Concluding Observations for: Norway, UN Doc. CCPR/C/NOR/CO/5, 25 April 2006, at para. 3 (hereinafter Norway Concluding Observations); Brazil, UN Doc. CCPR/C/BRA/CO/2, 1 December 2005, at paras. 11 and 14 (hereinafter Brazil Concluding Observations); and Paraguay, UN Doc. CCPR/C/PRY/CO/2, 24 April 2006, at paras. 8 and 21 (hereinafter Paraguay Concluding Observations).

<sup>57</sup> See for example Norway Concluding Observations, *supra* note 56, at para. 3. Here the HRC welcomed the “entry into force, on 1 January 2006, of legislation on gender representation on boards of public limited companies.”

<sup>58</sup> See for example Concluding Observations for: Kenya, UN Doc. CCPR/CO/83/KEN, 29 April 2005, at para. 26 (hereinafter Kenya Concluding Observations); and Uzbekistan, UN Doc. CCPR/CO/83/UZB, 26 April 2005, at para. 25 (hereinafter Uzbekistan Concluding Observations).

<sup>59</sup> See for example Concluding Observations, Suriname, UN Doc. CCPR/CO/80/SUR, 4 May 2004, at para. 21 (hereinafter Suriname Concluding Observations).

rights of indigenous peoples by mining, logging and property development companies.<sup>60</sup> See Part IV for more detail.

### **PART III - MEASURES STATES ARE REQUIRED TO TAKE**

#### **A. The Treaty**

44. Art. 2(2) says that where “not already provided for by existing legislative or other measures” States Parties undertake to take the “necessary steps” in accordance with their constitutional processes and the Covenant, to “adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant.”

45. So while States are obliged to take measures giving effect to rights, Art. 2(2) provides discretion regarding the types of measures States choose to take.

46. Other provisions suggest that legal measures are necessary in order to abide by certain Covenant obligations. As mentioned above, several provisions require rights to be “protected by law,” including Art. 6, Art. 17 and Art. 26, while other provisions require certain acts to be prohibited by law, including Art. 20 and Art. 26. Art. 8, which calls for the prohibition of slavery, also implies that appropriate prohibitions must be legal in nature, an interpretation supported by the HRC as set out below.

47. In relation to adjudication requirements Art. 2(3) requires that States Parties ensure victims have effective remedies, that their right to such remedies is determined by competent authorities and that any remedies provided are enforced. States Parties also undertake to develop the possibilities of judicial remedies. As set out below, the HRC provides some guidance on the features of an effective remedy, but generally recognizes States Parties’ discretion in choosing remedies.

#### **B. HRC Commentary**

##### **(i) Regulation**

###### *Legislative measures*

48. Given the discretion implied by the Covenant, it is unsurprising that many of the HRC’s commentaries do not specify a particular course of regulatory action, and instead focus more generally on protection and enjoyment of rights.

49. For example, Concluding Observations commonly direct States to take “effective,” “preventive” or “legislative” measures or even simply “measures” to combat certain behavior without explaining the required or desired characteristics of such measures.<sup>61</sup>

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<sup>60</sup> See for example *Love et al. v Australia*, Communication 983/2001, UN Doc. CCPR/C/77/983/2001, 28 April 2003 (hereinafter *Love et al. v Australia*); *Hopu and Bessert v France*, Communication 549/1993, UN Doc. CCPR/C/60/D/549/1993/Rev.1, 29 December 1997 (hereinafter *Hopu and Bessert v France*); *Ilmari Lämsman et al. v Finland*, Communication 511/1992, UN Doc. CCPR/C/52/D/511/1992, 8 November 1994 (hereinafter *Ilmari Lämsman et al. v Finland*); and *Chief Bernard Ominayak and the Lubicon Lake Band v Canada*, Communication 167/1984, UN Doc. CCPR/C/38/D/167/1984, 10 May 1990 (hereinafter *Lubicon Lake Band v Canada*).

50. Where the HRC provides more guidance, it tends to be in relation to those rights for which the Covenant explicitly requires protection by the law. For example, recommendations which specifically call for legislation regarding private sector acts mainly relate to preventing and prohibiting discrimination as well as harmful workplace practices. Recent Concluding Observations have said that a State Party should “ensure that ... federal and State employment legislation outlaw discrimination on the basis of sexual discrimination.”<sup>62</sup> The Committee has also said that States Parties should “strengthen the enforcement of the existing legislation and policies against child labor.”<sup>63</sup>

51. Similarly, Decisions tend to generally refer to protective measures without specifying what form of regulation is required. While most States generally seem willing to accept that an obligation to protect exists, the available sample suggests that they are then more likely to argue that they have already fulfilled the duty through existing legislative or administrative measures which they deem appropriate under the circumstances.<sup>64</sup>

52. General Comments also tend to speak broadly about regulation — often simply mirroring the requirement in Art. 2(2) for States Parties to adopt “legislative and other measures” to prohibit abuse by private actors. However, General Comment 31 suggests that the HRC has a strong preference for legislative and other legal measures.<sup>65</sup> It acknowledges that while direct incorporation of the Covenant into national law is not required, “Covenant guarantees may receive enhanced protection in those States where the Covenant is automatically or through specific incorporation part of the domestic legal order.”<sup>66</sup> The Committee also highlights that “Article 2 requires that States Parties adopt legislative, judicial, administrative, educative *and* other appropriate measures in order to fulfill their legal obligations,”<sup>67</sup> (emphasis added) suggesting that legislative measures should be among the measures States take to respect and ensure rights.

53. Whatever measures States choose, it is clear that the HRC expects that they be effective in form and substance. Merely having legislation “on the books” is not enough — mechanisms must be implemented and legislation enforced.<sup>68</sup>

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<sup>61</sup> See for example Uzbekistan Concluding Observations, *supra* note 58, at para. 25; Concluding Observations, Morocco, UN Doc. CCPR/CO/82/MAR, 1 December 2004, at para. 31 (hereinafter Morocco Concluding Observations); and Concluding Observations, Poland, UN Doc. CCPR/CO/82/POL, 2 December 2004, at para. 10 (hereinafter Poland Concluding Observations).

<sup>62</sup> US Concluding Observations, *supra* note 54, at para. 25.

<sup>63</sup> Concluding Observations, Thailand, UN Doc. CCPR/CO/84/THA, 8 July 2005, at para. 21 (hereinafter Thailand Concluding Observations).

<sup>64</sup> See for example *Lubicon Lake Band v Canada*, *supra* note 60, explained in Part IV in more detail. Canada appeared to accept that it owed a duty to a particular minority regarding possible detrimental acts by a non-State corporation but also argued that it had already taken adequate steps to fulfill that duty.

<sup>65</sup> See also Nowak, *supra* note 24, at 59: “In contrast to Art. 2(1) of the Social Covenant, the formulation ‘legislative or other measures’ demonstrates the *priority of legislative measures*.”

<sup>66</sup> General Comment 31, *supra* note 16, at para. 13.

<sup>67</sup> *Id.* at para. 7.

<sup>68</sup> See for example Paraguay Concluding Observations, *supra* note 56, at para. 8; Morocco Concluding Observations, *supra* note 61, at para. 31; and US Concluding Observations, *supra* note 54, at para. 26.



### *Monitoring*

54. The HRC suggests that monitoring of corporate behavior for compliance is a key aspect of regulation in order to complement legislative measures. This seems distinct from the clear obligation in General Comment 31 for States to act with due diligence to *investigate* harm – the goal seems to be to systematically monitor corporate activities in order to prevent harm rather than simply to investigate it after the fact.<sup>69</sup>

55. There is also a sense that the HRC supports monitoring of corporate activities affecting indigenous peoples: this comes from its consistent calls for effective participation of indigenous peoples in decisions affecting their rights which relate to major extractives and infrastructure projects. The Committee implies that it considers that States should monitor whether participating businesses are effectively consulting with affected communities. For example, General Comment 23 expresses the HRC's view that the enjoyment of rights under Art. 26 and 27 might require States to “ensure the effective participation of members of minority communities in decisions which affect them.”<sup>70</sup> Concluding Observations have expressed concern at mining and logging concessions being granted before informing or consulting relevant communities and the HRC has called for mechanisms “to allow for indigenous and tribal peoples to be consulted and to participate in decisions that affect them.”<sup>71</sup>

56. Neither these observations nor General Comment 23 specify that corporate activities should be monitored to ensure they are not threatening effective participation. They also do not say that mechanisms established to facilitate effective participation should allow for complaints against corporate acts. However, considering corporations are increasingly major stakeholders in commercial projects which may affect indigenous communities, it seems possible to at least imply HRC encouragement for such measures. More guidance would be helpful to understand whether this interpretation is correct.

57. General Comment 16 implies that the HRC considers that some form of inspection or monitoring of private entities might be necessary in relation to privacy rights. It says that States are required to take “effective measures” to ensure that private information is never used for “purposes incompatible with the Covenant”<sup>72</sup> and that individuals should “be able to ascertain which public authorities or private individuals or bodies control or may control their files.”<sup>73</sup> The Committee also contends that individuals should be able to request rectification or elimination of incorrect or unlawfully collected information.<sup>74</sup> These views suggest that the Committee may expect States to mandate some form of reporting from or monitoring of private bodies, such as employers or marketing corporations, in order to ensure transparency and full disclosure.

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<sup>69</sup> See also Nowak, *supra* note 24, at 60: “In short, the measures prescribed by Art. 2(2) do not relate solely to repressive remedies against violations that have already taken place but rather include preventive measures and steps to ensure the necessary conditions for unimpeded enjoyment of rights ensured by the Covenant.”

<sup>70</sup> General Comment 23, *supra* note 46, at para. 7.

<sup>71</sup> Suriname Concluding Observations, *supra* note 59, at para. 21.

<sup>72</sup> General Comment 16, *supra* note 48, at para. 10.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

58. Several Concluding Observations call for “preventive measures” to ensure children do not work in harmful conditions, implying one preventive measure could be States monitoring employers’ compliance with relevant standards.<sup>75</sup> Further, recent Concluding Observations expressed the HRC’s concern that the State Party did not provide any information on the establishment of “oversight systems” of private and public agencies carrying out interrogations at State-run detention centers.<sup>76</sup> As explained below, such comments are more focused on private agencies carrying out public functions than purely private acts.<sup>77</sup> Nevertheless, they illustrate the HRC’s support for broad ranging monitoring schemes to ensure compliance with Covenant rights.

## **(ii) Adjudication**

59. The sample did not uncover specific references to the term “adjudication.” However, the HRC regularly calls for investigation, sanctioning of offenders and the provision of effective remediation, suggesting it considers some form of adjudication is necessary to punish, redress and stop abuse by both private and public actors, including all types of business enterprises. In other words, it does not consider that the right to an effective remedy in Art. 2(3) is limited to violations by State agents. This view is supported by other commentators, who highlight that Art. 2(3)(a) requires that effective remedies be provided “notwithstanding that the violation has been committed by persons acting in an official capacity.” They claim that if a remedy must be provided “even” for violations by a State agent, then remedies must surely be necessary where the perpetrator is not a State agent.<sup>78</sup>

### *Investigation and administrative mechanisms*

60. The HRC considers that a State Party’s failure to investigate claims of abuse due to failure to establish appropriate administrative processes could amount to a “separate breach of the Covenant.”<sup>79</sup> The Committee believes States must investigate violations by both State and private actors in good faith and take appropriate action, including ensuring that persons whose rights are violated have an effective remedy, as set out below. It also asks for States to take steps to put an end to “ongoing violations.”<sup>80</sup>

61. The HRC considers that administrative mechanisms must ensure that investigations are carried out “promptly, thoroughly and effectively through independent and impartial bodies.”<sup>81</sup> It recognizes that “national human rights institutions, endowed with appropriate powers, can contribute to this end.”<sup>82</sup>

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<sup>75</sup> For example, see Thailand Concluding Observations, *supra* note 63, at para. 21.

<sup>76</sup> US Concluding Observations, *supra* note 54, at para. 13.

<sup>77</sup> Note also the most recent Concluding Observations for New Zealand which expressed concern about privatization of prison services and noted that there did not appear to be “any effective mechanism of day-to-day monitoring to ensure that prisoners are treated with humanity...” UN Doc. CCPR/CO/75/NZL, 7 August 2002, at para. 13 (hereinafter New Zealand Concluding Observations).

<sup>78</sup> See for example Nowak, *supra* note 24, at 39 – 40.

<sup>79</sup> General Comment 31, *supra* note 16, at para. 15.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

62. In the Concluding Observations for the United States, the Committee noted with concern “shortcomings concerning the independence, impartiality and effectiveness of investigations into allegations of torture and cruel, inhuman or degrading treatment or punishment inflicted by United States military and non-military personnel or contract employees, in detention facilities in Guantanamo Bay, Afghanistan, Iraq and other overseas locations ...”<sup>83</sup> It then recommended prompt and independent investigations into all allegations, including those against contract employees. While the HRC was focusing on agents acting on the State Party’s behalf, such comments illustrate broader support from the HRC for prompt, independent and effective investigations into abuse by public and private actors.

63. As discussed above, numerous Decisions in the sample highlight the importance of States investigating harm, particularly in relation to threats against security of the person. The HRC has suggested that where a State has taken adequate steps to investigate wrongdoing, the HRC will not substitute its views in place of the State’s views.<sup>84</sup>

#### *Complaints mechanisms*

64. Art. 2(3) provides that States Parties undertake to ensure that persons claiming a remedy have their rights determined by competent judicial, administrative or legislative authorities or by any other competent authority provided by the State Party’s legal system. States Parties also undertake to develop the possibility of judicial remedies.

65. General Comment 31 highlights that the HRC views access to such competent authorities as pivotal to States Parties’ obligations under the Covenant. It says that it “attaches importance to States Parties establishing appropriate judicial and administrative mechanisms for addressing claims of rights violations under domestic law.”<sup>85</sup> The HRC’s commentaries consistently encourage States to make greater efforts to provide forums for claims regarding public and private human rights abuses.

66. For example, General Comment 16 provides that it is “indispensable” for States Parties’ periodic reports to contain information on complaints mechanisms available for privacy breaches as well as “complaints lodged in respect of arbitrary or unlawful interference, and the number of any findings in that regard, as well as the remedies provided in such cases.”<sup>86</sup> The General Comment is sufficiently broad that it appears to support complaints mechanisms for both public and private breaches. While more focused on State action, General Comment 20 considers that States Parties must have effective complaints procedures regarding alleged torture and cruel, inhuman or degrading treatment. Indeed, it says that “the right to lodge complaints against maltreatment prohibited by article 7 must be recognized in the domestic law.”<sup>87</sup>

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<sup>83</sup> US Concluding Observations, *supra* note 54, at para. 14.

<sup>84</sup> *Celal v Greece*, Communication 82/1235, UN Doc. CCPR/C/82/D/1235/2003, 11 November 2003, at para. 6.2.

<sup>85</sup> General Comment 31, *supra* note 16, at para. 15.

<sup>86</sup> General Comment 16, *supra* note 48, at paras. 10 – 11.

<sup>87</sup> General Comment 20, *supra* note 50, at para. 14.

67. Concluding Observations often discuss complaints mechanisms in the context of the labor market. For example, in the Concluding Observations for Thailand, the HRC was concerned about lack of “full protection” for migrant workers and said that the State Party “should consider establishing a governmental mechanism to which migrant workers can report violations of their rights by their employers, including illegal withholding of their personal documents.”<sup>88</sup>

68. It is also clear that the HRC supports the development of judicial remedies. Among other examples, this is implicit in the HRC’s recognition of the different ways in which the judiciary may effectively assure rights, including through “direct applicability of the Covenant, application of comparable constitutional or other provisions of law, or the interpretive effect of the Covenant in the application of national law.”<sup>89</sup> Further, in Concluding Observations, the HRC has expressed regret at situations where the Covenant “has not yet been invoked in the courts or before the administrative authorities (article 2 of the Covenant).”<sup>90</sup> As illustrated below, the HRC’s focus on bringing perpetrators to justice also suggests significant support for sanction through the judicial system.

69. Decisions confirm that the right in Art. 2(3) to a remedy determined by competent authorities exists even where there the violation has not been “formally established,” provided claims are “sufficiently well-founded to be arguable under the Covenant.”<sup>91</sup>

#### *Reparation and compensation*

70. The HRC considers that the right to an effective remedy necessitates action by the State Party to provide reparation in relation to the violation. It specifically provides in General Comment 31 that “without reparation to individuals whose Covenant rights have been violated, the obligation to provide an effective remedy, which is central to the efficacy of article 2, paragraph 3, is not discharged.”<sup>92</sup>

71. The Committee provides that “where appropriate, reparation can involve restitution, rehabilitation and measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices, as well as bringing to justice the perpetrators of human rights violations.”<sup>93</sup> This suggests that the HRC considers States to have some latitude in deciding the content of reparation under Art. 2(3), provided it amounts to an *effective* remedy under the circumstances.<sup>94</sup>

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<sup>88</sup> Thailand Concluding Observations, *supra* note 63, at para. 23.

<sup>89</sup> General Comment 31, *supra* note 16, at para 15.

<sup>90</sup> See for example, Concluding Observations, Central African Republic, UN Doc. CCPR/C/CAF/CO/2, 27 July 2006, at para. 6.

<sup>91</sup> *Kazantzis v Cyprus*, Communication 972/2001, UN Doc. CCPR/C/78/D/972/2001, 7 August 2003, at para. 6.6, quoted in *Faure v Australia*, Communication 1036/2001, UN Doc. CCPR/C/85/D/1036/2001, 23 November 2005 at para. 7.2. Though compare *R. A. V. N. et al. v. Argentina*, Communication 343/1988, U.N. Doc. CCPR/C/38/D/344/1988, 5 April 1990, at para. 5.3, which took a more literal view of Art. 2(3).

<sup>92</sup> General Comment 31, *supra* note 16, at para. 16.

<sup>93</sup> *Id.*

<sup>94</sup> See generally Nowak, *supra* note 24, at 65. He suggests that: “whether a remedy (“un recours”) is *effective* (“utile”) may ultimately be determined only on the basis of concrete cases, taking into consideration all relevant circumstances, the respective national legal system and the special features of the substantive right concerned.”

72. The HRC has not suggested that the duty to provide “reparation” equates to a duty to provide compensation, monetary or otherwise, although it “considers that the Covenant generally entails appropriate compensation.”<sup>95</sup> The Committee’s commentaries indicate that it believes reparation should be provided for harm caused by both public and private actors.<sup>96</sup>

73. It is uncommon for Decisions in the sample to call for a particular type of remedy in communications concerning abuse by business enterprises. Where the HRC finds a violation by the State, it generally says only that the author is entitled to an appropriate remedy and that the State is obliged to “protect the authors’ rights effectively and to ensure that similar violations do not occur in the future.”<sup>97</sup> Examples where more detail was provided include a Decision where the State suggested a particular remedy,<sup>98</sup> and Decisions concerning violations of Art. 7, where the HRC commonly calls for particular legislative and punitive action and rehabilitation processes.<sup>99</sup>

74. Indeed, it seems that the HRC has intentionally focused on broader legislative and administrative change in Decisions in order to encourage States Parties to work towards preventing recurrence of abuse. General Comment 31 acknowledges that “it has been a frequent practice of the Committee in cases under the Optional Protocol to include in its Views the need for measures, beyond a victim-specific remedy, to be taken to avoid recurrence of the type of violation in question. Such measures may require changes in the State Party’s laws or practices.”<sup>100</sup>

75. The Concluding Observations in the sample tend not to explicitly discuss reparation or compensation. One exception is the Concluding Observations for the United States, which supported reparations for victims of unlawful interrogation techniques, whether such techniques were carried out by the State’s military or private contractors.<sup>101</sup> While the Committee did not elaborate on what types of reparation were required, it did imply that the State should facilitate direct actions against private agencies for reparation. First, as explained in more detail in section (iii) below, the Committee said that States should “ensure there are effective means to follow suit against abuses committed by agencies operating outside the military structure.”<sup>102</sup> Second, it said that the State “should ensure that the right to reparation of the victims of such practices is

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<sup>95</sup> General Comment 31, *supra* note 16, at para. 16.

<sup>96</sup> Though as stated at the outset, whether there is a State violation concerning harm by a private actor will depend on whether the State Party failed to act with due diligence to prevent, investigate, punish or redress the harm.

<sup>97</sup> See for example *Hopu and Bessert v France*, *supra* note 60, at para. 12. The facts of this communication are provided in Part IV below.

<sup>98</sup> See *Lubicon Lake Band v Canada*, *supra* note 60, also discussed in Part IV below. The HRC deemed Canada’s proposed remedy appropriate within the meaning of Art. 2. The remedy included a reserve for the affected community and other benefits and programmes.

<sup>99</sup> See for example, *Bousroual v Algeria*, Communication 992/2001, UN Doc. CCPR/C/86/992/2001, 24 April 2006, at para. 11 (hereinafter *Bousroual v Algeria*).

<sup>100</sup> General Comment 31, *supra* note 16, at para. 17.

<sup>101</sup> US Concluding Observations, *supra* note 54, at para. 13.

<sup>102</sup> *Id.*

respected.”<sup>103</sup> The HRC’s discussion was more focused on private agencies acting on the State’s behalf than those carrying out purely private functions. Accordingly, more guidance would be helpful on the HRC’s views as to whether States should facilitate legal action against *enterprises* not acting on the State’s behalf.

*Bringing perpetrators to justice and penalties*

76. General Comment 31 suggests that the HRC considers that bringing perpetrators to justice is also part of the duty to provide an effective remedy. It highlights that this duty particularly applies to violations recognized as criminal under domestic or international law.<sup>104</sup> The HRC lists violations of Art. 6, Art. 7 and Art. 9 as prime examples, but does not limit the duty to violation of these rights. It comments that “as with failure to investigate, failure to bring to justice perpetrators of such violations could in and of itself give rise to a separate breach of the Covenant.”<sup>105</sup>

77. Other General Comments usually do not provide specific guidance on the types of penalties perpetrators should face, including whether civil or criminal penalties are required and whether companies should face penalties themselves or whether it is sufficient if individual officers are punished.

78. One exception is General Comment 20, which at least suggests that the HRC considers criminal prosecution to be necessary in relation to Art. 7 breaches. It says “States parties should indicate when presenting their reports the provisions of their criminal law which penalize torture and cruel, inhuman and degrading treatment or punishment, specifying the penalties applicable to such acts, whether committed by public officials or other persons acting on behalf of the State, or by private persons.”<sup>106</sup> In fact, the Committee says that those persons who encourage, order, tolerate or perpetuate prohibited acts “must be held responsible,” suggesting that criminal legislation must focus on both primary and secondary liability.<sup>107</sup>

79. Decisions dealing with torture and disappearances again seem to recommend criminal punishment for both State and non-State offenders in most situations.<sup>108</sup> However, the Committee has also stated that the “Covenant does not provide a right for individuals to require that the State party criminally prosecute another person.”<sup>109</sup> Nevertheless, the Committee calls for States Parties to “investigate thoroughly alleged violations of human rights” and to “prosecute and punish those held responsible for such violations.”<sup>110</sup>

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<sup>103</sup> *Id.* See also para. 14 which asks for information about measures to ensure respect of the right to reparation for victims of Art. 7 breaches in detention facilities in overseas locations.

<sup>104</sup> General Comment 31, *supra* note 16, at para. 18.

<sup>105</sup> *Id.*

<sup>106</sup> General Comment 20, *supra* note 50, at para. 13.

<sup>107</sup> *Id.*

<sup>108</sup> See for example *Bousroual v Algeria*, *supra* note 99, at paras. 9.12 and 11.

<sup>109</sup> *Rajapakse v Sri Lanka*, *supra* note 30, at para 9.3.

<sup>110</sup> *Id.*

80. Concluding Observations regularly call for sanctions against employers for discriminatory practices, and criminal penalties for practices such as slave labor, child labor and trafficking.<sup>111</sup> Once again, the Committee recommends criminal penalties in relation to violations of Art. 7, including against private contractors acting on the State's behalf.<sup>112</sup>

*Effectiveness of remedies – access and enforcement*

81. Whatever remedy is chosen, it is clear that the HRC requires it to “function effectively in practice.”<sup>113</sup> It asks States Parties to report on “obstacles to the effectiveness of existing remedies,”<sup>114</sup> presumably to ensure that if a remedy is put in place, it contributes to addressing the harm and preventing future violations.

82. Further, the HRC calls for remedies to be accessible and “appropriately adapted so as to take account of the special vulnerability of certain categories of person ...”<sup>115</sup> It is clear that the HRC supports the creation and implementation of appropriate processes to assist victims to complain about violations and receive an effective remedy, whether complaints focus on State or non-State abuse, including corporate acts.

**(iii) Natural v legal persons**

83. The above analysis highlights that the HRC considers States Parties to have obligations under the Covenant to regulate and adjudicate corporate activities as part of the duty to respect and ensure rights. However, consistent with the choice left to States Parties as to the means of complying with their Covenant obligations, there is less guidance regarding whether the HRC believes States Parties may fulfill this duty by focusing on the acts of natural persons within the “offending” business enterprise or whether they are obliged to regulate the business enterprise in its own right. While General Comment 31 makes it clear that the HRC considers that States Parties could breach their obligations if they fail to punish or redress harm caused by *private entities*,<sup>116</sup> implying that the Committee at least supports direct actions against corporations, it does not specifically answer this question.

84. The most relevant statement in the sample comes from the Concluding Observations for the United States. In expressing concern about violations of Art. 7 by “private contractors” in detention facilities within the United States’ jurisdiction, the Committee said that the State should ensure there are “effective means to follow suit against abuses committed by agencies operating outside the military structure and that appropriate sanctions be imposed on its personnel who used or approved the use of the

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<sup>111</sup> See for example Brazil Concluding Observations, *supra* note 56, at para. 11; Thailand Concluding Observations, *supra* note 63, at para. 20; Concluding Observations, Benin, UN Doc. CCPR/CO/82/BEN, 1 December 2004, at para. 24 (hereinafter Benin Concluding Observations); and Concluding Observations, Uganda, UN Doc. CCPR/CO/80/UGA, 4 May 2004, at para. 20.

<sup>112</sup> See for example, US Concluding Observations, *supra* note 54, at para. 14.

<sup>113</sup> General Comment 31, *supra* note 16, at para. 20.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* at para.15. The HRC mentions children as one example.

<sup>116</sup> *Id.* at para. 8.

now prohibited techniques.”<sup>117</sup> Thus the Committee apparently supports actions against private agencies, though it is less clear exactly what the Committee considers to be “effective means,” including whether it expects the State to facilitate victims to take legal action in some way; what types of suits are envisaged; and whether the Committee supports or requires such suits in cases where recourse has already been taken against individuals at the agencies.

85. Numerous Decisions and Concluding Observations highlight the need for States to ensure effective remedies for indigenous peoples affected by corporate activities, particularly those threatening land and cultural resources. More guidance is encouraged on whether an effective remedy might require States to facilitate victims to bring legal actions directly against offending corporations, and what could be appropriate procedures for processing such claims.

86. The reason for the HRC’s lack of guidance on this issue may be that it focuses on protecting against abuse and enjoyment of rights; namely, in line with the discretion provided by the Covenant, the emphasis is on the State taking appropriate steps to prevent, investigate, punish and redress the particular harm rather than taking specific action against a particular actor. Nevertheless, more guidance could serve to clarify States’ obligations and increase victims’ understanding of their remedial options. It could also provide corporations with greater insight into when they are likely to face legal action in their own right.

#### **(iv) Educational and promotional measures**

87. The Committee sees educational measures which promote human rights as part of a variety of measures (including legislative, judicial and administrative) required to ensure enjoyment of rights. The sample does not include any explicit directions to States to promote human rights amongst the business community. However, the HRC does broadly highlight its support for educating both State and private actors as to the content of Covenant rights.<sup>118</sup> For example, General Comment 31 refers to the importance of raising “levels of awareness about the Covenant not only among public officials and State agents but also among the population at large.”<sup>119</sup>

88. Several Concluding Observations discuss the importance of public education in eradicating discriminatory and harmful employment practices,<sup>120</sup> implying that the Committee supports educating both private and public employers. In fact, the HRC has recommended a State Party to train “contract employees” working in detention facilities “about their respective obligations and responsibilities in line with articles 7 and 10 of the Covenant” to prevent recurrence of violations.<sup>121</sup>

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<sup>117</sup> US Concluding Observations, *supra* note 54, at para. 13.

<sup>118</sup> See A/HRC/4/35/Add.1, paras. 68 – 71 for a comparison of how the other core human rights treaties and treaty bodies reference promotional measures in relation to corporate acts.

<sup>119</sup> General Comment 31, *supra* note 16, at para. 7.

<sup>120</sup> See for example Brazil Concluding Observations, *supra* note 56, at para. 11; and Thailand Concluding Observations, *supra* note 63, at para. 21.

<sup>121</sup> US Concluding Observations, *supra* note 54, at para. 14.



## **PART IV - BUSINESS AND RIGHTS SPECIFIC INFORMATION**

89. This Part discusses key examples of the types of corporate activities the HRC has most frequently discussed to date, including the relevant corporate actors and rights in issue.

90. It is purely illustrative of past and current trends and does not suggest that the HRC may or will focus only on certain types of abuses by certain types of business enterprises. Rather, the above analysis confirms that in relation to the duty to protect, the HRC believes States Parties have a duty to protect against the abuse of all rights which all types of private persons and entities are capable of violating. Indeed, out of all of the General Comments, it is General Comment 31 - which focuses on the nature of States' general legal obligations under the Covenant and not a particular right - that most clearly explains the Committee's thinking regarding the duty to protect.

### **A. Employers**

91. The HRC regularly provides recommendations for protecting rights in the labor market, with the clear message that both private and public employment activities should be regulated and adjudicated to ensure protection.

#### *General Comments*

92. General Comment 28 mentions employers when discussing State obligations to protect against interference with women's privacy by public and private actors. The HRC specifically refers to employers' practices, such as mandatory pregnancy tests before hiring, as examples of such interference.<sup>122</sup> The HRC requires States to "report on any laws and public or private actions that interfere with the equal enjoyment by women of the rights under article 17, and on the measures taken to eliminate such interference and to afford women protection from any such interference."<sup>123</sup> Thus it seems that the HRC considers States to be responsible for protecting against abuse by various private actors, including private employers.

93. General Comment 28 also directs States to protect against discrimination by both public and private agencies in accordance with Art. 26. In particular, the HRC refers to discrimination against women in the enjoyment of labor rights, especially equal pay for equal work. This implies that the HRC believes States must regulate and adjudicate the acts of non-State actors, such as employers, to ensure *effective* equal protection. The HRC comments that States should "...take the lead in implementing all measures necessary to eliminate discrimination against women in all fields, for example by prohibiting discrimination by private actors in areas such as employment, education, political activities and the provision of accommodation, goods and services. States parties should report on all these measures and provide information on the remedies available to victims of such discrimination."<sup>124</sup> This also suggests a focus on private actors in other fields, such as landlords and service providers.

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<sup>122</sup> General Comment 28, *supra* note 40, at para. 20.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.* at para. 31.

94. General Comment 16 interprets Art. 17's prohibition against arbitrary or unlawful interference with the home as also prohibiting interference in a place where a person "carries out his usual occupation."<sup>125</sup> The General Comment commences with a strong statement that States must adopt legislative and other measures in order to protect against interference from State actors or "natural or legal persons."<sup>126</sup> Accordingly, its reference to places of occupation seems a further direction to States to prevent unlawful or arbitrary interferences or attacks on privacy or reputation in the workplace.

95. General Comment 17 directs States to take "every possible economic and social measure" to prevent children from "being subjected to acts of violence and cruel and inhuman treatment or from being exploited by means of forced labor or prostitution, or by their use in the illicit trafficking of narcotic drugs or by any other means."<sup>127</sup> The HRC's use of the phrase "every possible economic and social measure" suggests that in addition to regulation, States Parties are encouraged to take further, more creative steps to prevent exploitation.

### *Concluding Observations*

96. Concluding Observations also illustrate the HRC's view that States Parties should take steps to regulate and adjudicate acts by private and public employers. They include numerous examples of recommendations to regulate employers to effectively protect against discrimination, privacy breaches and child labor. The HRC clearly considers that States should take steps to prevent and punish abuses by employers, having said that States should not only legislate against discriminatory and harmful practices such as requiring sterilization certificates, but should also sanction employers.<sup>128</sup>

97. Several Concluding Observations in the sample mention the need to protect against discrimination in public and private life, particularly against women. These observations discuss both violent and non-violent forms of discrimination, with calls to prohibit and punish actions ranging from trafficking and slave labor to workplace discrimination.<sup>129</sup> There is support for States to increase participation by women in public and private life, particularly in the labor market, including corporate boards and executive positions.<sup>130</sup>

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<sup>125</sup> General Comment 16, *supra* note 48, at para. 5.

<sup>126</sup> *Id.* at para. 1.

<sup>127</sup> General Comment 17, at para. 3.

<sup>128</sup> See for example, Brazil Concluding Observations, *supra* note 56, at para. 11.

<sup>129</sup> See for example Paraguay Concluding Observations, *supra* note 56, at para. 8; Brazil Concluding Observations, *supra* note 56, at paras. 11 and 14; *supra* note 63, Concluding Observations, at paras. 20 – 21; and Benin Concluding Observations, *supra* note 111, at para. 24.

<sup>130</sup> See for example Norway Concluding Observations, *supra* note 56, at para. 3; Brazil Concluding Observations, *supra* note 56, at para. 10; Concluding Observations, Slovenia, UN Doc. CCPR/CO/84/SVN, 25 July 2005, at para. 8 (hereinafter Slovenia Concluding Observations); Concluding Observations, Mauritius, UN Doc. CCPR/CO/83/MUS, 27 April 2005, at para. 8; Concluding Observations, Albania, UN Doc. CCPR/CO/82/ALB, 2 December 2004, at para. 11 (hereinafter Albania Concluding Observations); and Concluding Observations, Germany, UN Doc. CCPR/CO/80/DEU, 4 May 2005, at para. 11 (hereinafter Germany Concluding Observations).

98. As suggested in Part III, the HRC emphasizes that passing non-discrimination legislation is not enough—it must be enforced in both the public and private spheres.<sup>131</sup> For example, it is clear that the HRC supports constraints on employers to ensure equal treatment of women in the workforce,<sup>132</sup> as well as the establishment of mechanisms to facilitate complaints by migrant workers about violations of their rights by employers.<sup>133</sup>

99. Concluding Observations also target employers from particular sectors as likely to require regulation regarding child labor in certain situations, such as the commercial and agricultural sectors.<sup>134</sup> In the Concluding Observations for Uzbekistan, the HRC singled out the cotton industry as being of particular concern.<sup>135</sup> It is clear that the HRC expects States to “combat and reduce” child labor in these sectors, suggesting a need to regulate and adjudicate abuse.<sup>136</sup>

100. Further, the Concluding Observations provide strong guidance in relation to preventing and punishing trafficking of women and girls, with clear recommendations to regulate both non-State and State offenders. The Committee has referred to Art. 3 and 8 of the Covenant in recommending that States Parties reinforce international cooperation and practical measures to end trafficking, prosecute and punish perpetrators, combat trafficking-related corruption and offer rehabilitation and protection programmes to victims.<sup>137</sup>

#### *Decisions*

101. Decisions highlight the importance of protecting against employment discrimination. In *Jazairi v Canada*, the author alleged that the State failed to prevent and remedy discrimination by a private university in granting a promotion. He argued that Canada’s employment discrimination legislation was flawed because it did not prohibit discrimination based on political opinion. The complaint was held inadmissible on a number of grounds and the HRC did not comment specifically on the State’s duty to protect against discriminatory action by a non-State employer. However, it did say that the omission in the legislation suggested that “the State party may have failed to ensure that, in an appropriate case, there would be a remedy available to a victim of discrimination on political grounds in the field of employment.”<sup>138</sup> The HRC did not further explore this issue because it accepted that the university’s decision was not based on political opinion and refused to consider a hypothetical situation.

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<sup>131</sup> See for example Paraguay Concluding Observations, *supra* note 56, at para. 8.

<sup>132</sup> See for example Concluding Observations, Finland, UN Doc. CCPR/CO/82/FIN, 2 December 2004, at para. 9 (hereinafter Finland Concluding Observations).

<sup>133</sup> Thailand Concluding Observations, *supra* note 63, at para. 23.

<sup>134</sup> See for example Kenya Concluding Observations, *supra* note 58, at para. 26.

<sup>135</sup> Uzbekistan Concluding Observations, *supra* note 58, at para. 25.

<sup>136</sup> Kenya Concluding Observations, *supra* note 58, at para. 26.

<sup>137</sup> See for example Albania Concluding Observations, *supra* note 130, at para. 15; Slovenia Concluding Observations, *supra* note 130, at para. 11; Paraguay Concluding Observations, *supra* note 56, at para. 13; Brazil Concluding Observations, *supra* note 56, at para. 15; and Norway Concluding Observations, *supra* note 56, at para. 12.

<sup>138</sup> *Jazairi v Canada*, Communication 958/2000, UN Doc. CCPR/C/82/D/958/2000, 11 November 2004, at para. 7.4.

102. The dissenting members argued that the complaint was admissible because there was evidence of discrimination. They further claimed that on the merits, there was a breach of the Covenant because the legislation failed to provide equal and effective protection under Art. 26.<sup>139</sup> Accordingly, both the majority and the dissent indicated that States are responsible for facilitating remedies for discrimination by both public and private employers.

## **B. Media and communications networks**

103. The HRC has indicated that in order to abide by certain Covenant obligations such as the hate speech prohibitions in Art. 20 and nondiscrimination and equal protection provisions in Art. 3 and Art. 26, the State is obligated to regulate the media and other communication networks in order to prevent the publication of information likely to have harmful effects. Such regulation would also require a careful balancing with the protection of freedom of expression.

104. For example, while General Comment 28 does not specifically refer to the media, it does point out that the “publication and dissemination of obscene and pornographic material which portrays women and girls as objects of violence or degrading or inhuman treatment is likely to promote these kinds of treatment of women and girls” and asks States to “provide information about legal measures to restrict the publication or dissemination of such material.”<sup>140</sup>

105. In line with Art. 20 of the Covenant, several Concluding Observations also suggest that States should adopt strong measures to prevent advocacy of hate and intolerance in the public domain. The Concluding Observations for Suriname discussed the fact that “certain media” may be “echoing” hate speech,<sup>141</sup> implying that the State should take steps in accordance with the Covenant to prevent and punish such actions.

106. The most recent Concluding Observations for Italy suggested that the HRC considers it necessary for States to monitor and regulate the media market to ensure that corruption, conflicts of interest or even market concentration do not jeopardize freedom of expression. Despite noting several laws regarding broadcasting and conflict of interest, the HRC expressed concern “about information that these steps may remain insufficient to address the issues of political influence over public television channels, of conflict of interests and high level of concentration of the audio-visual market. This situation is conducive to undermining freedom of expression, in a manner incompatible with article 19 of the Covenant.”<sup>142</sup> The HRC asked Italy to report on “concrete results” from implementation of existing legislation. The Concluding Observations for Italy were the only ones in the sample to suggest that market concentration could undermine rights.

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<sup>139</sup> *Id.* at para 8 of the Individual Opinion of Committee members Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Ahmed Tawfik Khalil and Mr. Rajsoomer Lallah.

<sup>140</sup> General Comment 28, *supra* note 40, at para. 22.

<sup>141</sup> See for example, Slovenia Concluding Observations, *supra* note 130, at para. 13.

<sup>142</sup> Concluding Observations, Italy, UN Doc. CCPR/C/ITA/CO/5, 24 April 2006, at para. 20.

### **C. Extractives and property development companies**

107. The HRC has expressed concern about detrimental effects on indigenous peoples and minorities from extractives and property development activities in General Comments, Concluding Observations and Decisions. With varying levels of specificity, it recommends that States Parties take steps to regulate and adjudicate activities capable of jeopardizing rights, including activities affecting land and cultural resources, living conditions and access to justice.

#### *General Comments*

108. Art. 27 provides that in “States where ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.” As stated in Part II, the HRC emphasizes in General Comment 23 on the rights of minorities that States Parties must take positive steps to protect against denial of cultural rights under Art. 27 by both State and non-State actors.

109. The Committee also observes that “culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples. That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law.”<sup>143</sup> The Committee then reiterates that the ability to carry out such activities “may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them.”<sup>144</sup> While this implies positive measures of protection might include regulation of companies involved in such decisions, more specific guidance would be encouraged.

#### *Concluding Observations*

110. Several Concluding Observations in the sample highlight concerns related to extractives and property development activities affecting indigenous communities.

111. For example, in the Concluding Observations for Suriname, the HRC expressed regret that logging and mining concessions are often provided without consultation with affected groups.<sup>145</sup> It also noted that mercury had been released into land close to indigenous tribes. The HRC called for legislation to guarantee rights as well as the establishment of a mechanism for open consultations on relevant decisions. Further, it asserted that the State was obliged to prevent mercury poisoning.

112. In the latest Concluding Observations for Canada, the HRC was concerned that land negotiations between the government and the Lubicon Lake Band were stalled, and that there was information that the Band’s land “continues to be compromised by logging and

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<sup>143</sup> General Comment 23, *supra* note 46, at para. 7.

<sup>144</sup> *Id.*

<sup>145</sup> Suriname Concluding Observations, *supra* note 59, at para. 21.

large-scale oil and gas extraction.”<sup>146</sup> The Committee commented that the State “should consult with the Band before granting licenses for economic exploitation of the disputed land, and ensure that in no case such exploitation jeopardizes the rights recognized under the Covenant.”<sup>147</sup>

113. Again, while more specific guidance would be helpful, this seems to be a direction for Canada to regulate all participants in such projects to ensure that rights under Art. 27 are protected. Further, the requirement to consult with the Band before granting licenses suggests that the HRC might expect the State Party to be fully informed as to the likely impacts of a particular project. If this is the case, it might suggest that the HRC supports States requiring reporting from, or at least dialogue with, non-State or State owned enterprises involved in these projects.

#### *Decisions*

114. Communications concerning corporate activities affecting minorities or indigenous peoples commonly rely on alleged breaches of Art. 27.

115. The HRC has said that a State Party could breach its Art. 27 obligations if it introduces measures with a collective impact amounting to a denial of cultural rights.<sup>148</sup> The HRC will look at the “overall effects” of State measures to decide whether there is likely to be a denial of rights or a more limited, permissible impact. In exploring overall impacts, it will examine whether there might be combined effects on rights from acts spanning different geographical areas and time periods.<sup>149</sup>

116. The HRC has acknowledged that States “may understandably wish to encourage development or allow economic activity by enterprises.”<sup>150</sup> However, where such development affects rights protected under Art. 27, the HRC will examine the legitimacy of the State’s plans according to the obligations in Art. 27 and not simply a margin of appreciation more focused on the State’s interests.<sup>151</sup>

117. It is unclear exactly what kinds of measures will classify as “permissible impacts” but it seems that the HRC may be less likely to find an outright denial of rights where the State Party takes reasonable steps to lessen the impact, such as ensuring communication with the relevant community and facilitating effective remedies for any damage by private actors.

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<sup>146</sup> Concluding Observations, Canada, UN Doc. CCPR/C/CAN/CO/5, at para. 9 (hereinafter Canada Concluding Observations).

<sup>147</sup> *Id.*

<sup>148</sup> *Ilmari Länsman et al. v Finland*, *supra* note 60, at para. 9.4. See also *Jouni Länsman et al v Finland*, Communication 1023/2001, UN Doc. CCPR/C/83/D/1023/2001, 15 April 2005, at paras. 10.1 – 10.2 (hereinafter *Jouni Länsman et al v Finland*) for similar comments regarding very similar facts (see note 153 below).

<sup>149</sup> *Jouni Länsman et al v Finland*, *supra* note 148, at para. 10.2.

<sup>150</sup> *Ilmari Länsman et al. v Finland*, *supra* note 60, at para. 9.4.

<sup>151</sup> *Id.*

118. It seems that the HRC believes both negative and positive acts by States Parties could lead to a denial of rights. For example, some Decisions suggest that the HRC considers failure to prevent or curb abuse by a private company as a denial of rights in some situations. Further, the HRC has highlighted that any guidance it provides regarding State measures at one point in time will not prevent it from providing different determinations for future acts that are more intrusive or provide less protection.

119. For example, in a communication concerning Finland's alleged breach of minority rights by contracting with a private company for quarrying services, the authors were concerned about present and future mining activities. First, they argued that present quarrying by the private company would disturb minority economic activities such as reindeer herding and would desecrate a sacred site. The authors were also concerned about broader access to the Finnish market by multinational mining companies, suggesting that such companies might seek to commence operations in traditional areas to the detriment of Covenant rights.

120. The HRC held that the claim was admissible but that there was no breach of Art. 27 in relation to the present activities. It found Finland acted with sufficient concern for the community, including consulting with the community;<sup>152</sup> limiting quarrying times and establishing a compensation regime for any damage. While there might have been some interference with rights, it did not find there had been outright denial. However, the HRC also highlighted that Finland was obliged to monitor all future contracts to ensure protection of minority rights:<sup>153</sup> “with regard to the authors' concerns about future activities, the Committee notes that economic activities must, in order to comply with article 27, be carried out in a way that the authors continue to benefit from reindeer husbandry. Furthermore, if mining activities in the Angeli area were to be approved on a large scale and significantly expanded by those companies to which exploitation permits have been issued, then this may constitute a violation of the authors' rights under article 27, in particular of their right to enjoy their own culture. The State party is under a duty to bear this in mind when either extending existing contracts or granting new ones.”<sup>154</sup>

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<sup>152</sup> The importance of effective participation by communities in decisions affecting their rights was also reiterated in *Mahuika et al. v New Zealand*, Communication 547/1993, UN Doc. CCPR/C/70/D/547/1993, 15 November 2000 (hereinafter *Mahuika et al. v New Zealand*). The communication concerned an agreement between Maori tribes and the government regarding commercial fishing interests. The authors were from tribes which had not agreed to the settlement but the HRC found that there was sufficient consultation with a broad sample of tribes before the Government enacted the relevant legislation (para 9.8). In relation to effective participation it said at para. 9.5: “In its case law under the Optional Protocol, the Committee has emphasized that the acceptability of measures that affect or interfere with the culturally significant economic activities of a minority depends on whether the members of the minority in question have had the opportunity to participate in the decision-making process in relation to these measures and whether they will continue to benefit from their traditional economy.”

<sup>153</sup> Indeed, in 2001 members of the same community raised another complaint regarding the effect of commercial logging activities on reindeer husbandry activities in some of the areas dealt with in *Ilmari Länsman v Finland*: see *Jouni Länsman et al v Finland*, *supra* note 148. The HRC reiterated its comments about looking at past, present and future effects but found that the effects on husbandry in this instance did not amount to an outright denial of Art. 27 rights.

<sup>154</sup> *Ilmari Länsman v Finland*, *supra* note 60, at para. 9.8. Note that future impacts were also discussed in *Mahuika et al. v New Zealand*, *supra* note 152. At para. 9.4, the Committee referred to *Ilmari Länsman v Finland* and emphasized that “in order to comply with article 27, measures affecting the economic

121. Another key example is *Lubicon Lake Band v Canada*, where members of the Lubicon Lake Band alleged that a provincial government expropriated their land for the benefit of private corporate interests, including through leases for oil and gas exploration and the construction of timber mills. In particular, the authors complained about the Daishowa project – a timber mill operated by a Japanese company which allegedly used timber resources rightfully owned by the Band. Accordingly, they alleged violations by Canada of Art. 1 and 27 of the ICCPR, for failing to prevent these activities.<sup>155</sup>

122. Canada responded that the authors failed to exhaust domestic remedies, and argued that it was simply obliged to provide the authors with a reserve under domestic law and that no violations of the ICCPR had occurred.<sup>156</sup> Regardless, Canada claimed the commercial activities were not occurring on land belonging to the Band and that cultural activities had not been unduly disturbed.

123. The HRC found a breach of Art. 27, saying that: “historical inequities, to which the State party refers, and certain more recent developments threaten the way of life and culture of the Lubicon Lake Band, and constitute a violation of article 27 so long as they continue. The State party proposes to rectify the situation by a remedy that the Committee deems appropriate within the meaning of article 2 of the Covenant.”<sup>157</sup> The proposed remedy included benefits and programmes for 500 Band members worth \$C 45 million as well as a 95 square mile reserve set aside for the Band.

124. The HRC did not further explain its reasoning for declaring a breach of Art. 27. Nevertheless, the implication was that Canada had failed to protect the Band from violations resulting from private commercial development.<sup>158</sup>

125. Mr. Nisuke Ando, in an individual opinion, was not certain that the State’s activities amounted to a breach of Art. 27. He said that the right to enjoy one’s culture did not mean that a way of life had to be “preserved intact at all costs.”<sup>159</sup> He commented that “past history of mankind bears out that technical development has brought about various changes to existing ways of life and thus affected a culture sustained thereon. Indeed,

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activities of Maori must be carried out in a way that the authors continue to enjoy their culture, and profess and practice their religion in community with other members of the group. The State party is under a duty to bear this in mind in the future implementation of the Treaty of Waitangi (Fisheries Claims) Settlement Act.”

<sup>155</sup> *Lubicon Lake Band v Canada*, *supra* note 60, at para. 13.3. Note that the Art. 1 claim concerning self-determination was inadmissible given the HRC’s consistent view that communications can only be brought under the Optional Protocol by individuals in relation to individual rather than collective rights.

<sup>156</sup> *Id.* at para. 9.2.

<sup>157</sup> *Id.* at para. 33.

<sup>158</sup> For a discussion of this communication see, Craig Scott, *Multinational Enterprises and Emergent Jurisprudence on Violations of Economic, Social and Cultural Rights*, in *Economic, Social and Cultural Rights: A Textbook* 563, 583 (Eide, C. Krause, and A. Rosas, eds., 2<sup>nd</sup> edition 2001). Scott suggests that the phrase “historical inequities” referred to Canada’s failure to respect an 1899 treaty applying to the Band and that the phrase “certain more recent developments,” ‘in the context of the case and the Lubicon’s pleadings, could only have referred to the pulp and paper activities of Daishowa.’

<sup>159</sup> *Lubicon Lake Band v Canada*, *supra* note 60, Individual Opinion by Mr Nisuke Ando.



outright refusal by a group in a given society to change its traditional way of life may hamper the economic development of the society as a whole.”<sup>160</sup>

126. Mr. Ando did not directly dissent but seemed to imply that a balancing act might be required where development and cultural rights conflict. Nevertheless, he also supported the need to protect against exploitation of natural resources: “I do not oppose the adoption of the Human Rights Committee's views, as they may serve as a warning against the exploitation of natural resources which might cause irreparable damage to the environment of the earth that must be preserved for future generations.”<sup>161</sup>

127. Decisions dealing with corporate activities affecting indigenous peoples and other communities extend beyond those based on Art. 27. Some deal with Art. 17's prohibition against arbitrary or unlawful interference in the home as well as family rights in Art. 23 when ancestral lands are disputed. In *Hopu and Bessert v France*, the authors alleged breach of their Art. 17 and Art. 23 rights based on commercial dealings related to ancestral burial grounds and traditional fishing grounds in Tahiti. Specifically, they complained about a State owned company's lease of sacred land to a corporation called Societe Hotelier RIVNAC, which appeared to be a private company. The lease was used by RIVNAC to develop the land to build a hotel, in conjunction with the State owned company.<sup>162</sup> The HRC concluded that the construction of a hotel on the sacred land would interfere with the authors' rights under Art. 17 and Art. 23.<sup>163</sup> It said there was no evidence that the construction was reasonable or that the State considered the importance of the land before leasing it to the private developer.<sup>164</sup>

128. Once again, the Decision did not specify how the State's violation related to the business activities. However, it did imply that the violation came from the State's failure to properly take into account relevant considerations in granting the lease. Nevertheless, it is unclear whether the HRC based its decision on the State's failure to protect against RIVNAC's actions; whether it was focused on the State owned company's acts; or whether it automatically attributed RIVNAC's acts to the State based on links to the State owned company.<sup>165</sup>

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<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> *Hopu and Bessert v France*, *supra* note 60, at para. 10.3.

<sup>163</sup> Art. 27 was not discussed as France has entered a reservation concerning that article.

<sup>164</sup> *Hopu and Bessert v France*, *supra* note 60, at para. 10.3.

<sup>165</sup> For a discussion of these issues, see Scott, *supra* note 158, at 585. Part V below explores how the Committee usually deals with claims relating to State controlled enterprises.

## **PART V – STATE CONTROLLED ENTERPRISES AND PRIVATIZATION**

129. This Part examines the HRC's views on States Parties' duties in relation to activities by State controlled enterprises and enterprises performing government functions, whether they are privately or publicly owned. It appears that the Committee sees the same positive obligations for States Parties in relation to preventing abuse by both privately and publicly owned corporations acting **without** government control. Where its guidance differs somewhat is in relation to corporations acting under government control, where questions of direct attribution arise.

130. The secondary rules of State responsibility as codified in the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts (ILC Articles) clarify when the acts of non-government entities may be directly attributed to a State under international law.<sup>166</sup> They thus provide guidance as to when the State may be held responsible under international law for the acts of enterprises, including State and non-State owned companies.

131. Given that the aim of this report is to map the HRC's interpretation of States Parties' duties under the Covenant, the report does not include a detailed discussion of the ILC Articles. In brief, it appears that where the HRC cannot directly attribute the acts of an enterprise to the State because of lack of control, it will ask whether there is responsibility linked to a breach of the positive obligations imposed under the Covenant to protect against third party abuse. However, as illustrated below, it is not always clear whether the HRC is basing its discussions on direct attribution through control or failure to comply with positive obligations.

### **A. General Comments**

132. General Comment 31 clearly affirms that, apart from the responsibility of the State for the acts of its agents, the State also must protect the rights recognized under the Covenant where these rights are threatened by the acts of private parties. This would include the acts of companies, whether publicly owned or not.

133. It may be that General Comment 31 also provides guidance in relation to accountability for State-controlled enterprises. The Committee says that States Parties

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<sup>166</sup> The ILC Articles were adopted by the ILC in 2001. In 2004, the UN General Assembly deferred further consideration of them until its 62<sup>nd</sup> session in 2007. Professor James Crawford, the ILC Special Rapporteur on State Responsibility from 1997 – 2001, suggests that the ILC Articles provide only a limited number of situations in which States may be held responsible for private acts. He argues that State attribution for private acts will occur only when the State consents to accept responsibility; when private entities are empowered by the law to exercise elements of government function (Art. 5); where private groups act under the State's instructions or direct control (Art. 8); and where groups exercise government authority. (Art. 9). See General Assembly Resolution 59/35, 2 December 2000; UN Doc A/RES/59/35, adopted at the 65<sup>th</sup> plenary meeting of the General Assembly (see UN Doc. A/59/SR.65). For more information, see James Crawford, *The ILC's Articles on State Responsibility, Introduction, Text and Commentaries* (Cambridge University Press, 2002).

should be particularly conscious of ensuring that their “agents” are held accountable for violations, especially those considered criminal under international and domestic law, including torture, extrajudicial killings and enforced disappearances. It says that “where public officials or State agents have committed violations of the Covenant rights referred to in this paragraph, the States Parties concerned may not relieve perpetrators from personal responsibility, as has occurred with certain amnesties (see General Comment 20 (44)) and prior legal immunities and indemnities. Furthermore, no official status justifies persons who may be accused of responsibility for such violations being held immune from legal responsibility.”<sup>167</sup>

134. In principle, this could apply also to situations where companies, or individual directors of companies, are acting under the direction or control of the State, or follow the instructions of the State, in committing the particular act, since they are then de facto agents of the State within the meaning of Article 8 of the ILC Articles. More guidance from the HRC would be helpful, however, on the precise scope of the this obligation, i.e., on the conditions in which a company, while not part of the State apparatus, may nevertheless be considered to directly engage the State’s responsibility because it acts under the State’s instructions, direction or control in the commission of the act.

## **B. Concluding Observations**

135. The Concluding Observations highlight the HRC’s view that States Parties should prevent abuse by all manner of business enterprises.<sup>168</sup> For example, in the Concluding Observations for Finland, the HRC expressed concern at the ways in which both private and public commercial use of traditional lands could threaten rights.<sup>169</sup> It implied the State should refrain from acts that could adversely affect land settlement, including monitoring activities by both State and non-State business enterprises.

136. The HRC also has expressed concerns about the lack of accountability which could result from the privatization of certain governmental functions, when these are delegated by the State to private companies.

137. In particular, Concluding Observations have expressed concern about the lack of monitoring mechanisms for private prisons, and the failure to hold accountable private contractors suspected of torture or cruel, inhuman or degrading treatment at detention and interrogation centers.<sup>170</sup> The most recent Concluding Observations for New Zealand, while welcoming information that all prisons would be publicly managed from July 2005, also said that the HRC remained concerned about “whether the practice of privatization, in an area where the State is responsible for protecting the rights persons of whom it has

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<sup>167</sup> General Comment 31, *supra* note 16, at para. 18.

<sup>168</sup> For example, see Thailand Concluding Observations, *supra* note 63, at para. 23; Kenya Concluding Observations, *supra* note 58, at para. 26, and Uzbekistan Concluding Observations, *supra* note 58, at para. 25.

<sup>169</sup> Finland Concluding Observations, *supra* note 132, at para. 17.

<sup>170</sup> See New Zealand Concluding Observations, *supra* note 77, at para. 13; and US Concluding Observations, *supra* note 54, at paras. 13 and 14. See Part III for more detail.

deprived of their liberty, effectively meets the obligations of the State Party under the Covenant and its own accountability for any violations.”<sup>171</sup>

### C. Decisions

138. As suggested above, it is sometimes unclear whether the Committee focuses on direct attribution or the duty to protect in considering communications against States Parties which involve wrongdoing by corporate actors. In line with broader developments in international law, however, it is at least clear that when discussing direct attribution the Committee concentrates on control rather than ownership.<sup>172</sup>

139. Questions related to company ownership or control arise in both admissibility and merits discussions. As an example of the former, *Czyklin v Canada* concerned discrimination by a private railway corporation. In arguing the communication was inadmissible, Canada claimed it could not be held responsible for the corporation’s acts but that the situation would have been different if the corporation was not privately owned.<sup>173</sup> The Committee did not comment on this argument as it found the communication inadmissible for failure to exhaust domestic remedies.

140. In its discussion on the merits in *Hertzberg v Finland*, the HRC considered that the State *could* be held responsible for censorship acts by the State-controlled Finnish Broadcasting Company even though it ultimately found there was no breach of the Covenant. The HRC said that it was starting from the “premise that the State party is responsible for actions of the Finnish Broadcasting Company, in which the State holds a dominant stake (90%) and which is placed under specific government control.”<sup>174</sup>

141. *Love v Australia* concerned employment discrimination by the national airline, Qantas, when it was still government owned. The State argued that it could only be held responsible for Qantas’ acts if it had empowered it to exercise “elements of governmental authority.”<sup>175</sup> It said that while it owned all of the shares in the airline at the time of the discrimination, it “did not intervene in day-to-day administration,”<sup>176</sup> and the airline was “not exercising government powers.”<sup>177</sup> Accordingly, the State argued that even if the authors had suffered discrimination, the airline, rather than the State, was responsible.

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<sup>171</sup> New Zealand, Concluding Observations, *supra* note 77, at para. 13.

<sup>172</sup> There is international case-law to the effect that publicly owned companies, whose legal personality is distinct from that of the State, should be treated no differently than private companies: unless they are exercising elements of government authority or are acting under the instructions, or are under the direction or control of the State, in the conditions provided by Articles 5 and 8 of the ILC Articles respectively, their acts will not be considered as attributable to the State (see for example *SEDO, Inc. v. National Iranian Oil Co.*, (1987) 15 Iran-U.S.C.T.R 23 and *International Technical Products Corp. v. Islamic Republic of Iran*, (1985) 9 Iran-U.S.C.T.R. 206). However, where the State uses its ownership interest as a vehicle for directing the company to commit the acts, the conditions of Article 8 of the ILC Articles should be considered to be fulfilled, and therefore the act should be considered to be attributable to the State.

<sup>173</sup> *Czyklin v Canada*, *supra* note 29, at para. 4.7.

<sup>174</sup> *Hertzberg v Finland*, Communication 61/1979, UN Doc. CCPR/C/15/D/61/1979, 2 April 1982, at para. 9.1.

<sup>175</sup> *Love et al. v Australia*, *supra* note 60, at para. 4.6.

<sup>176</sup> *Id.*

<sup>177</sup> *Id.* at para. 4.7.

142. The HRC did not directly consider the State's arguments at the admissibility stage. It simply said that the arguments should be considered at the merits stage because they were "intimately bound up with the assessment of the scope of the State party's obligation under article 26 of the Covenant to respect and ensure the equal protection of the law against discriminatory dismissal."<sup>178</sup> However, at the merits stage, the HRC found that there was no actionable discrimination and decided it was "unnecessary to decide whether the dismissal was directly imputable to the State party, or whether the State party's responsibility would be engaged by a failure to prevent third party discrimination."<sup>179</sup> This comment provides one illustration of the difference the HRC sees between direct attribution through control of a corporation and responsibility through failure to abide by the duty to protect. However, it also highlights that regardless, the end-result is still likely to require action by the State to curb abuse by the enterprise. In other words, either way, the State is unlikely to succeed in an argument that it does not need to take any steps to prevent and punish corporate abuse.

143. Finally, as mentioned in Part IV, *Hopu and Bessert v France* provides an example of a communication complaining about actions by both a State-owned enterprise and a private business enterprise where the HRC found the State in breach of its Covenant obligations. The HRC did not provide much guidance on the links between the State and corporate actions and thus it is not clear if it directly attributed the corporate acts to the State on the basis of control. Nevertheless, it relied to some degree on the State's failure to monitor or regulate the corporations' actions and implied that the State-owned enterprise in particular should have considered the project's human rights impacts before granting the lease to the private company.<sup>180</sup>

144. The above examples highlight that in line with broader concepts of international law, the Committee sees States Parties as having the same types of obligations regarding both State and non-State owned companies – the differentiating factor is government control rather than ownership. In certain situations of government control, the Committee clearly considers that the company's acts may be directly attributed to the State. However, as set out in Part VIII below, it is not always clear how the State's obligations in such situations may differ, if at all, to those under situations where it is required to act with due diligence to protect against private abuse.

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<sup>178</sup> *Id.* at para 7.4.

<sup>179</sup> *Id.* at para. 8.4.

<sup>180</sup> *Hopu and Bessert v France*, *supra* note 60, at para. 10.3.

## PART VI – TERRITORIAL SCOPE

145. This part examines the territorial scope of States Parties' duties under the ICCPR. The HRC's views in this area are only explored to the extent that they shed light on protection against corporate abuse outside a State Party's territory.

### A. Power or effective control

146. Under Art. 2(1) of the ICCPR, a State Party undertakes to respect and ensure the Covenant rights to all individuals "within its territory and subject to its jurisdiction." According to the HRC in General Comment 31, this means that a State Party must 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."<sup>181</sup> (emphasis added)

147. This view is not accepted by all States Parties, with some States arguing that under Art. 2(1), Covenant obligations only apply to areas which are both within a State Party's territory and jurisdiction.<sup>182</sup> Nevertheless, the HRC has consistently rejected this view,<sup>183</sup> and has said that as part of interpreting the Covenant in "good faith" and "in accordance with the ordinary meaning to be given to its terms in their context, including subsequent practice," a State Party should "acknowledge the applicability of the Covenant with respect to individuals under its jurisdiction but outside its territory."<sup>184</sup>

148. In General Comment 31, the HRC suggests that a State Party's power or effective control over individuals outside its territory may result from a variety of situations. It provides one example as being the presence of a State Party's troops or agents on foreign territory, including as part of peacekeeping operations. For example, the Committee comments that "... the enjoyment of Covenant rights is not limited to citizens of States Parties but must also be available to all individuals ... who may find themselves in the territory or subject to the jurisdiction of the State Party. This principle also applies to those within the power or effective control of the forces of a State Party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained, such as forces constituting a national contingent of a State Party assigned to an international peace-keeping or peace-enforcement operation."<sup>185</sup>

149. In the Concluding Observations for the United States, the HRC suggested that detention facilities in Guantanamo Bay, Afghanistan, Iraq and other overseas locations run by agents of the United States government, whether part of the military or privately

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<sup>181</sup> General Comment 31, *supra* note 16, at para. 10.

<sup>182</sup> See generally Annex 1 of the latest periodic report from the USA: UN Doc. CCPR/C/USA/3, 28 November 2005.

<sup>183</sup> See also Olivier De Schutter, *Globalization and Jurisdiction: Lessons from the European Convention on Human Rights*, 6 *Baltic Yearbook of International Law*, 183-245, 196 (2006). Professor De Schutter notes that the HRC's position has been mirrored by CESCR as well as the International Court of Justice in its Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory.

<sup>184</sup> US Concluding Observations, *supra* note 54, at para. 10.

<sup>185</sup> General Comment 31, *supra* note 16, at para. 10.

contracted, are within the State's jurisdiction and therefore subject to its obligations under the Covenant. For example, the HRC said that "the State party should conduct prompt and independent investigations into all allegations concerning suspicious deaths, torture or cruel, inhuman or degrading treatment or punishment inflicted by its personnel (including commanders) as well as contract employees, in detention facilities in Guantanamo Bay, Afghanistan, Iraq and other overseas locations."<sup>186</sup>

150. Continuing the theme of military or peacekeeping presence amounting to power or effective control over individuals, the Concluding Observations for Poland welcomed Poland's commitment to respect the rights of individuals within its jurisdiction, including situations where troops operate overseas in peacekeeping missions.<sup>187</sup> Further, in the latest Concluding Observations for Belgium, published soon after General Comment 31, the Committee was concerned that Belgium was "unable to affirm, in the absence of a finding by an international body that it has failed to honor its obligations, that the Covenant automatically applies when it exercises power or effective control over a person outside its territory, regardless of the circumstances in which such power or effective control was obtained, such as forces constituting a national contingent assigned to an international peacekeeping or peace enforcement operation."<sup>188</sup> The HRC commented that the State should "respect the safeguards established by the Covenant, not only in its territory but also when it exercises its jurisdiction abroad, as for example in the case of peacekeeping missions or NATO military missions, and should train the members of such missions appropriately."<sup>189</sup>

151. The HRC also expressed concern at the small number of convictions for suspected human rights abuses by the Belgian military in Somalia.<sup>190</sup> It indicated that the victims were under the effective control of Belgian forces and therefore Belgium's Covenant obligations applied.

152. Finally, the Concluding Observations for Germany, published the same month as General Comment 31, expressed concern at the State's ambiguity as to the Covenant's applicability to "persons subject to its jurisdiction in situations where its troops or police forces operate abroad, in particular in the context of peace missions."<sup>191</sup> It reiterated that States Parties could be held accountable for their agents' actions outside their territories.

153. The Decisions in the sample do not provide much guidance on this issue. In a communication alleging discrimination by Portugal for failing to compensate citizens who lost property during the civil war in Portuguese colonies (citizens who had lost property in Portugal received compensation), Portugal suggested that the territorial requirement is satisfied where a State exercises a "degree of authority" over the

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<sup>186</sup> US Concluding Observations, *supra* note 54, at para. 14. See also paras. 15 and 18.

<sup>187</sup> Poland Concluding Observations, *supra* note 61, at para. 3.

<sup>188</sup> Concluding Observations, Belgium, UN Doc. CCPR/CO/81/BEL, 12 August 2004, at para. 6 (hereinafter Belgium Concluding Observations).

<sup>189</sup> *Id.*

<sup>190</sup> *Id.* at para. 10.

<sup>191</sup> Germany Concluding Observations, *supra* note 130, at para. 11.

victims.<sup>192</sup> Only one member commented on these arguments, saying that while such issues might “interest international lawyers,” they were unnecessary to discuss because the communication was inadmissible based on failure to exhaust domestic remedies.<sup>193</sup>

## **B. Relevance to the duty to protect against corporate abuse**

154. The above demonstrates that the HRC considers that a State Party’s Covenant obligations apply to individuals over whom it has power or effective control, whether or not those individuals are within the State’s national territory. To date, the Committee has only considered situations where effective control is gained through State agents acting abroad, especially those involved in peacekeeping operations.

155. The HRC has not explicitly addressed the situation where a corporation acts on the State’s behalf (exercising elements of governmental authority or acting under the instructions, direction or control of the State) outside the national territory, and exercises a degree of control over individuals such that, were such control to be exercised by State agents, the State’s Covenant obligations would apply in full. Thus more guidance from the HRC would be helpful regarding such a situation.

156. This situation is entirely different from scenarios in which corporate actors abuse the rights of persons completely outside the State’s territory or effective control where the State is able to influence the actions of those corporations in some way. This is considered in Part VII below.

## **PART VII EXTRATERRITORIAL REGULATION OVER ACTIONS BY CORPORATIONS ABROAD**

157. Given the SRSG’s mandate looks specifically at the acts of transnational businesses, it is also important to explore whether the HRC has interpreted the Covenant as requiring or encouraging the regulation of persons or activities affecting individuals who are outside a State’s national territory or effective control, including the activities of corporations with strong links to the State. Such regulation is often referred to as “prescriptive extraterritorial jurisdiction.”

158. As noted in the SRSG’s March 2007 report, prescriptive extraterritorial jurisdiction is generally permissible under international law provided there is a recognized basis of jurisdiction: including where the actor or victim is a national; where the acts have substantial adverse effects on the State; or where specific international crimes are

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<sup>192</sup> *Abel da Silva Queiroz et al v Portugal*, Communication 969/2001, UN Doc. CCPR/C/84/969/2001, 26 August 2005, ¶4.9.

<sup>193</sup> *Id.* See Individual Opinion from Ms. Ruth Wedgwood.



involved.<sup>194</sup> An overall reasonableness test must also be met, which includes non-intervention in other States' internal affairs.<sup>195</sup>

159. At the outset, it is important to note that unlike the Convention Against Torture (CAT), the Covenant does not expressly require States Parties to take action in relation to perpetrators of abuse abroad. Art. 2(1) says only that States Parties undertake to respect and ensure rights to all individuals within their territory and jurisdiction. In contrast, Art. 5 of CAT requires a State Party to take such measures as may be necessary to establish jurisdiction over certain offences when: (a) the offences are committed in any territory under its jurisdiction; (b) when the alleged offender is a national of that State; or when the victim is a national of the State if it considers it appropriate. The State Party should also take the necessary measures to establish jurisdiction over offences in cases where the alleged offender is present in territory under its jurisdiction and it does not extradite that person. Therefore, CAT appears to direct States Parties to regulate the activities of their nationals even when such persons may have breached rights abroad.<sup>196</sup>

160. Thus, this Part examines whether the HRC has ever interpreted the Covenant as requiring such actions by States Parties. The HRC has not considered this issue in great detail. More guidance is encouraged to not only further explain the few comments the HRC has made but also to confirm whether, in an increasingly inter-connected world, States Parties are obliged under the Covenant to take any action against perpetrators, including corporations, with links to the State who abuse the rights of individuals who are both outside the State's territory and its effective control.<sup>197</sup>

161. At the outset, it is important to note that the research did not suggest that the HRC believes extraterritorial regulation is *not* permitted under the Covenant, though the Committee has indicated that actions in relation to situations outside the State's territory and effective control should comply with the UN Charter and other relevant principles of international law.

## **A. General Comments**

162. The most relevant statement appears to be in General Comment 31, which, after a long "list" of recommendations to States Parties about how to protect rights, directs States Parties to "also assist each other to bring to justice persons suspected of having committed acts in violation of the Covenant that are punishable under domestic or international law."<sup>198</sup> However, it is unclear if this statement requires or even encourages

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<sup>194</sup> Under the principle of "universal jurisdiction" States may be obliged to exercise jurisdiction over individuals within their territory who allegedly committed certain international crimes. It is unclear whether and how such obligations extend jurisdiction over juridical persons, including corporations. See A/HRC/4/35/Add.2 and A/HRC/4/35, para. 15.

<sup>195</sup> Of course, the entire human rights regime may be seen to challenge the classical view of non-intervention. The debate here hinges on what is considered coercive. For more detail, see A/HRC/4/35/Add. 2 and also Clapham, *supra* note 33, at 98.

<sup>196</sup> For more detail, see the report on CAT as part of this series – likely to be published by July 2007.

<sup>197</sup> Note that it is outside the scope of this report to explore when a corporation may be considered domiciled in a State.

<sup>198</sup> General Comment 31, *supra* note 16, at para. 18.

regulation over persons within the State's jurisdiction that have committed abuses abroad, since it could also be discussing information exchanges; respect for extradition treaties; all of these steps or some other kind of assistance entirely.

163. As explained in more detail in Part I, General Comment 31 also encourages States Parties to call on "offending States" to comply with their treaty obligations. It says such calls should be "considered a reflection of legitimate community interest."<sup>199</sup> The significance, if any, of this comment in relation to extraterritorial regulation is unclear since it is unknown if such comments may be seen as encouragement for States Parties to also take steps to prevent abuse overseas by their own nationals, including corporations, especially in situations where the host State is unwilling or unable to act. At the very least, it may suggest that provided States Parties abide by non-intervention principles in the UN Charter and customary international law, the Committee does not consider that States Parties are prohibited from engaging in extraterritorial regulation under the Covenant.

164. General Comment 7 on the prohibition against torture refers to Art. 7(2)'s requirement for free consent to medical or scientific experimentation and provides that "at least in countries where science and medicine are highly developed, and even for peoples and areas outside their borders if affected by their experiments, more attention should be given to the possible need and means to ensure the observance of this provision."<sup>200</sup> It is unknown what the Committee meant by "their experiments" - i.e. whether this phrase was also intended to refer to experiments by private actors. It is also unclear whether the phrase "paying attention" to peoples and areas outside a State's borders indicated that the HRC expected States Parties to prosecute their nationals, including corporate actors, for abusing rights of individuals outside their territory and beyond their effective control. General Comment 7 was replaced by General Comment 20, which reiterates Art. 7(2)'s importance but does not mention persons outside the State's borders.<sup>201</sup> Nevertheless, it also does not renounce these earlier comments.

165. General Comment 12 on self-determination provides that all States Parties should "take positive action to facilitate realization of and respect for the right of peoples to self-determination."<sup>202</sup> It confirms that such actions must be consistent with the principle of non-intervention contained in the UN Charter and customary international law. Again, it is uncertain if the HRC was merely referring to traditional acts of international cooperation such as development assistance and political support for peoples denied the right, or if it was contemplating regulation of nationals, including corporations, which interfere with self-determination rights abroad.

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<sup>199</sup> *Id.* at para. 2.

<sup>200</sup> General Comment 7, at para. 3.

<sup>201</sup> General Comment 20, *supra* note 50, at para. 5.

<sup>202</sup> General Comment No. 12, 'General Comment No. 12: Article 1 (Right to self-determination),' 13 March 1984 (21<sup>st</sup> Session), at para. 6, UN Human Rights Compilation at 134.

## B. Concluding Observations

166. The Concluding Observations in the sample are also largely silent on this issue. As mentioned above, the Concluding Observations for Belgium expressed concern at the small number of convictions for suspected human rights abuse by the Belgian military in Somalia.<sup>203</sup> However, this concern stemmed from the fact that the Covenant violations were committed by State agents of Belgium (i.e. the Belgian military) against individuals under the State's control, rather than amounting to a separate call to regulate actors over whom the State had some influence.

## C. Decisions

167. It is even less surprising that none of the Decisions in the sample deal with a complaint as to corporate acts affecting individuals outside the State Party's territory or effective control. According to Art. 1 of the Optional Protocol, communications must be from individuals subject to the State Party's jurisdiction who claim to be victims of a violation by the State Party of any of the Covenant rights. Thus it would seem difficult for an individual outside the State's jurisdiction to complain about the State failing to take actions against third parties breaching their rights. And it would seem just as difficult for individuals within the State's jurisdiction to convincingly argue that their rights have been violated by a failure to regulate corporate acts affecting individuals abroad.

168. Some of the deportation and extradition Decisions consider the responsibility of States Parties to protect individuals under their jurisdiction from facing abuse overseas, particularly in situations involving extradition or deportation to a State where those individuals would be likely to face torture or other threats to security of the person. However, these Decisions concern situations where an individual is under the jurisdiction of a State Party; they do not shed light on any obligations which States Parties may have as regards persons outside their jurisdiction, even where the State may influence their situation.

169. For example, in *Ahani v Canada*, the author claimed he would face persecution, including torture, by Iranian government agents if deported by Canada. He was deported despite the HRC's calls to delay the deportation and the evidence suggested that the State Party had failed to appropriately assess whether there was a substantial risk of torture upon his return to Iran. In finding Canada in violation of Art. 9(4) as well as Art. 13 in conjunction with Art. 7, the HRC considered that the State Party was obliged to "take steps of due diligence to avoid a threat to an individual of torture from third parties."<sup>204</sup> In identifying Canada's obligation to provide the author with an effective remedy, it said that the State was obliged to "(a) to make reparation to the author if it comes to light that torture was in fact suffered subsequent to deportation, and (b) to take such steps as may be appropriate to ensure that the author is not, in the future, subjected to torture as a result of the events of his presence in, and removal from, the State party."<sup>205</sup>

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<sup>203</sup> Belgium Concluding Observations, *supra* note 187, at para. 10.

<sup>204</sup> *Ahani v Canada*, *supra* note 22, at para. 10.6.

<sup>205</sup> *Id.* at para. 12.

170. Along with similar comments in General Comment 20, General Comment 31, Concluding Observations and numerous other Decisions, this Decision illustrates the HRC's support for holding a State Party responsible for protecting persons within its effective control from violations of their Covenant rights overseas where harm is foreseeable.<sup>206</sup> The general principle seems to be: "if a person is lawfully expelled or extradited, the State party concerned will not generally have responsibility under the Covenant for any violations of that person's rights that may later occur in the other jurisdiction. In that sense a State party clearly is not required to guarantee the rights of persons within another jurisdiction. If a State party takes a decision relating to a person within its jurisdiction and the necessary and foreseeable consequences is that the person's rights under the Covenant will be violated in another jurisdiction, the State party itself may be in violation of the Covenant... The foreseeability of the consequence would mean that there was a present violation by the State party, even though the consequence would not occur until later on."<sup>207</sup>

171. A key factor in deportation and extradition Decisions is that the author is within the State Party's jurisdiction and that the State is obliged to make deportation or extradition decisions in light of whether violation of the author's rights in another jurisdiction is foreseeable. Thus, it does not appear that these Decisions advocate an extension of the duty to protect against abuse overseas per se, but rather only when it is foreseeable that a **person within a State Party's jurisdiction** could face abuse if sent to another jurisdiction. As the HRC expressed it in *Judge v Canada*, the question seems to be whether the State which holds the rights-holder will be the "crucial link in the causation chain" that might make abuse possible in another jurisdiction.<sup>208</sup>

172. Greater insight is needed from the Committee on whether a more general formulation based on foreseeability arguments would be consistent with the Covenant.

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<sup>206</sup> See General Comment 31, *supra* note 16, at para. 12 and General Comment 20, *supra* note 50, at para. 9. In General Comment 20, the Committee says that in its view, "... States parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement..." The concept of non-refoulement is a principle of international law, codified in Art. 33 of 1951 Convention on the Status of Refugees. Art. 33 prohibits States Parties from returning a refugee to a place where "his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion." See also Canada Concluding Observations, *supra* note 146, at paras. 15 – 16; US Concluding Observations, *supra* note 54, at para. 16.

<sup>207</sup> *Kindler v. Canada*, Communication 470/1991, UN Doc. CCPR/C/48/D/470/1991, 11 November 1993, at para. 6.2 (hereinafter *Kindler v Canada*). See also para. 13.1. Note that in *Kindler v Canada*, the HRC ultimately decided that the deportation by a State that has abolished the death penalty of a person to a country where they will face the death penalty was not a violation of Covenant rights per se. In *Judge v Canada*, Communication 829/1998, UN Doc. CCPR/C/78/D/829/1998, 20 October 2003 (hereinafter *Judge v Canada*), the Committee noted that this view might no longer be appropriate given the need to read the Covenant as a living document in light of factual and legal developments. It therefore considered that States that have abolished the death penalty do have "an obligation not to expose a person to the real risk" of the application of the death penalty in another State. (para 10.4) Despite this difference in views on whether risk of the death penalty equated to a risk of a breach of Covenant rights per se, it appears that both Decisions supported the contention that a State Party may violate the Covenant if it deports or extradites a person within its jurisdiction to another jurisdiction where there is a real risk that person would face abuse.

<sup>208</sup> *Judge v Canada*, *supra* note 205, at para. 10.6.

For example, are there situations in which a State may be responsible for taking action in relation to events abroad where it is foreseeable that failure to do so, including failing to regulate nationals, could lead to abuse - even in situation when the rights-holder is not within the State's jurisdiction? More guidance from the HRC on this issue could greatly assist States to understand if there are any situations in which they are required to exercise extraterritorial regulation over their nationals, including corporations, beyond situations where they have power or effective control over the affected individuals.

## **PART VIII – CONCLUSION: ISSUES FOR FURTHER CONSIDERATION**

173. This report shows that the Committee has increasingly thought about and provided guidance concerning States Parties' duties in relation to corporate activities. It is clear that it considers States Parties to have a duty to act with due diligence to prevent, punish, investigate and redress private abuse of all rights capable of being violated by private actors. And it has discussed this duty in the context of corporate activities on numerous occasions. At the very least it is clear that the HRC views this duty as applying to protect individuals within States Parties' territory or jurisdiction – that is, those within their power or effective control.

174. While the Committee does not often prescribe exactly what measures States should take in order to fulfill the duty in relation to corporate activities, it is clear it considers legislative, administrative, judicial and educative tools to be of significant importance. In actual fact, the lack of detailed guidance to States on some issues is not surprising considering the discretion provided by the Covenant.

175. Nonetheless, set out below are several areas which are key to the SRS's mandate and which with greater elaboration could assist all stakeholders to better understand the State duty to protect against corporate abuse. No judgment is made as to whether and how the HRC should consider all or some of these issues – they are highlighted as much to indicate how far the HRC has progressed on this issue as to point out areas which could pose difficult questions for States Parties, businesses, individuals and civil society.

### **A. Scope of the duty to protect**

176. Of the HRC's General Comments, only General Comment 31 mentions the concept of "due diligence" in explaining States Parties' positive obligations under the duty to protect. And while the research sample was admittedly limited, very few Concluding Observations or Decisions in the sample mention or elaborate on this concept, and then only with limited relevance for situations involving business enterprises.

177. Accordingly, while it is clear that the HRC considers States Parties' obligations regarding third party abuse to be ones of means rather than result, it not always clear how much the HRC expects of States Parties, or even encourages them to do, in satisfying these obligations. For example, it is uncertain if States Parties need only take all reasonable steps or if a higher standard is required. Further, as elaborated below, the HRC rarely expresses any preference for whether steps, particularly remedial steps, should be taken against individuals or entities. And it is unknown whether a State might

have weaker or stronger duties in relation to corporate abuse than other types of non-State abuse.

178. It would also be helpful to further understand the Committee's views on the interaction of the duty to protect with obligations to ensure effective participation by communities, especially indigenous communities, in decisions affecting them where such decisions relate to commercial projects. To this end, it would be useful to know whether the Committee supports States taking steps to require or encourage participating companies to undertake human rights impact assessments in relation to such activities.

#### **B. State controlled enterprises**

179. It is unclear under which conditions the HRC considers that a company, while not part of the State apparatus, may nevertheless be considered to engage directly the responsibility of the State because it acts under the State's direction, control or instructions. Further, even where this is the case, it is unknown if the State will be held to a different standard than under the duty to protect – i.e. whether it may be held responsible even if it acted with due diligence to prevent, punish, investigate and redress the abuse.

#### **C. Natural v legal persons**

180. Greater clarity from the Committee would be helpful regarding whether it believes that the right to an effective remedy ever necessitates action against a business enterprise in its own right. Of course, States Parties have a certain degree of discretion when implementing the Covenant and the Committee has rightly focused more on the end-results of protection and enjoyment. Nevertheless, further discussion on this issue could consider what the remedial options of victims should be, and what liabilities should be imposed on business enterprises. It could also pave the way for dialogue between States Parties and the HRC on best practices.

#### **D. Territorial application**

181. The Committee clearly considers that a State Party's Covenant obligations apply to individuals who are within its power or effective control even if they are outside the State's national territory. This includes situations where the State's agents exercise such power or effective control. However, the Committee has not considered how this concept could work in the context of corporate activities.

182. It is therefore unknown how the Committee might deal with a situation where a corporation acts on the State's behalf (exercising elements of governmental authority or acting under the State's instructions, direction or control) outside the national territory, and exercises a degree of control over individuals such that, were such control to be exercised by State agents, the State's Covenant obligations would apply in full. The fact that the HRC appears to have discussed the concept of effective control only in relation to peacekeeping and detention facilities abroad to date should not be interpreted as an indication that the concept is limited to these situations.

#### **E. Extraterritorial regulation**

183. The research sample uncovered very little guidance on whether the HRC supports or is likely to support an interpretation of the Covenant which would require States to regulate the activities of their nationals abroad, including corporations, in situations where the State does not have power or effective control over the relevant individuals affected by such activities.

184. Assorted statements in the General Comments and Decisions at least suggest that the HRC *might* encourage such regulation or some other form of legal or political action by States but these statements could also benefit from further elaboration and clarification. Further, the research did not suggest that the HRC believes extraterritorial regulation is *not* permitted under the Covenant, though the Committee has indicated that actions in relation to situations outside the State's territory and effective control should comply with the UN Charter and other relevant principles of international law.

185. More detailed discussion on this issue could help States to better understand whether the HRC believes the Covenant requires extraterritorial regulation or other action to curb corporate abuse affecting individuals who are both outside the State's national territory and its effective control. If so, it would be helpful to know whether the HRC might call for action only in relation to States Parties' nationals (including legal persons), or whether there are more general requirements under the concept of universal jurisdiction. It would also be useful to understand whether the HRC believes there are any limitations on such regulation under the Covenant.

#### **F. Inter-State dialogue**

186. More generally, it is unclear exactly what significance to attribute to the HRC's encouragement in General Comment 31 for States Parties to call on others to comply with their obligations. It would be helpful to understand whether the HRC expects actions by States Parties apart from inter-State dialogue in order to note their concern, including taking steps to limit abuse in such States by their own nationals, or making loans and development assistance conditional upon human rights protection.

## **ANNEX 1: SUBSTANTIVE ARTICLES OF THE ICCPR<sup>209</sup>**

**International Covenant on Civil and Political Rights**  
**Adopted and opened for signature, ratification and accession by General Assembly**  
**resolution 2200A (XXI)**  
**of 16 December 1966**  
**Entry into force 23 March 1976, in accordance with Article 49**

Preamble

The States Parties to the present Covenant,

Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Recognizing that these rights derive from the inherent dignity of the human person,

Recognizing that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights,

Considering the obligation of States under the Charter of the United Nations to promote universal respect for, and observance of, human rights and freedoms,

Realizing that the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant,

Agree upon the following articles:

### ***PART I***

#### ***Article 1***

1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

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

3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right

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<sup>209</sup> Note that all procedural Articles have been taken out of this version, leaving only the substantive Articles that are referred to in the report. Text sourced from the official site of the UN Office of the High Commissioner for Human Rights as at June 2007. See <http://www.ohchr.org/english/law/ccpr.htm>.



of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

## ***PART II***

### ***Article 2***

1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.
3. Each State Party to the present Covenant undertakes:
  - (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
  - (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
  - (c) To ensure that the competent authorities shall enforce such remedies when granted.

### ***Article 3***

The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant.

### ***Article 4***

1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.
2. No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision.
3. Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. Art. further communication shall be made, through the same intermediary, on the date on which it terminates such derogation.

### ***Article 5***

1. Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights

and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant.

2. There shall be no restriction upon or derogation from any of the fundamental human rights recognized or existing in any State Party to the present Covenant pursuant to law, conventions, regulations or custom on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent.

## ***PART III***

### ***Article 6***

1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgement rendered by a competent court.

3. When deprivation of life constitutes the crime of genocide, it is understood that nothing in this article shall authorize any State Party to the present Covenant to derogate in any way from any obligation assumed under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide.

4. Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.

5. Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.

6. Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant.

### ***Article 7***

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

### ***Article 8***

1. No one shall be held in slavery; slavery and the slave-trade in all their forms shall be prohibited.

2. No one shall be held in servitude.

3.

(a) No one shall be required to perform forced or compulsory labour;

(b) Paragraph 3 (a) shall not be held to preclude, in countries where imprisonment with hard labour may be imposed as a punishment for a crime, the performance of hard labour in pursuance of a sentence to such punishment by a competent court;

(c) For the purpose of this paragraph the term "forced or compulsory labour" shall not include:

(i) Any work or service, not referred to in subparagraph (b), normally required of a person who is under detention in consequence of a lawful order of a court, or of a person during conditional release from such detention;

(ii) Any service of a military character and, in countries where conscientious objection is recognized, any national service required by law of conscientious objectors;

(iii) Any service exacted in cases of emergency or calamity threatening the life or well-being of the community;

(iv) Any work or service which forms part of normal civil obligations.

## **Article 9**

1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.

3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.

4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

## **Article 10**

1. All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

2.

(a) Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons;

(b) Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication.

3. The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status.

## **Article 11**

No one shall be imprisoned merely on the ground of inability to fulfil a contractual obligation.

## **Article 12**

1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.
2. Everyone shall be free to leave any country, including his own.
3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.
4. No one shall be arbitrarily deprived of the right to enter his own country.

### **Article 13**

An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.

### **Article 14**

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

(b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

(c) To be tried without undue delay;

(d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;

(e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;

(g) Not to be compelled to testify against himself or to confess guilt.

4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.

5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.

6. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

### ***Article 15***

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.

2. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.

### ***Article 16***

Everyone shall have the right to recognition everywhere as a person before the law.

### ***Article 17***

1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

2. Everyone has the right to the protection of the law against such interference or attacks.

### ***Article 18***

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.

3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

### ***Article 19***

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
  - (a) For respect of the rights or reputations of others;
  - (b) For the protection of national security or of public order (ordre public), or of public health or morals.

### ***Article 20***

1. Any propaganda for war shall be prohibited by law.
2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

### ***Article 21***

The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.

### ***Article 22***

1. Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.
2. No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.
3. Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or to apply the law in such a manner as to prejudice, the guarantees provided for in that Convention.

### ***Article 23***

1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.
2. The right of men and women of marriageable age to marry and to found a family shall be recognized.
3. No marriage shall be entered into without the free and full consent of the intending spouses.

4. States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children.

### ***Article 24***

1. Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.

2. Every child shall be registered immediately after birth and shall have a name.

3. Every child has the right to acquire a nationality.

### ***Article 25***

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

(a) To take part in the conduct of public affairs, directly or through freely chosen representatives;

(b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;

(c) To have access, on general terms of equality, to public service in his country.

### ***Article 26***

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

### ***Article 27***

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

## ANNEX 2: STATES PARTIES TO THE ICCPR AND FIRST OPTIONAL PROTOCOL<sup>210</sup>

### ICCPR

<b>Last update:</b>	19 April 2007
<b>Entry into force:</b>	23 March 1976, in accordance with article 49 , for all provisions except those of article 41; 28 March 1979 for the provisions of article 41 (Human Rights Committee), in accordance with paragraph 2 of the said article 41.
<b>Registration:</b>	23 March 1976, No. 14668.
<b>Status:</b>	Signatories: 67, Parties: 160.
<b>Text:</b>	United Nations, <i>Treaty Series</i> , vol. 999, p. 171 and vol. 1057, p. 407 (procès-verbal of rectification of the authentic Spanish text); depositary notification C.N.782.2001.TREATIES-6 of 5 October 2001 [Proposal of correction to the original of the Covenant (Chinese authentic text)] and C.N.8.2002.TREATIES-1 of 3 January 2002 [Rectification of the original of the Covenant (Chinese authentic text)].

**Note:** The Covenant was opened for signature at New York on 19 December 1966.

Participant	Signature	Ratification, Accession (a), Succession (d)
Afghanistan	.	24 Jan 1983 a
Albania	.	4 Oct 1991 a
Algeria	10 Dec 1968	12 Sep 1989
Andorra	5 Aug 2002	22 Sep 2006
Angola	.	10 Jan 1992 a
Argentina	19 Feb 1968	8 Aug 1986
Armenia	.	23 Jun 1993 a
Australia	18 Dec 1972	13 Aug 1980
Austria	10 Dec 1973	10 Sep 1978
Azerbaijan	.	13 Aug 1992 a
Barhain	.	20 Sep 2006 a
Bangladesh	.	6 Sep 2000 a
Barbados	.	5 Jan 1973 a
Belarus	19 Mar 1968	12 Nov 1973
Belgium	10 Dec 1968	21 Apr 1983
Belize	.	10 Jun 1996 a
Benin	.	12 Mar 1992 a
Bolivia	.	12 Aug 1982 a
Bosnia and Herzegovina 1	.	1 Sep 1993 d
Botswana	8 Sep 2000	8 Sep 2000
Brazil	.	24 Jan 1992 a
Bulgaria	8 Oct 1968	21 Sep 1970
Burkina Faso	.	4 Jan 1999 a

<sup>210</sup> As at 28 April 2007 - note that lists officially updated on 19 April 2007. Sourced from the official site of the UN Office of the High Commissioner for Human Rights. See <http://www.ohchr.org/english/countries/ratification/5.htm>.



Burundi	.	9 May 1990 a
Cambodia 2 , 3	17 Oct 1980	26 May 1992 a
Cameroon	.	27 Jun 1984 a
Canada	.	19 May 1976 a
Cape Verde	.	6 Aug 1993 a
Central African Republic	.	8 May 1981 a
Chad	.	9 Jun 1995 a
Chile	16 Sep 1969	10 Feb 1972
China 4 , 5 , 13	5 Oct 1998	.
Colombia	21 Dec 1966	29 Oct 1969
Congo	.	5 Oct 1983 a
Costa Rica	19 Dec 1966	29 Nov 1968
Côte d'Ivoire	.	26 Mar 1992 a
Croatia 1	.	12 Oct 1992 d
Cyprus	19 Dec 1966	2 Apr 1969
Czech Republic 6	.	22 Feb 1993 d
Democratic People's Republic of Korea 7	.	14 Sep 1981 a
Democratic Republic of the Congo	.	1 Nov 1976 a
Denmark	20 Mar 1968	6 Jan 1972
Djibouti	.	5 Nov 2002 a
Dominica	.	17 Jun 1993 a
Dominican Republic	.	4 Jan 1978 a
Ecuador	4 Apr 1968	6 Mar 1969
Egypt	4 Aug 1967	14 Jan 1982
El Salvador	21 Sep 1967	30 Nov 1979
Equatorial Guinea	.	25 Sep 1987 a
Eritrea	.	22 Jan 2002 a
Estonia	.	21 Oct 1991 a
Ethiopia	.	11 Jun 1993 a
Finland	11 Oct 1967	19 Aug 1975
France	.	4 Nov 1980 a
Gabon	.	21 Jan 1983 a
Gambia	.	22 Mar 1979 a
Georgia	.	3 May 1994 a
Germany 8 , 9	9 Oct 1968	17 Dec 1973
Ghana	7 Sep 2000	7 Sep 2000
Greece	.	5 May 1997 a
Grenada	.	6 Sep 1991 a
Guatemala	.	5 May 1992 a
Guinea	28 Feb 1967	24 Jan 1978
Guinea-Bissau	12 Sep 2000	.
Guyana	22 Aug 1968	15 Feb 1977
Haiti	.	6 Feb 1991 a
Honduras	19 Dec 1966	25 Aug 1997
Hungary	25 Mar 1969	17 Jan 1974

Iceland	30 Dec 1968	22 Aug 1979
India	.	10 Apr 1979 a
Indonesia	.	23 Feb 2006 a
Iran (Islamic Republic of)	4 Apr 1968	24 Jun 1975
Iraq	18 Feb 1969	25 Jan 1971
Ireland	1 Oct 1973	8 Dec 1989
Israel	19 Dec 1966	3 Oct 1991
Italy	18 Jan 1967	15 Sep 1978
Jamaica	19 Dec 1966	3 Oct 1975
Japan	30 May 1978	21 Jun 1979
Jordan	30 Jun 1972	28 May 1975
Kazakhstan	2 Dec 2003	24 Jan 2006
Kenya	.	1 May 1972 a
Kuwait	.	21 May 1996 a
Kyrgyzstan	.	7 Oct 1994 a
Lao People's Democratic Republic	7 Dec 2000	.
Latvia	.	14 Apr 1992 a
Lebanon	.	3 Nov 1972 a
Lesotho	.	9 Sep 1992 a
Liberia	18 Apr 1967	22 Sep 2004
Libyan Arab Jamahiriya	.	15 May 1970 a
Liechtenstein	.	10 Dec 1998 a
Lithuania	.	20 Nov 1991 a
Luxembourg	26 Nov 1974	18 Aug 1983
Madagascar	17 Sep 1969	21 Jun 1971
Malawi	.	22 Dec 1993 a
Maldives	.	19 Sep 2006 a
Mali	.	16 Jul 1974 a
Malta	.	13 Sep 1990 a
Mauritania	.	17 Nov 2004 a
Mauritius	.	12 Dec 1973 a
Mexico	.	23 Mar 1981 a
Monaco	26 Jun 1997	28 Aug 1997
Mongolia	5 Jun 1968	18 Nov 1974
Montenegro <sup>14</sup>	.	23 Oct 2006 d
Morocco	19 Jan 1977	3 May 1979
Mozambique	.	21 Jul 1993 a
Namibia	.	28 Nov 1994 a
Nauru	12 Nov 2001	.
Nepal	.	14 May 1991 a
Netherlands 10	25 Jun 1969	11 Dec 1978
New Zealand 11	12 Nov 1968	28 Dec 1978
Nicaragua	.	12 Mar 1980 a

Niger	.	7 Mar 1986 a
Nigeria	.	29 Jul 1993 a
Norway	20 Mar 1968	13 Sep 1972
Panama	27 Jul 1976	8 Mar 1977
Paraguay	.	10 Jun 1992 a
Peru	11 Aug 1977	28 Apr 1978
Philippines	19 Dec 1966	23 Oct 1986
Poland	2 Mar 1967	18 Mar 1977
Portugal 5	7 Oct 1976	15 Jun 1978
Republic of Korea	.	10 Apr 1990 a
Republic of Moldova	.	26 Jan 1993 a
Romania	27 Jun 1968	9 Dec 1974
Russian Federation	18 Mar 1968	16 Oct 1973
Rwanda	.	16 Apr 1975 a
Saint Vincent and the Grenadines	.	9 Nov 1981 a
San Marino	.	18 Oct 1985 a
Sao Tome and Principe	31 Oct 1995	.
Senegal	6 Jul 1970	13 Feb 1978
Serbia and Montenegro 1	.	12 Mar 2001 d
Seychelles	.	5 May 1992 a
Sierra Leone	.	23 Aug 1996 a
Slovakia 6	.	28 May 1993 d
Slovenia 1	.	6 Jul 1992 d
Somalia	.	24 Jan 1990 a
South Africa	3 Oct 1994	10 Dec 1998
Spain	28 Sep 1976	27 Apr 1977
Sri Lanka	.	11 Jun 1980 a
Sudan	.	18 Mar 1986 a
Suriname	.	28 Dec 1976 a
Swaziland	.	26 Mar 2004 a
Sweden	29 Sep 1967	6 Dec 1971
Switzerland	.	18 Jun 1992 a
Syrian Arab Republic	.	21 Apr 1969 a
Tajikistan	.	4 Jan 1999 a
Thailand	.	29 Oct 1996 a
The Former Yugoslav Republic of Macedonia 1	.	18 Jan 1994 d
Timor-Leste	.	18 Sep 2003 a
Togo	.	24 May 1984 a
Trinidad and Tobago	.	21 Dec 1978 a
Tunisia	30 Apr 1968	18 Mar 1969
Turkey	15 Aug 2000	23 Sep 2003
Turkmenistan	.	1 May 1997 a
Uganda	.	21 Jun 1995 a
Ukraine	20 Mar 1968	12 Nov 1973
United Kingdom of Great Britain and Northern Ireland 12 , 13	16 Sep 1968	20 May 1976

United Republic of Tanzania	.	11 Jun 1976 a
United States of America	5 Oct 1977	8 Jun 1992
Uruguay	21 Feb 1967	1 Apr 1970
Uzbekistan	.	28 Sep 1995 a
Venezuela (Bolivarian Republic of)	24 Jun 1969	10 May 1978
Viet Nam	.	24 Sep 1982 a
Yemen <a href="#">14</a>	.	9 Feb 1987 a
Zambia	.	10 Apr 1984 a
Zimbabwe	.	13 May 1991 a

## First Optional Protocol

**Last update:** 19 April 2007  
**Entry into force:** 23 March 1976, in accordance with article 9.  
**Registration:** 23 March 1976, No. 14668.  
**Status:** Signatories: 34 ,Parties: 1091 , 2 , 3 .  
**Text:** United Nations, *Treaty Series* , vol. 999, p. 171 .

**Note:** The Protocol was opened for signature at New York on 19 December 1966.

Participant	Signature, Succession to signature (d)	Ratification, Accession (a), Succession (d)
Algeria	.	12 Sep 1989 a
Andorra	5 Aug 2002	22 Sep 2006
Angola	.	10 Jan 1992 a
Argentina	.	8 Aug 1986 a
Armenia	.	23 Jun 1993 a
Australia	.	25 Sep 1991 a
Austria	10 Dec 1973	10 Dec 1987
Azerbaijan	.	27 Nov 2001 a
Barbados	.	5 Jan 1973 a
Belarus	.	30 Sep 1992 a
Belgium	.	17 May 1994 a
Benin	.	12 Mar 1992 a
Bolivia	.	12 Aug 1982 a
Bosnia and Herzegovina	1 Mar 1995	1 Mar 1995
Bulgaria	.	26 Mar 1992 a
Burkina Faso	.	4 Jan 1999 a
Cambodia	27 Sep 2004	.
Cameroon	.	27 Jun 1984 a
Canada	.	19 May 1976 a
Cape Verde	.	19 May 2000 a
Central African Republic	.	8 May 1981 a
Chad	.	9 Jun 1995 a
Chile	.	27 May 1992 a
China 4	.	.
Colombia	21 Dec 1966	29 Oct 1969
Congo	.	5 Oct 1983 a
Costa Rica	19 Dec 1966	29 Nov 1968
Côte d'Ivoire	.	5 Mar 1997 a
Croatia	.	12 Oct 1995 a
Cyprus	19 Dec 1966	15 Apr 1992
Czech Republic 5	.	22 Feb 1993 d
Democratic Republic of the Congo	.	1 Nov 1976 a
Denmark	20 Mar 1968	6 Jan 1972
Djibouti	.	5 Nov 2002 a
Dominican Republic	.	4 Jan 1978 a
Ecuador	4 Apr 1968	6 Mar 1969
El Salvador	21 Sep 1967	6 Jun 1995
Equatorial Guinea	.	25 Sep 1987 a
Estonia	.	21 Oct 1991 a
Finland	11 Dec 1967	19 Aug 1975
France	.	17 Feb 1984 a

Gambia	.	9 Jun 1988 a
Georgia	.	3 May 1994 a
Germany	.	25 Aug 1993 a
Ghana	7 Sep 2000	7 Sep 2000
Greece	.	5 May 1997 a
Guatemala	.	28 Nov 2000 a
Guinea	19 Mar 1975	17 Jun 1993
Guinea-Bissau	12 Sep 2000	.
Guyana 2	.	10 May 1993 a
Honduras	19 Dec 1966	7 Jun 2005
Hungary	.	7 Sep 1988 a
Iceland	.	22 Aug 1979 a
Ireland	.	8 Dec 1989 a
Italy	30 Apr 1976	15 Sep 1978
Jamaica 1	[19 Dec 1966	3 Oct 1975]
Kyrgyzstan	.	7 Oct 1994 a
Latvia	.	22 Jun 1994 a
Lesotho	.	6 Sep 2000 a
Liberia	22 Sep 2004	.
Libyan Arab Jamahiriya	.	16 May 1989 a
Liechtenstein	.	10 Dec 1998 a
Lithuania	.	20 Nov 1991 a
Luxembourg	.	18 Aug 1983 a
Madagascar	17 Sep 1969	21 Jun 1971
Malawi	.	11 Jun 1996 a
Maldives	.	19 Sep 2006 a
Mali	.	24 Oct 2001 a
Malta	.	13 Sep 1990 a
Mauritius	.	12 Dec 1973 a
Mexico	.	15 Mar 2002 a
Mongolia	.	16 Apr 1991 a
Montenegro <sup>4</sup>	.	23 Oct 2006 d
Namibia	.	28 Nov 1994 a
Nauru	12 Nov 2001	.
Nepal	.	14 May 1991 a
Netherlands 6	25 Jun 1969	11 Dec 1978
New Zealand 7	.	26 May 1989 a
Nicaragua	.	12 Mar 1980 a
Niger	.	7 Mar 1986 a
Norway	20 Mar 1968	13 Sep 1972
Panama	27 Jul 1976	8 Mar 1977
Paraguay	.	10 Jan 1995 a
Peru	11 Aug 1977	3 Oct 1980
Philippines	19 Dec 1966	22 Aug 1989
Poland	.	7 Nov 1991 a
Portugal	1 Aug 1978	3 May 1983
Republic of Korea	.	10 Apr 1990 a
Republic of Moldova	16 Sep 2005	.
Romania	.	20 Jul 1993 a
Russian Federation	.	1 Oct 1991 a
Saint Vincent and the Grenadines	.	9 Nov 1981 a
San Marino	.	18 Oct 1985 a
Sao Tome and Principe	6 Sep 2000	.

Senegal	6 Jul 1970	13 Feb 1978
Serbia	12 Mar 2001 d	6 Sep 2001
Seychelles	.	5 May 1992 a
Sierra Leone	.	23 Aug 1996 a
Slovakia 5	.	28 May 1993 d
Slovenia	.	16 Jul 1993 a
Somalia	.	24 Jan 1990 a
South Africa	.	28 Aug 2002 a
Spain	.	25 Jan 1985 a
Sri Lanka	.	3 Oct 1997 a
Suriname	.	28 Dec 1976 a
Sweden	29 Sep 1967	6 Dec 1971
Tajikistan	.	4 Jan 1999 a
The Former Yugoslav Republic of Macedonia 8	12 Dec 1994 d	12 Dec 1994
Togo	.	30 Mar 1988 a
Trinidad and Tobago 3	.	[14 Nov 1980 a]
Turkey	3 Feb 2004	24 Nov 2006
Turkmenistan	.	1 May 1997 a
Uganda	.	14 Nov 1995 a
Ukraine	.	25 Jul 1991 a
Uruguay	21 Feb 1967	1 Apr 1970
Uzbekistan	.	28 Sep 1995 a
Venezuela	15 Nov 1976	10 May 1978
Zambia	.	10 Apr 1984 a