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UNDER INTERNATIONAL LAW**

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Abstract

International law defines the legal responsibilities of international legal persons in their conduct with each other, and their treatment of individuals within State boundaries. Its domain encompasses a wide range of issues of international concern, such as human rights, disarmament, international crime, refugees, migration, problems of nationality, the treatment of prisoners, the use of force, and the conduct of war, among others. It also regulates the global commons, such as the environment and sustainable development, international waters, outer space, global communications and world trade.

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1. INTRODUCTION

Responsibility is at the heart of international law, it constitutes an essential part of what may be considered the Constitution of the international community'. Responsibility interacts with the notion of sovereignty, and affects its definition, while, reciprocally; the omnipresence of sovereignty in international relations inevitably influences the conception of international responsibility. At the same time, responsibility has profoundly evolved together with international law itself: responsibility is the corollary of international.¹

The UN Charter, in its Preamble, set an objective: "to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained". Ever since, the development of, and respect for international law has been a key part of the work of the Organization. This work is carried out in many ways - by courts, tribunals, multilateral treaties - and by the Security Council, which can approve peacekeeping missions, impose sanctions, or authorize the use of force when there is a threat to international peace and security, if it deems this necessary. These powers are given to it by the UN Charter, which is considered an international treaty. As such, it is an instrument of international law, and UN Member States are bound by it. The UN Charter codifies the major principles of international relations, from the sovereign equality of States to the prohibition of the use of force in international relations.

2. CONCEPTS CLARIFICATION

JUDICIAL RESPONSIBILITY

Judicial responsibility is a broad concept. It encompasses all forms of responsibility that might be imposed on a person or body exercising a judicial function.²

3. INTERNATIONAL JUDICIAL BODIES RESPONSIBLE FOR THE COMPLIANCE OF STATES TO INTERNATIONAL LAW

A. International Court of Justice

The principal judicial organ of the United Nations is the International Court of Justice (ICJ). This main body of the UN settles legal disputes submitted to it by States in accordance with international law. It also gives advisory opinions on legal questions referred to it from authorized UN organs and specialized agencies. The Court is composed of 15 judges, who are elected for terms of nine years by the General Assembly and the Security Council.

B. Courts and Tribunals

In addition to the International Court of Justice, a wide variety of international courts, international tribunals, ad hoc tribunals and UN-assisted tribunals have varying degrees of relation to the United Nations (such as the tribunals for the former Yugoslavia and Rwanda, the Special Court for Sierra Leone, the Extraordinary Chambers in the Courts of Cambodia and the Special Tribunal for

¹Alain Pellet, Responsibility and International Law

²https://academic.oup.com/ajcl/article-abstract/30/suppl_1/177/2682301?redirectedFrom=PDF

Lebanon). The Mechanism for International Criminal Tribunals (the MICT) was established by the United Nations Security Council on 22 December 2010 to carry out a number of essential functions of the International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Tribunal for the former Yugoslavia (ICTY), after the completion of their respective mandates. These are established by (and are

C. The Security Council.

The Security Council and International Law

Some of the action of the Security Council has international law implications, such as those related to peacekeeping missions, ad hoc tribunals, sanctions, and resolutions adopted under Chapter VII of the Charter. In accordance with Article 13(b) of the Rome Statute, the Security Council can refer certain situations to the Prosecutor of the International Criminal Court (ICC), if it appears international crimes (such as genocide, crimes against humanity, war crimes, the crime of aggression) have been committed.

D. General Assembly - Sixth Committee (Legal)

The General Assembly's Sixth Committee is the primary forum for the consideration of legal questions in the General Assembly. All UN Member States are entitled to representation on the Sixth Committee as one of the main committees of the General Assembly.

E. The General Assembly and International Law

The UN Charter gives the General Assembly the power to initiate studies and make recommendations to promote the development and codification of international law. Many subsidiary bodies of the General Assembly consider specific areas of international law and report to the plenary. Most legal matters are referred the Sixth Committee, which then reports to the plenary. The International Law Commission and the UN Commission on International Trade Law report to the General Assembly. The General Assembly also considers topics related to the institutional law of the United Nations, such as the adoption of the Staff Regulations and the establishment of the system of internal justice.

F. International Law Commission

The International Law Commission promotes the progressive development of international law and its codification. The Commission's work on a topic usually involves some aspects of the progressive development, as well as the codification of international law, with the balance between the two varying depending on the particular topic.

G. United Nations Commission on International Trade Law (UNCITRAL)

The United Nations Commission on International Trade Law is a core legal body of the United Nations system in the field of international trade law, with universal membership, specializing in commercial law, with a focus on the modernization and harmonization of rules on international business. The UNCITRAL Secretariat has established a Case Law on UNCITRAL texts (CLOUT)

system for collecting and disseminating information on court decisions and arbitral awards relating to the Conventions and Model Laws that have emanated from the work of the Commission.³

4. RESPONSIBILITY OF STATES AND INTERNATIONAL INSTITUTIONS TO PROTECT HUMAN RIGHTS

General Comment No. 3 of the UN Committee on Economic, Social and Cultural Rights concretely explains the general nature of the obligations of States parties to the treaty. States parties who want to implement in good faith the ICESCR must:

It should be highlighted that the adoption and implementation of national human rights plans is considered internationally as a best practice and can represent a useful tool for a coherent and effective action towards the realization of all human rights. In the area of ESC rights the enactment of framework legislation, and the adoption of national plans and strategies towards the full realization of rights, has been recommended by the CESCR in a wide variety of instances. These strategies are identified as a crucial element of compliance with the obligation to fulfil the rights enshrined in the ICESCR. They should not only be embedded within the human-rights framework, following fundamental principles such as participation, accountability, rule of law and transparency, but they should also set clear targets and benchmarks against which to check State performance towards the full realization of these rights. Plans and framework legislation should also establish and indicate the particular remedies that rights holders have at their disposal to claim their rights and to complain against violations.

In addition to the general framework described, UN treaty bodies, especially the CESCR, as well as regional and national courts and authorities have fundamentally contributed to interpret and operationalize the provisions of relevant international instruments. In particular, great progress has been achieved in defining the scope of State obligations with regard to ESC rights. As mentioned in the section above regarding misconceptions in this field, the work of the CESCR, among others, has largely contributed to “demystifying” ESC rights and challenging the perception that justiciability over these rights would open the door to all kinds of unreasonable claims upon the State. For instance, today it is well established that the right to health is not the right of everyone to be healthy or that the rights to work and to housing do not result in a right of everyone to claim a job or a house from the State. Rather, States must ensure a minimal level of protection in these areas and exert their best efforts toward full realization, using the maximum of available resources and appealing to international cooperation and assistance when necessary. States have also a negative obligation not to interfere with the enjoyment of ESC rights, and to take protective measure to prevent third parties from doing so.

Immediate and progressive realization, non-retrogression

Although the International Covenant on Economic, Social and Cultural Rights lays out the general obligation of progressive achievement with respect to the rights enumerated in the Covenant, the Committee on ESC rights and other authorities have identified that not every aspect of a particular

³<https://www.un.org/en/sections/what-we-do/uphold-international-law/>

right is subject to this progressive qualifier. In realizing rights, the State has general and specific obligations. A specific ESC right can therefore be translated into a series of obligations, some of which are of an immediate nature and others of which are subject to progressive realization.

The Committee has in its General Comments indicated certain elements of provisions “capable of immediate application of judicial and other organs in many national legal systems”. These include ICESCR provisions such as article 2(2) on non-discrimination; article 3 specifically on equality between men and women; article 7(a)(i) on fair wages and equal remuneration; article 8 on the right to form trade unions and the right to strike; article 10(3) on the special protection of minors; article 13(2)(a) on compulsory free-of-charge primary education; article 13(3) on freedom of parents’ choice in educational matters; article 13(4) on private education; and article 15(3) on freedom of scientific research. These obligations continue to apply at all times, even in times of economic crisis.

While these provisions have been identified as being of immediate application, the obligation “to take steps” also imposes obligations of immediate effect to take deliberate and targeted steps and use all appropriate means. These include legislative measures, such as the incorporation of the ICESCR into domestic law, and the provision of judicial or administrative remedies. It also includes other appropriate means such as administrative, financial, educational or social measures.

For example, adopting and implementing a national strategy and plan of action in the field of education, health, or water and sanitation can be related to the immediate obligation to “take steps”.

Obligations of immediate application are also expressed in the concept of the minimum core content of each of the ESC rights. This obligation creates a fundamental minimum level of obligations that includes the negative duty of States not to arbitrarily interfere with the exercise by individuals of their human rights. The core content of ESC rights explores in more detail in the section below.

Obligations of immediate effect thus include the following elements:

Obligations of progressive realization

The concept of “progressive realization” is premised on the understanding that the realization of ESC rights in their entirety “will generally not be able to be achieved in a short period of time... reflecting the realities of the real world and the difficulties involved for any country in ensuring [their] full realization”. This limitation has often been used to justify States’ inactivity. However, the Committee has clarified that progressively “should not be misinterpreted as depriving the obligation of all meaningful content”. Considered in light of the “overall objective, indeed the *raison d’être*” of the Covenant, the Committee clarifies that article 2(1) “imposes an obligation to move as expeditiously and effectively as possible” towards the full realization of Covenant rights. States must not remain inactive and must not defer to another time the design and implementation of steps that aim at the full realization of ESC rights. Such steps should be deliberate, concrete and targeted as clearly as possible towards meeting obligations under the Covenant.

In imposing an obligation to move as “expeditiously and effectively as possible” towards the Covenant’s goal, the ICESCR generally prohibits any measures that may involve a step back in the level of enjoyment of ESC rights. The Committee has in this context invoked the term

“retrogressive measures”, to refer to certain State practices that undermine the protection afforded to ESC rights. General Comment No. 4 on the right to adequate housing provides an illustration of retrogressive measures in the context of housing:

“A general decline in living and housing conditions, directly attributable to policy and legislative decisions by States parties, and in the absence of accompanying compensatory measures, would be inconsistent with the obligations under the Covenant.”

As a rule, the adoption of a deliberately retrogressive measure, whether through direct action of the State or resulting from a failure of the State to regulate or otherwise protect against the misfeasance of non-State entities, which adversely affects any of the ESC rights would likely be in breach of obligations imposed by the ICESCR. There is in this regard a “strong presumption of the impermissibility of any retrogressive measures” taken in relation to substantive rights.

Retrogressive measures are in this way *prima facie* incompatible with the Covenant. States have a resulting burden of proof to justify the lawfulness of any such measures with due regard for the limitations provisions of article 4 of the ICESCR. Thus, a State that takes such measures will have the onus of proving that the measures taken are in pursuit of a compelling goal; that these measures are strictly necessary; and that there are no alternative or less restrictive measures available.

The obligation to respect

The obligation to respect requires that a State when discharging public powers, refrain from itself interfering with the existing enjoyment of a right by rights-holders.

In, *SERAC and CESR v. Nigeria*, the African Commission on Human and Peoples’ Rights defined the duty to respect and held that the Government failed to respect the rights to health and a healthy environment by “attacking, burning, and destroying several Ogoni villages and homes”.

Obligations to respect impose a number of negative obligations, which in most cases may not be subject to progressive realization. These obligations apply fully and immediately and are no different in character than those contained in the civil and political rights. It should be added that like any human rights obligations, this entails the adoption of positive measures to prevent interference with such rights by establishing appropriate institutions, and by providing for an effective system of administration of justice to conduct proper investigations and to provide for remedy and reparation to any violation by State agents.

In the example of *SERAC and CESR v. Nigeria* mentioned above, the Court stated that:

“At the very minimum, the right to shelter obliges the Nigerian Government not to destroy the housing of its citizens and not to obstruct efforts by individuals or communities to rebuild lost homes. The State’s obligation to respect housing rights requires it, and thereby all of its organs and agents, to abstain from carrying out, sponsoring or tolerating any practice, policy or legal measure violating the integrity of the individual or infringing upon his or her freedom to use those material or other resources available to them in a way they find most appropriate to satisfy individual, family, household or community housing needs. The government has destroyed Ogoni houses and villages and then, through its security forces, obstructed, harassed, beaten and, in some cases, shot and killed innocent civilians who have attempted to return to rebuild their ruined homes.

These actions constitute massive violations of the right to shelter, in violation of Articles 14, 16 and 18(1) of the African Charter.”

The obligation to protect

The obligation to protect requires a State to take measures that prevent third parties from interfering with the enjoyment of a right. This is also referred to under the rubric of third-party effect (or in French les obligations d’effets horizontaux , or in German, Drittwirkung).

The obligation to protect may involve a heightened measure when there is a power imbalance between an individual and a third party, such as in respect of large business enterprises. This obligation places emphasis on State action that is necessary to prevent, stop or obtain redress or punishment for third party interference. This duty is normally achieved through:

This obligation should complement other State activity such as regulation and law enforcement.

The obligation to protect should in practical terms provide protection against a wide range of conduct, including:

The obligation to fulfill

An obligation to fulfill requires a State to take legislative, administrative, budgetary, judicial and other measures towards the full realization of rights, including by means of international assistance and cooperation.

The precise scope and content of the obligation necessarily depends on the particular context, but generally involves establishment of a State of institutional machinery essential for the realization of rights. This can take different forms. In effect, it mirrors the requirements embodied in the phrase “all appropriate means” within article 2(1) of the ICESCR. As a general rule, States are required to create legal, institutional, administrative, and procedural conditions, as well as to provide material benefit for the realization of certain rights without discrimination.

In other words, States are expected to be proactive agents, capable of increasing access to ESC rights, and ensure the enjoyment of at least a minimum essential level of the rights to all.

The obligation to fulfill involves positive action, which means that violations in this area involve State omissions. Although they may seem to be more difficult to define and circumscribe, judicial orders requiring public authorities to act in relation to health care are common in many jurisdictions.

This duty places emphasis on:

The obligation to fulfill can provide protection against:

→ International Centre for the Legal Protection of Human Rights (INTERIGHTS) v. Greece
Complaint No. 49/2008

Extraterritorial obligations of States in the area of ESC rights

Human rights obligations generally, including in the area of ESC rights, have extraterritorial application. The increasing pace of economic globalization has made the discharge of such obligations ever more a critical part of the human rights landscape. This state of affairs impelled the ICJ and University of Maastricht to convene an expert process leading to the elaboration of the

Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights, these were adopted by a group of international legal experts in 2011 with a view to addressing these dimensions of human rights protection. Leading international legal experts, including UN Special Procedures mandate-holders and members of the UN Treaty Bodies, were among the signatories to the principles.

The Maastricht Principles define State extraterritorial obligations (hereafter ETOs) to respect, protect and fulfill human rights separately and jointly as comprising:

1. Obligations relating to the acts and omissions of a State, within or beyond its territory, that have effects on the enjoyment of human rights outside of that State's territory; and
2. The obligations of a global character that are set out in the Charter of the United Nations and human rights instruments to take action, separately, and jointly through international cooperation, to realize human rights universally."

The Maastricht Principles establish the basis for jurisdiction and responsibility that allow for the operationalization of and the assessment of compliance with ETOs. In particular, the Maastricht Principles specify that ETOs will apply in:

1. "Situations over which it exercises authority or effective control, whether or not such control is exercised in accordance with international law;
2. Situation over which State acts or omissions bring about foreseeable effects on the enjoyment of economic, social and cultural rights, whether within or outside its territory;
3. Situations in which the State, acting separately or jointly, whether through its executive, legislative or judicial branches, is in a position to exercise decisive influence or to take measures to realize economic, social and cultural rights extraterritorially, in accordance with international law."

A State's responsibility will be engaged when State conduct – or the acts and omissions of non-State actors for which State responsibility can be attributed – breach the concerned State's obligations under international human rights law. States have both negative and positive ETOs. They must not harm ESC rights of people living in another State; they must protect from harm by third parties the people that they regulate, control or are in a position to influence; and they must contribute to fulfilling ESC rights globally to the maximum of their available resources.

CONCLUSION AND RECOMMENDATIONS

In conclusion State Responsibilities includes:

An obligation to prioritize the achievement of the minimum essential level of each right and the individuals and groups who are the most dis-advantaged;

An obligation not to discriminate among different groups of people in the realization of rights;

An obligation to take steps (including devising specific strategies and programmes) deliberately targeted towards the full realization of rights.

The researcher believes that states and international institutions should provide the following for every member of the human race:

- a) Protection against forced labour;
- b) Protection of employment and against unlawful dismissal for all, especially for disadvantaged and marginalized individuals and groups, permitting them to live a life of dignity.
- c) Equal enjoyment to all of adequate protection from core social risks and contingencies;
- d) Access to a social security scheme that provides a minimum essential level of benefits to all individuals and families that.⁴

⁴<https://www.icj.org/chapter-2-esc-rights-under-international-law-and-the-role-of-judicial-and-quasi-judicial-bodies-2/2-3-identifying-breaches-of-international-obligations-of-states-pertaining-to-esc-rights/2-3-1-state-obligations-stemming-from-international-law/>