

**Fourteen Misconceptions
about Extraterritorial Obligations in Economic,
Social and Cultural Rights**



Imprint

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Introduction

Human rights are the foundation of modern international law. In our days international and transnational economic and political decisions deeply affect the wellbeing of people far away from the respective decision makers. Over the past 20 years some areas of international law have developed – often against broad protests of civil society activists - that are in conflict with human rights. For States – and the human rights community - to address these legal and political concerns, some legal and doctrinal misunderstandings have to be tackled that otherwise curtail the powers of human rights – one of them the attempted reduction of States' obligations to territory.

The following fourteen misconceptions are sometimes encountered when discussing extraterritorial obligations in the area of economic, social and cultural rights (ETOs). They are not the only ones. Nevertheless they are perhaps the most frequent questions coming up in the context of ETOs.

There is also considerable urgency to strengthen ETOs and implement the primacy of human rights – in the middle of multiple crises. The ETO Consortium, a network of more than 80 CSOs and academics, has made this its task. The Consortium also deals – in another publication - with "Twelve reasons to strengthen ETOs".

The ETO Consortium deals with economic, social and cultural rights and uses the Maastricht Principles on States' extraterritorial obligations in this area as its key term of reference. Just as the Maastricht Principles carry the spirit of

indivisibility of human rights, so do the responses to these fourteen misconceptions. They are applicable to extraterritorial obligations related to human rights in general and this is how they should be read.

Although published by the ETO Consortium, the responses to these fourteen misconceptions do not reflect a position of the Consortium or any of its members. The responsibility is with the author. He tried to capture some of the discussions inside and outside the ETO Consortium. The Maastricht Principles provide the main terms of reference. The legal Commentary to these Principles is recommended reading for all those who seek legal detail going beyond the responses provided in this little publication.

Rolf Künemann

Heidelberg, January 2014

Misconception 1: Human rights obligations are limited to a State's own territory

This misconception often originates from the Covenant on Civil and Political Rights Article 2.1 where each state party “undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant ...” This clause has led to strange practises, such as reintroducing torture by bringing people abroad to be tortured. Even though this definitely means progress compared to States torturing people in their territory, it does not mean much for the victims and their human right to be free from torture. A careful reading of article 2.1 would note that a distinction is made between the obligation to respect and the obligation to ensure. The clause does not read “to respect and ensure to all individuals within ...”, but “to respect and to ensure to all individuals within...”. This confirms that the respect-obligation is unspecific and only the ensure-obligation is specified for individuals “within”. Respect-obligations are universally owed to all individuals.

Respecting a human right, i.e. not impairing the normative content to which the right gives a claim, is something every State can achieve no matter where: It simply means a certain form of inaction – namely avoidance of impairing activities. Ensuring a right is a different matter as it requires specific action – and a certain result, namely that human rights are ensured.

The ensure-obligation is currently not very much in use. It has been replaced by the obligations to protect and to fulfil. Can States protect and fulfil human rights outside their territories? Yes, they can, but the details need to be specified. Over the past 20 years, some specifications for ETOs have been developed mainly by the UN human rights system, but also by some courts. The Maastricht Principles on Extraterritorial Obligations in the Area of Economic, Social and Cultural Rights reflect this work.

Returning to art. 2.1 of the Covenant on Civil and Political Rights it is worth noting that the UN respective treaty body interpreted the words “in its territory and subject to its jurisdiction” as referring to situations “in its territory and/or subject to its jurisdiction” – taking jurisdiction as the crucial specification for its work. This does justice to the purpose of the Covenant – and all other human rights treaties – the protection and fulfilment of human rights. The interpretation also provides coherence with the other treaties, as those never refer to territory when it comes to the scope of obligations, but rather to jurisdiction. Jurisdiction is a term giving rise to misconceptions of its own – one of them being the identification of jurisdiction with territory, dealt with in misconceptions 7 and 8.

There are many reasons why States obligations cannot be limited to individuals in the States territory. The most important reason is perhaps the universality of human rights: Everybody has the same human rights everywhere at any time. In a world that does not consist of totally isolated nation states, a State has sometimes great difficulties ensuring human rights in its territory without the cooperation of other States and without their other extraterritorial obligations. This is discussed in the context of the next misconception.

Misconception 2: There is no need for ETOs: If every state meets its territorial obligations, this will ensure human rights globally.

A world where States meet their territorial human rights obligations would certainly be a better place. But, is it really true that in such a world human rights would be ensured globally? Let us take a step back and reconsider obligations of result such as the obligation to ensure. This obligation is not only met, if the result is obtained, but also when States have done their best to obtain the

result: In art.2 ICESCR this is specified by reference to using the “maximum of its available resources” – a provision that is also important for ensure-obligations under the ICCPR. Moreover force majeure can prevent results even for States doing their best.

What counts for rights-holders is the result and not whether their domestic States did the best to attain it. How about the contribution of other States? Of course, the domestic States might have asked them to cooperate in its efforts to ensure human rights in its territory. For her domestic State this is really part of “doing the best one can” to ensure human rights territorially - and is still covered by territorial obligations. Nevertheless it is not enough.

Consider the following example. A foreign State sends agents into the domestic State’s territory to kill a person. The domestic State tried its best to protect this person, but failed. Neither State breached a territorial obligation: The agent’s State acted extraterritorially, and the domestic State did its best. Nevertheless the persons’ human right was not ensured – contrary to the claim (in Misconception 2) human rights could be ensured globally, if all States met their territorial obligations.

In reality, the foreign State was under an obligation to cooperate internationally with the State where the threatened person resided. The foreign State has to do its best in this sense. Obviously this includes not sending the killer in the first place. Therefore the extraterritorial respect-obligation not to send killers abroad is implied.

Let us resume: If the aim is that human rights be ensured globally (as is required by the universality of human rights), then it is insufficient that each State meets its territorial obligations - unless they act under an obligation to cooperate, but this implies ETOs.

Many States are not in a position to ensure human rights on their own – in particular in the context of deregulated globalisation. Countries are increasingly affected by TNCs and by the regulatory failures of other States and international organizations. The assumption that human rights can be universally ensured by territorial obligations alone (perhaps assisted with some related cooperation between States) ignores such realities and the related power disparities in the international arena with decision making being dominated by powerful States.

Misconception 3: ETOs undermine the principle of State sovereignty

The concerns around the loss of sovereignty through ETOs often focus on extraterritorial jurisdiction: Are there “clashes” of jurisdictions via that curtail the sovereignty of a State affected by other States’ jurisdiction – for example in regulating national companies that are affiliates of foreign TNCs? These issues will be discussed in some detail in Misconceptions 8 and 9.

At this point we only recall that States are not sovereign to violate human rights. Each State has to assume *prima facie* that the other State wants to meet its human rights obligations. States have a certain level of discretion on how to meet protect- and fulfil- obligations. These different methods may need to be harmonized in cooperation. This would not mean, of course, that affiliates of TNCs get a better deal than independent national companies, but that higher or different foreign standards apply in addition. There would, of course, be no use of force abroad - and no other threat to a foreign State's sovereignty. Maastricht Principle 10 describes these and other limits to exercise jurisdiction for ETOs.

The greatest threat to sovereignty to date is the global corporate sector shielding itself against regulation. By corporate capture and

forced trade agreements the sector tries to tie the States' hands. The primacy of human rights in general –including ETOs – obliges States to ignore obligations under commercial agreements that interfere with human rights or even to consider these treaties void. In doing so, ETOs make States duty-bound to cooperate in order to destroy such attacks on peoples' sovereignty. Defending peoples' sovereignty in times of globalisation greatly benefits from the duty to cooperate to mutually respect, protect and fulfil the respective peoples' rights to self-determination: Treaties that cannot be reconciled with human rights are void.

Misconception 4: There is no need for States to regulate TNCs or supervise IGOs, as these already have their own internal mechanisms

Regulation of TNCs and supervision of IGOs are areas where ETOs make a lot of difference. As we will treat TNCs in some detail in the responses to subsequent misconceptions, we will focus on IGOs in this one. IGOs have their internal mechanisms to comply with certain standards. The experience with internal mechanisms is not really satisfactory. The World Bank's operational directives and safeguards mechanisms have not made the World Bank human rights compliant. These mechanisms are simply lacking teeth. World Bank inspection panels have done good jobs, but often have had no chance to see their recommendations implemented against the management.

There is, however, a more fundamental reason why internal mechanisms are insufficient to ensure the realisation of ESCR – and this is fundamental to the nature of human rights: Human rights imply a right to remedy including legal review by an independent entity. Internal mechanisms cannot by definition create independent entities, nor ensure legal review. For this to

happen there must be clear-cut (legal) obligations that are actionable in independent courts.

IGOs are international governmental organisations. They are not international corporations where States (instead of individuals or other corporations) happen to be the shareholders. This is sometimes forgotten. Just as national governmental organisations are part of their nation state and their actions/omissions are attributable to their nation state, so are IGOs part of the community of governing States and their actions/omissions are attributable to these States. National governmental organisations have to act coherently with the human rights obligations of their State, and if they fail to do so they must be actionable. It is necessary, but not sufficient, for national governments to supervise their national authorities. Similarly for IGOs. Governing States have to supervise them, but this is not sufficient: IGOs have to act coherently with the human rights obligations of their governing States, and if they fail to do so they must be actionable. As the effect of most IGO actions is often outside the territories of all except one of the governing States, the obligations for which coherence has to be ensured are normally extraterritorial obligations of the governing states. Without considering ETOs the rule of law at international governmental level could not be upheld.

Misconception 5: ETOs are new

While it is true that, in the context of globalisation, ETOs are more important than ever before - they are not new. The response to the previous misconception shows that they are linked to the universality of human rights. Universality, on the other hand, has been a element of the human rights concept from the very beginning.

The impression that ETOs are new probably originates from the observations that most human rights treaties do not explicitly refer to them and that ETO language has been rather rare in the UN human rights system in general. While the treaty issue will be dealt with under Misconception 6, we focus here on the language of the UN human rights system.

A frequent term for ETOs in the system has been “international obligations”. Reference to these obligations can be found extensively in the General Comments of the Committee on Economic, Social and Cultural Rights, for example. Using international obligations terminology for ETOs, however, has certain weaknesses: A State’s international obligations are often seen to describe obligations under international law, where as national or domestic obligations are those in domestic law. As human rights law, ETOs are both part of international law and domestic law. A second weakness of international obligations terminology is the possible misunderstanding that these are obligations owed to other nations (international), whereas ETOs are obligations owed to individuals – namely those in other territories.

Misconception 6: International human rights instruments do not recognize ETOs

The absence of the words “extraterritorial obligation” in human rights instruments must not be mistaken as non-recognition of ETOs. Let us consider the International Bill of Human Rights – the “mother of human rights” consisting of UDHR, ICESCR and ICCPR. The concept of ETOs is embedded in all three of them.

Art.28 UDHR reads “Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.” This underlines that

for the full realization of human rights it is not enough that each State takes care of its territorial obligations: An international order is necessary to this effect. In the context of human rights this can only be an order of human rights law, where the legal relationship between rights- and duty-holders is not confined to the territory of the rights-holder's State. This is exactly what ETOs provide.

Under art.22 UDHR “Everyone, as a member of society, ...is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.” This provision refers to the entitlement (of individual rights-holders) to realization via international cooperation. If somebody is entitled to realization via certain means (here: international cooperation), then this person is also entitled to international cooperation. This entitlement cannot be met by the territorial obligation to seek international cooperation for domestic realization of human rights. Hence the entitlement to cooperation extends to foreign States, and hence gives rise to extraterritorial obligations of these foreign States to cooperate with each other and with the domestic State. Art.22 therefore implies ETOs.

The ICCPR is the only human rights instrument that makes reference both to territory and jurisdiction in the general clause on the scope of obligations. As mentioned in the response to Misconception 1, the respective treaty body interprets the limitation clause “within its territory and subject to its jurisdiction” as, “within its territory and/or subject to its jurisdiction”, and deals with extraterritorial obligations under the ICCPR, as they are not excluded – at least as long as the respective rights-holders are in the jurisdiction of the State. Jurisdiction is a

concept different from territory. There are some misconceptions around jurisdiction, one of them is the illusion that jurisdiction is essentially the same as territory. (This will be taken up in Misconceptions 8 and 9.)

The ICESCR defines general States obligations in art.2. This article refers to international cooperation as a means for the realization in the Covenant rights. For the reasons mentioned above in the context of art.22. UDHR this implies ETOs for all the rights in the ICESCR. Moreover the preambles of both ICESCR and ICCPR are „Considering the obligation of States under the Charter of the UN to promote universal respect for, and observance of, human rights and freedoms”. Universality does not know borders, hence this obligation is extraterritorial, even though this is not made explicit.

The source of Misunderstanding 6 is the fact that the instruments do not explicitly use the terms extraterritorial obligations or international obligations. Already the International Bill of Human Rights implies ETOs - in each of its three parts, as we have just seen. Faced with the challenges of globalisation there are good grounds to be much more explicit and further strengthen and elaborate in greater detail the respective extraterritorial human rights obligations.

Misconception 7: With ETOs States are responsible for the acts of third parties

Responsibility is a term that can easily give rise to misunderstandings. In the literal sense a person or institution has a responsibility if it has to respond (to somebody else) for its acts. Almost by definition responsibility is entailed by breaches of obligations. In human rights language the term responsibility was sometimes used as a substitute for the term obligation, in particular in situations where one wanted to avoid taking a

position as to whether the obligations was legal or moral. (In human rights parlance “obligations” are often taken to be legal.) Strictly speaking this confuses two levels of duties: Primary duties (obligations) that provide norms for day-to-day action, and secondary norms that provide norms (responsibilities) for what wrongdoers have to take on themselves when they breached a primary norm. Responsibilities would include the cessation of breach, restitution, compensation, satisfaction. A State cannot be responsible for acts of third parties, as they are not its own acts. They can and do, however, carry protect-obligations in the context with acts of third parties.

The obligations of States to govern TNCs are central in many debates today: TNCs have become very powerful international actors. How can international rights-based governance over powerful international third parties be achieved? What are the related obligations for States that can impact on a TNC? It is in this context that the misunderstanding can come up that ETOs make States responsible for the acts of third parties.

The misunderstanding here is essentially a misunderstanding of the protect-obligation as such. Protect-obligations require due diligence with regard to protecting people from impairments of their human rights by third parties. They require preventive action in terms of policies and regulation, and impose the duty to investigate and prosecute, if third parties impair these rights.

As breaches of protect-obligations are wrongdoings, they entail the responsibility of the respective State. The fact that a Third Party abused a person’s human rights (and take on respective responsibilities), however, does not imply that a State breached its protect-obligations. Therefore it does not imply that this State automatically has to take on responsibility for doing something wrong.

The breach of a protect-obligation and the abusive act of a Third Party are sometimes closely related, and it makes sense to look for breaches of the protect-obligation and hence for State responsibility in this context: If a group of policemen stands by when a person is beaten up in the street, there is a breach of the protect-obligation immediately related to this crime. The police, however is not responsible for this crime. The responsibility is with those who beat up the person. Nevertheless the police carries a responsibility of its own - for the severe breach of its protect-obligation.

This is not different when third parties are transnational and protect obligations extraterritorial. The only difference is that extraterritorial protect obligations are more complex than territorial ones.

Misconception 8: ETOs would require States to act outside their jurisdictions.

Jurisdiction describes for States and institutions a certain competence or permission to act. There is a variety of jurisdictions: Jurisprudential jurisdiction circumscribes the mandate of a court (in terms of substance matter, region etc.), prescriptive jurisdiction details the power to provide rules (for example legislation, and administrative orders of different institutions), enforcement jurisdiction details the power to enforce rules.

Jurisdiction is used in some human rights instruments (but not all of them) as a means to limit the scope of obligations. As protect- and fulfil- obligations require action from States, the question which action is permissible in which situation is of interest for a proper understanding of the scope of the obligation.

In international law in general States have permission to act unless their action infringes on the rights of other States, in particular their sovereignty. So, jurisdiction is not something intrinsic to a State but a relational notion between States. States obligations aim at the universal realisation of human rights. Jurisdiction on human rights obligations therefore has to be fine-tuned with this objective in mind. On the one hand jurisdictional arrangements must not leave gaps (impairments of human rights not covered by obligations of any State), and on the other hand it must not lead to counterproductive overlaps in human rights regulation or implementation.

In this fine-tuning it was natural to take into consideration the jurisdictional standards in general international law. As territory is part of the concept of States, a first approximation to jurisdiction has been territory: States have permission to act on their territory, but not on the territory of other States. Unfortunately, what was only meant as a first approximation, all too often turned into a default, and eventually into identification: Some people when talking essentially about territory in an international law context preferred to use the word jurisdiction instead – as it sounded more sophisticated.

Returning to Misconception 8 with all this in mind, we find that if we set the term territory for jurisdiction we can only agree: Yes, ETOs may require a State's action outside its territory. If Misconception 8 really means jurisdiction as defined above, however, we have to say no: By definition a State's human rights obligations (including ETOs) are not in force outside the acting State's jurisdiction, and therefore ETOs do not require acting outside the State's jurisdiction.

Further details for a State's jurisdiction on ETOs under ESCR can be found in the Maastricht Principles: Maastricht Principles 9 describes three categories of situations within a State's

jurisdiction for economic, social and cultural rights. 9a deals with situations over which the State exercises authority or effective control. In 9b we have situations where States' actions or omissions bring about foreseeable effects on the enjoyment of human rights, and in 9c situations are included where a State's action (possibly together with other States) can take decisive influence on the realisation of ESCR abroad, as long as this is in line with international law. Jurisdiction therefore does not give rise to systemic gaps in the realization of human rights.

Maastricht Principle 10 makes sure that States don't take ETOs under ESCR as a justification for acting against the UN Charter and general international law. The Charter requires for example in article 2(4) that members "refrain in their international relations from the use of force against territorial integrity or political independence of any state". Sovereignty and equality of states are other concepts that can limit jurisdiction, of course. In jurisdiction for human rights action, however, sovereignty will not be as predominant as in other fields of law. In any event, a detailed analysis is necessary. There is already a lot of inspiration available in the law that can be found in the Commentary to the Principles.¹ The Commentary is recommended reading for all those who want to find out how a ETOs under ESCR have developed in human rights treaty law over the past decades.

Misconception 9: ETOs put obligations on another State

Seen from the perspective of the rights-holders reviewing the States' obligations they can rely on, this claim is certainly true: ETOs put obligations on other States than their domestic State.

¹ De Schutter et al, Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights, HRQ Nov. 2012

The phrase, however, is meant differently: There is sometimes the feeling that ETOs interfere with the internal affairs of other States.

Suppose, for example, a home State to a TNC regulates the affiliates of this TNC abroad. The affiliate may be legally incorporated in the host State, but for all practical purposes be a part of the TNC or controlled by it. Does the home State's regulation somehow create certain obligations for the host States? Is the host State no longer free to regulate the affiliates differently? Is the host State obliged to enforce the home State regulation on the affiliates in its country?

Careful consideration is necessary in such situations, on the basis of the Maastricht Principles 9 and 10 on jurisdiction. Even though the home state may have jurisdiction (under Maastricht Principle 9, and in view of Maastricht Principles 25c), there are situations where this jurisdiction must not be exercised (under Maastricht Principle 10) - for example when such exercise would violate the UN Charter or general international law. This immediately excludes the extraterritorial use of enforcement jurisdiction by the home State on the affiliates of its TNCs. Moreover, under Maastricht Principle 10 home state regulation must not affect the sovereignty of the host State to use its own level of discretion for the rights-based regulation of the respective companies. If the host State has no effective regulation protecting human rights against the affiliate, it breached its territorial human rights obligations. Such a breach cannot be justified with host State Sovereignty. Altogether we conclude that for this case ETOs do impose obligations for the host State.

Let us have a short look at the ET fulfil-obligation. In an indirect way, the ET fulfil-obligation to create an enabling environment (Maastricht Principle 29), for example, may it fact generate obligations for other states: Suppose a sufficient number of States reviews and changes the WTO constitution on the basis of

Maastricht Principle 29 in one of several ways consistent with ETOs: This would certainly have an indirect effect on the obligations of other States. They may still be free to join or leave this new “WTO”, but if they join they may have to accept the specific form of the enabling environment that was developed under ETOs. This, however, is far from “putting an obligation on another State”. ETOs are obligations of States separately and jointly, and as part of the international community. They are, however, not enabling one State to prescribe any behaviour to another State.

Misconception 10: ETOs have to be balanced with other States’ obligations under international law

Sometimes there are complaints about the so-called fragmentation of international law. In a given situation there are various demands arising from various obligations of various fields of international law, one of them international human rights law. Would this imply a need to balance the various demands and find a compromise? No. We recall that human rights law has primacy and that international law in reality is not fragmented, but based on human rights law. This implies that international agreements in conflict with human rights are void. If we have to balance, then this balancing would have to take place among different human rights relevant to the situation at hand – and not between human rights and other concerns.

The idea behind the misconception may be correct in suggesting that ETOs under ESCR are more likely to conflict with certain parts of international law, than territorial obligations are. After all, territorial obligations are formally part of international law as far as they have been described in international treaties, in essence, however, most territorial obligations easily fit with domestic law. Not so ETOs. By their very nature they are international, or rather

“diagonal” (linking a person in one State to one or more other States). ETOs have much to say on how the world is currently run with the international commercial agreements developed over the past 20 years. This message of ETOs must not be “balanced” with commercial law. Instead commercial law has to be brought in line with human rights law – so that the obligations under commercial law fit with ETOs under ESCR.

This rebirth of international law on the basis of full human rights with strong ETOs will provide - together with the Rights of Mother Earth - the much needed framework for international law, just as constitutional law does for domestic law: An international court is needed that would provide the review of international “legislation” (international treaties) for their compliance with the norms of human rights law. Without ETOs, human rights would be barred from taking on this essential task.

Misconception 11: ETOs lead globally to chaos in governance.

Chaos in governance occurs when there is unclear distribution of competence, or lack of coherence between various governmental actors - at the national and/or international level. The concern behind this misconception, of course, is the international sector. International chaos – as severe crises – is what we currently experience on a global scale. These crises are not due to chaos in governance, however, but to governance failures - or even lack of governance. Some coherence of States' international action is needed. States meeting their ETOs will lead to coherence of views and policies by making them rights-based. What is currently pushed, however, is a global investment and trade regime that undermines the UN system of international governance and human rights. As long as some States act as if they were agents of TNCs, there is little chance to address the chaos resulting from the

lack of rights-based governance. All these issues of chaos are not due to ETOs but rather linked to their current weakness, which is an impediment to the emergence of human rights as the true basis of the international governance.

The neglect of extraterritorial obligations is tantamount to extraterritorial violations of human rights. Misconception 11 somehow claims the opposite of what was outlined in the response to the previous misconception, when it was shown that human rights provide the ordering principle for international law thanks to ETOs. Can these ETOs lead to chaos instead of the international order to which all of us have a right under UDHR art.28?

ET respect-obligations prevent States' negative impact on the enjoyment of human rights abroad, by demanding that States avoid certain activities. So this can impossibly lead to "chaotic governance". The reference to such chaos in governance altogether seems to hint at jurisdictional conflicts in the context of ET protect- and fulfil-obligations. In the response to Misconception 8 this was referred to as a possible "overlap". It should be noted that a lot of protect- and fulfil-ETOs do not involve such jurisdictional issues as they do not regulate abroad even though they have a protective or fulfilment impact abroad. For the issue of TNCs this is called "parent-based regulation": The parent company is regulated within the territory of the regulating State with impacts on its affiliates.

For the remaining protect- and fulfil-ETOs there are two types of possible governance conflicts: First of all, conflicts between the home State of the persons suffering an impairment of human rights, and the foreign State that aims at meeting its ETOs in this regard. Secondly, conflicts between different States taking action to meet ETOs relative to the same situation the a third country.

The first type of governance conflicts can be avoided by a careful application of Maastricht Principle 10, not only the prohibition of use of force on the territory of another State, but also – and in particular - the sovereignty of the State on the national territory and the principle of the equality of States. Sovereignty cannot serve as a justification for failing to take measures to protect or fulfil the enjoyment of human rights in one's territory. Moreover a State that does not fear for its sovereignty when welcoming TNCs into its national economy cannot convincingly refer to sovereignty issues in when it comes to the related human rights obligations - including the extraterritorial obligations of those States that provide the legal, logistic and political bases for these TNCs to operate (as described in Maastricht Principle 25c). Under Misconception 10 we considered the possibly competing approaches of home State and host State when directly regulating an affiliate of a TNC. Unfortunately it has to be noted that such competition how to provide best regulation to protect human rights is still rare.

An example for the second type is the uncoordinated and sometimes competing approaches by various foreign national (or international) agencies working with the same Southern government on essentially the same issues. Sometimes international assistance provides examples for chaos in governance, when agencies of various States cooperate with different ministries of the same State on essentially the same problem trying to introduce different competing solutions - for example in the field of social protection. Such situations have led not only to the well-known concerns of aid efficiency, but also create difficult situations for national governance in the "recipient country". It should be noted, however, that these situations of chaos are not the result of ETOs. On the contrary. They happen exactly when such assistance is not rights based and neglects ETOs, and in particular the obligation to cooperate.

An important antidote to chaos in governance is the obligation to cooperate for the joint purpose of universally implementing human rights. This obligation provides the pervasive light for all ETOs. The ET obligation to cooperate with the respective nation State on protect- and fulfil-matters includes seeking the consent of this State whenever possible. This obligation may require case by case agreements or even – and perhaps preferably – a general agreement governing such situations. This would also be desirable for example from the point of view of aid efficiency, climate change, regulation of TNCs. ETOs provide the tools to deal with such challenges.

Misconception 12: It is not possible to hold a State accountable with regard to its ETOs, as these are not clearly defined (especially with regard to fulfil-obligations)

Similar misconceptions were formulated in the past against ESCR altogether. They were proven false. Territorial and extraterritorial obligations under ESCR are well-defined as shown in the Maastricht Principles. The Maastricht Principles reflect the state of international human rights treaty law on these matters. Misconception 12 rightly points to the need to further elaborate extraterritorial fulfil-obligations, but it draws the wrong conclusions. To the extent of what has been elaborated so far, States can very well be held accountable.

In situations of a State conceiving action abroad on its own, extraterritorial respect-obligations are by and large identical to territorial respect obligations – and these are straightforward. When acting jointly with other States, for example in the context of intergovernmental organisations, ET respect-obligations require due diligence to make sure that the IGO acts coherently with these obligations. In case of persistent breaches of respect-

obligations by other member states and/or the IGO despite due diligence of the State, the State would have to leave the IGO.

Misconception 12 singles out ET fulfil-obligations. The Maastricht Principles 29 to 35 provide important elements for ET fulfil-obligations that can be used to hold States accountable, such as their role in relation to a review of multi- and bilateral treaties (Principle 29a), or in mobilizing maximum available resources (Principle 31), its implementation of priorities in cooperation (Principle 32), its response to a request for international assistance and cooperation (Principle 35).

It is a misunderstanding of human rights and how their implementation develops, to refrain from holding states accountable until all eventualities for cases have been broadly elaborated. The Maastricht Principles should rather be seen as an invitation to use what is at hand - and as an invitation to elaborate ETOs further.

Misconception 13: ETOs are unwieldy and expensive.

Whether something is unwieldy depends on the facility of operating it. Whether something is expensive will show only after a cost-benefit analysis. With this in mind the three classes of obligations should be considered one-by-one.

Extraterritorial respect-obligation require that States avoid certain activities abroad – namely those that impair the enjoyment of human rights. This is neither unwieldy nor expensive. Some quarters may argue that respect-obligations imply “opportunity cost” for the State. This however is true both on the territory and abroad. The primacy of human rights values the rights of the potential victims higher than any “opportunities” arising from human rights violations. As this is true inside the

territory, why should it be unwieldy and expensive once the victims are abroad? Universality of human rights requires the same hands-off policies no matter where the potential victim is located.

The extraterritorial protect-obligation requires measures to regulate and prevent third parties abusing human rights abroad – if there are bases for protection as described in Maastricht Principle 25. This is legally straight forward as long as the regulating State can have foreseeable regulatory impact on this third party (Maastricht Principle 9b) and in particular if the third party has the “nationality” of the regulating State. What this means for business enterprises is spelled out in Maastricht Principle 25c. If there is a basis for regulation of the parent company, then there is also a basis for regulating its affiliates, no matter where they are legally incorporated. Generally speaking Maastricht Principle 25c restricts the basis for regulation to those situations where regulation can be possible for the respective State. The tools for regulation are not more complex than domestically. What may be complex, however, is the context – the “unwieldy” world generated by globalisation. The additional effort and cost for regulating TNCs along these lines is part of the cost of globalisation. Ignoring human rights obligations in this new context is clearly not an option. Upholding human rights requires ET protect-measures – and the related increasing efforts of States separately and jointly in international cooperation to meet these extraterritorial obligations. The cost for doing so are dwarfed by the “cost” for human rights and the destruction of any meaningful concept of democracy, political participation and peoples’ sovereignty, if TNCs’ can abuse human rights with impunity and are allowed to spin out of public control.

The extraterritorial fulfil-obligations are those most frequently deemed expensive. Certainly, international assistance costs money – like many other State activities do. The important issue

here is a cost-benefit analysis. In the area of international assistance, ETOs help to make transfers more effective by clear priority setting (Maastricht Principles 32), and by the duty to cooperate. Under ET fulfil-obligations certain transfers and other measures are no longer optional, but obligatory. This also opens the door for international regulation of global social transfers increasing their efficiency and making them less unwieldy. In terms of ETOs such transfers are only subsidiary to the respective national obligations. They are triggered once the domestic States of the persons suffering deprivation cannot reasonably be expected to provide the core content of ESCR. With a view to the priority setting mentioned, there are but a few States for which such expectations are unreasonable. Hence the resources needed to meet the related extraterritorial obligations are of manageable proportions for the international community.

Moreover it should be noted that international assistance and social transfers are only part of ET fulfil-obligations. ET fulfil-obligations also include the obligations to create enabling environments for deprived persons and groups, against adverse corporate agendas in the fields of finance, investment and trade, food and nutrition, destruction of ecosystems and climate. The misconception of ETOs being unwieldy and expensive does not stand scrutiny.

Misconception 14: ETOs allow States to escape their territorial obligations.

This misconception refers for example to the risk that some States may count on the international community's fulfil obligations and respective global social transfers instead of introducing their own social systems and allocating the necessary resources. This, of course, is ruled out by the subsidiarity nature of ET transfer obligations mentioned above in Misconception 13. The standards

that trigger this subsidiary duty have to be transparent and international. ETOs do not allow States to escape their territorial obligations – on the contrary, they help to meet them. International cooperation in the field of ET protect-obligations, for example, assists States to protect their residents against business abuses linked to foreign TNCs operating in their territories.

Resource allocations of a State to ETOs to the detriment of its own territorial fulfilment measures are highly unlikely. Such cases have not come up so far, as governments need the consent of their own residents as electorate. On the contrary – there is a risk that States try to escape their ETOs under the pretext of having to meet territorial obligations.

ETO Consortium

The ETO Consortium is a member-led network, comprised by a large number of CSOs and academics interested in human rights promotion and protection.

Established in Geneva in 2007, the purpose of the ETO Consortium is to address the gaps in human rights protection that have opened up through the neglect of extraterritorial obligations (ETOs).

The ETO Consortium mainstreams and applies ETOs, using as a key term of reference the Maastricht Principles on Extraterritorial Obligations in the Area of Economic, Social and Cultural Rights. The Consortium is continuously working to advance ETOs in multiple contexts and on various occasions, for instance by virtue of international and regional conferences and capacity building, case-work, research and advocacy.

The ETO Consortium organizes its work in focal groups according to thematic issues and to geographical regions. In addition to the focal groups, there is an academic support group, with a separate mandate to assist the focal groups and members. The ETO Consortium members use the Maastricht Principles in their day-to-day work, individually and in cooperation, with a view to seeking new avenues for addressing some of the most urgent problems related to the protection of economic, social and cultural human rights.

The ETO Consortium is led by an elected Steering Committee with academics and representatives of CSOs from various regions of the world. The Consortium appoints one of its member CSOs to host the ETO Consortium Secretariat for a certain period of time.

CSOs and academics interested in cooperation or membership are invited to contact the ETO Consortium's Secretariat.

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