

General Comment No. 24 on State Obligations Under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities: The Committee on Economic, Social and Cultural Rights Has Played Its Part

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Article abstract

In the context of discussions on the elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights, the Committee on Economic, Social and Cultural Rights adopted in 2017 the General Comment No. 24 on State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities. Going against neoliberal logic, the Committee promotes a welfare state that effectively circumscribes economic freedoms and that resolutely protects vulnerable populations. Among various interpretations of instruments and extraterritorial obligations, the Committee clearly chooses a teleological interpretation, without disrupting the economy of the treaty, but by decidedly opting for the control of transnational businesses by way of the only actors it can reach, given its mandate: States. The extraterritorial obligation to protect consists mainly in adopting reasonable measures (duty of diligence, judicial cooperation, fight against fiscal optimization) to prevent violations of the Covenant by a private business that the State can influence.

**GENERAL COMMENT NO. 24 ON STATE OBLIGATIONS
UNDER THE INTERNATIONAL COVENANT ON ECONOMIC,
SOCIAL AND CULTURAL RIGHTS IN THE CONTEXT OF
BUSINESS ACTIVITIES: THE COMMITTEE ON ECONOMIC,
SOCIAL AND CULTURAL RIGHTS HAS PLAYED ITS PART**

Sophie Grosbon *

Dans le contexte des négociations sur l'élaboration d'un instrument international juridiquement contraignant pour réglementer les activités des sociétés transnationales et autres entreprises, le Comité des droits économiques, sociaux et culturels a adopté en 2017 l'Observation générale n° 24 sur les obligations des États en vertu du Pacte international relatif aux droits économiques, sociaux et culturels dans le contexte des activités des entreprises. À rebours de la logique néolibérale, le Comité promeut un État providence qui encadre effectivement les libertés économiques et qui protège résolument les populations vulnérables. Face à des interprétations diverses des obligations extraterritoriales, le Comité choisit clairement l'interprétation téléologique, sans bouleverser l'esprit du traité, mais en optant pour l'encadrement des entreprises transnationales par le seul acteur qu'il peut, eu égard à son mandat, atteindre : les États. L'obligation extraterritoriale de protéger consiste notamment en l'adoption de mesures raisonnables (devoir de vigilance, coopération judiciaire, lutte contre l'optimisation fiscale) pour prévenir les violations du Pacte par une entreprise privée sur qui l'État peut exercer une influence.

In the context of discussions on the elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights, the Committee on Economic, Social and Cultural Rights adopted in 2017 the General Comment No. 24 on State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities. Going against neoliberal logic, the Committee promotes a welfare state that effectively circumscribes economic freedoms and that resolutely protects vulnerable populations. Among various interpretations of instruments and extraterritorial obligations, the Committee clearly chooses a teleological interpretation, without disrupting the economy of the treaty, but by decidedly opting for the control of transnational businesses by way of the only actors it can reach, given its mandate: States. The extraterritorial obligation to protect consists mainly in adopting reasonable measures (duty of diligence, judicial cooperation, fight against fiscal optimization) to prevent violations of the Covenant by a private business that the State can influence.

En el contexto de negociaciones sobre la elaboración de un instrumento internacional jurídicamente vinculante sobre las empresas transnacionales y otras empresas con respecto a los derechos humanos, el Comité de Derechos Económicos, Sociales y Culturales adoptó en 2017 la Observación general núm. 24 (2017) sobre las obligaciones de los Estados en virtud del Pacto Internacional de Derechos Económicos, Sociales y Culturales en el contexto de las actividades empresariales. A contracorriente de la lógica neoliberal, el Comité promueve un estado de bienestar que regula las libertades económicas y que protege las poblaciones vulnerables. Ante las interpretaciones diversas de las obligaciones extraterritoriales, el Comité elige claramente la interpretación teológica, sin alterar el espíritu del tratado, pero optando para el control de las empresas transnacionales por el único actor que pueda alcanzar: el Estado. La obligación extraterritorial de proteger consiste principalmente en la adopción de medidas razonables (deber de diligencia, cooperación judicial, lucha contra la optimización fiscal) para evitar violaciones del Pacto por parte de una empresa privada que el Estado pueda influir.

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The New York Covenants¹ – *International Covenant on Civil and Political Rights* (ICCPR) and *International Covenant on Economic, Social and Cultural Rights* (ICESCR) – adopted on 16 December 1966, focus on the vertical relationships between individuals and States and do not view companies as human rights holders or authors of human rights breaches. In terms of economic rights, the Covenants only establish the right to freely chosen or accepted work (Article 6 ICESCR), but they do not recognize the right to own property, the right to carry out a business or any other economic freedoms. At the same time, the Covenants require states to respect human rights (Article 2 of the two Covenants) and the communication procedures they provide are only applicable against States. Thus far, only individuals – not legal entities – have been entitled to seize the Human Rights Committee (HRC) in the event of a violation of the ICCPR (Article 1 of the optional Protocol).

Nevertheless, the desire to foster the liberalization of commercial trade, which has accrued since the fall of the Berlin Wall, has led to granting businesses, directly or indirectly, an increasing number of economic freedoms and rights through the medium of international economic law. These “substantive rights”² have often been protected by judicial or quasi-judicial bodies, at national, regional or international levels. Their sanctions can be much more effective than those enforced by any regional or international human rights body. In any case, the latter have agreed to protect the rights of legal entities³, so that there are now “corporate human rights.”⁴

Alongside this expanding protection of corporations’ fundamental rights, “a shift in the classic conception of relationships between human rights and the state” is taking place, where the state “is no longer the sole potential actor of rights’ violations,” but “becomes a protective force against abuse by private actors.”⁵ This “force”, in fact, is now becoming an obligation, given that it is now established that states must not only respect human rights, but also protect these rights by interfering, where necessary, in inter-individual relationships. But is it really still a force? The question arises notably with respect to transnational businesses. These businesses have seen tremendous development, thanks in particular to economic international law, and it may seem that their activities cannot be properly controlled, especially with weakened states tempted to attract such businesses in order to enhance their economic growth, with no desire or effective power to control them. Lack of desire, of course, occurs when the state or its

¹ *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976); *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976).

² According to the terminology of the appellate body of the WTO Dispute Settlement Body (WTO, *United States - import prohibition of Certain shrimp and shrimp products - Report of the Appellate Body*, WTO Doc WT/DS58/AB/R (1998), online: WTO <docsonline.wto.org>).

³ See Emmanuel Decaux, “L’applicabilité des normes relatives aux droits de l’Homme aux personnes morales de droit privé” (2002) 2 RIDC 549.

⁴ Marina Teller, “Les droits de l’Homme de l’entreprise” in Laurence Boy, Jean-Baptiste Racine & Fabrice Siiraiainen, eds, *Droit économique et droits de l’Homme* (Bruxelles: Larcier, 2009) 257 at 257, 267 [translated by author].

⁵ Véronique Champeil-Desplats, “Droits de l’Homme et libertés économiques: éléments de problématique” in Véronique Champeil-Desplats & Danièle Lochak, eds, *Libertés économiques et droits de l’Homme* (Nanterre: Presses universitaires de Nanterre, 2011) 21 at 29 [translated by author].

agents play an active role in, or benefit directly from, violations of human rights resulting from the activities of transnational corporations; but also, and this is a different situation, when in order to attract foreign investors necessary to economic development, states refrain from imposing strict fiscal, social and environmental regulations, which they fear may be challenged pursuant to investment protection agreements.⁶ Lack of effective power, as “it is now banal to point out [that] the turnover of the largest transnational companies [is] equivalent or higher than the GDP of many countries and that the turnover of a half-dozen of these corporations is higher than the GDP of the 100 poorest countries together”;⁷ but also, from a more legal point of view, as the international fragmentation of production processes and the development of direct foreign investment can lead to the dilution, possibly even dissolution of liabilities, and as hurdles barring proceedings, rulings and enforcement at the international level can lead to impunity.

As it happens, large transnational businesses are mostly based in Organisation for Economic Co-operation and Development (OECD) countries and, in a few recent decades, in emerging countries.

This is of particular significance, as it implies that the regulation of direct foreign investment (including ensuring the respect of human rights by transnational companies) cannot be separated from the question of North/South relationships and, more specifically, from the establishment of a more equitable economic international order.⁸

Thus, the goal is to avoid a situation where the respect, over here, of human rights and social, ecological and fiscal regulations related thereto would lead to the relocation of production over there—where the price for violations is so low—often to repatriate consumer goods here, while constantly increasing the pressure on the most vulnerable people wherever they are. It is about lifting the (social) veil and not averting our gaze from violations that are unbearable here, but that we feign to ignore when they occur in a faraway country, in the name of lower and lower prices here and of a prophetic economic development there.

In the 1970s, in the wake of the new economic international order, the UN envisaged the creation of a Code of Conduct on Transnational Corporations; however, the ideological divide between the Northern countries, focused on safeguarding their investors’ interests, and the Southern countries, concerned with protecting their sovereignty over their natural wealth and resources, led to the collapse of this project at the end of the 1980s.⁹ The activity of multinationals was addressed through incentive-

⁶ Olivier De Schutter, “La responsabilité des États dans le contrôle des sociétés transnationales : vers une convention internationale sur la lutte contre les atteintes aux droits de l’Homme commises par les sociétés transnationales” in Isabelle Daugareilh, ed, *Responsabilité sociale des entreprises et globalisation de l’économie* (Bruxelles: Bruylant, 2010) 707 at 713–728 [De Schutter].

⁷ Laurence Dubin, “Les relations partenariales entre les Nations Unies et les sociétés transnationales” in Karine Bannelier-Christakis et al, eds, *Les 70 ans des Nations unies : quel rôle dans le monde actuel ?* (Paris: Pedone, 2014) 191 at 193 [translated by author] [Dubin, “Les relations partenariales”].

⁸ De Schutter, *supra* note 6 at 711 [translated by author].

⁹ Dubin, “Les relations partenariales”, *supra* note 7 at 192–93; Karl P Sauvart, “The Negotiations of the United Nations Code of Conduct on Transnational Corporations” (2015) 16 *J World Investment & Trade*.

based principles in 1976 with the OECD Guidelines for Multinational Enterprises, revised in 2011 to include human rights concerns;¹⁰ in 2000, with the United Nations Global Compact¹¹; in 2011, with the Guiding Principles on Business and Human Rights adopted by the Human Rights Council.¹² The logic is always the same: businesses are invited, through the medium of partnerships, to become more responsible by respecting human rights on the basis of incentivising, non-binding instruments. This approach “rests on a neoliberal ethic according to which the market and its operators should be spared by international law”, become “global law” where States must negotiate with market forces the creation and enforcement of ethical rules of conduct.”¹³ In 2014, however, the Human Rights Council created a working group mandated to elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises.¹⁴

In this context, the Human Rights Treaty bodies have all relied on the obligation to protect in order to recommend that states control businesses operating within their territory,¹⁵ but also, more recently, control the conduct of businesses domiciled or registered on their territory that act abroad.¹⁶ Because of its specific

¹⁰ OECD, *Guidelines for Multinational Enterprises: 2011 Edition* (Paris: OECD, 2011); Catherine Colard-Fabregoule, “Les principes directeurs de l’OCDE à l’égard des multinationales” (2016) 3 RGDIP 579; John Gerard Ruggie & Tamaryn Nelson, “Human Rights and the OECD Guidelines for Multinational Enterprises: Normative Innovations and Implementations Challenges” (2015) 22 *Brown J World Affairs* 99.

¹¹ See Laurence Boisson de Chazournes & Emmanuelle Mazuyer, eds, *Le pacte mondial des Nations Unies 10 ans après* (Bruxelles: Bruylant, 2011).

¹² The Guiding Principles were designed by the UN Special Representative on the issue of human rights and transnational corporations and other business enterprises (*Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises*, UNGAOR, 2011, UN Doc A/HRC/17/31). They were approved by the Human Rights Council in its resolution 17/4 of 16 June 2011. Radu Mares, ed, *The UN Guiding Principles on Business and Human Rights: Foundations and Implementation* (Boston: Martinus Nijhoff, 2012).

¹³ Dubin, “Les relations partenariales”, *supra* note 7, at 203–04 [translated by author].

¹⁴ *Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights*, GA Res 26/9, UNGAOR, 26th session, A/HRC/RES/26/9 (2014); Surya Deva & David Bilchitz, eds, *Building a Treaty on Business and Human Rights: Context and Contours* (Cambridge: Cambridge University Press, 2017). For the latest developments on the draft treaty: *Report on the third Session of the Open-ended Intergovernmental Working Group on Transnational Corporations and other Business Enterprises with Respect to Human Rights*, UNGAOR, 37th Sess, UN Doc A/HRC/37/67 (2018).

¹⁵ UNHCR, 80th Sess, General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, 2187th Mtg, UN Doc CCPR/C/21/Rev.1/Add.13 (26 May 2004) at para 8; CEDAW, 47th Sess, General recommendation No. 28 on the core obligations of States parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women, UN Doc CEDAW/C/GC/28 (16 December 2010) at para 17; CERD, 51st Sess, General Recommendation XX on Article 5 of the CERD, 1147th Mtg, UN Doc A/51/18 (8 March 1996) at para 5.

¹⁶ CRC, 62nd Sess, General comment No. 16 on State obligations regarding the impact of the business sector on children's rights, UN Doc CRC/C/GC/16 (17 April 2013); HRC, 106th Sess, Concluding observations on the sixth periodic report of Germany, 2945th Mtg, UN Doc CCPR/C/DEU/CO/6 (12 November 2012) at para 16; HRC, 115th Session, Concluding observations on the fourth periodic report of the Republic of Korea, 3211th Mtg, UN Doc CCPR/C/KOR/CO/4 (3 December 2015) at para 11; HRC, 114th Sess, Concluding observations on the sixth periodic report of Canada, 3192nd Mtg, UN Doc CCPR/C/CAN/CO/6 (13 August 2015) at para 6; CEDAW, 47th Sess, General recommendation No. 28 on the core obligations of States parties under article 2 of the Convention on the Elimination of

mandate, the Committee on Economic, Social and Cultural Rights (CESCR) was immediately called upon to comment on the regulation private corporations by States.

CESCR is a body of independent experts that monitors the implementation of the *ICESCR* by its States parties.¹⁷ It regularly examines the reports that States parties have to submit – these describe how rights protections are being implemented at the national level. The CESCR then addresses its concerns and recommendations in the form of “concluding observations.” It also publishes “general comments” which represent its interpretation of the provisions of the Covenant.¹⁸ “Concluding observations” and “general comments” are not legally binding but have great moral authority. However, the International Court of Justice can “ascribe great weight to the interpretation adopted by [such] independent body that was established specifically to supervise the application of that treaty.”¹⁹

As Article 2(1) *ICESCR* commits States to act by deploying their own efforts, but also “through international assistance and co-operation”, to realize economic, social and cultural rights, the issue of extraterritorial obligations quickly arose.²⁰ In its Concluding Observations²¹ and General Comments,²² the Committee thus gradually

All Forms of Discrimination against Women, UN Doc CEDAW/C/GC/28 (16 December 2010) at para 36; CEDAW, 58th Sess, Concluding observations on the combined fourth and fifth periodic reports of India, 1220th Mtg, UN Doc CEDAW/C/IND/CO/4-5 (24 July 2014) at para 15; CEDAW, 66th Sess, Concluding observations on the combined seventh and eighth periodic reports of Germany, 1483rd Mtg, UN Doc CEDAW/C/DEU/CO/7-8 (9 March 2017) at para 16; CERD, 70th Sess, Consideration of Reports submitted by states parties under Article 9 of the Convention: Concluding observations of the Committee on the Elimination of Racial Discrimination, 1808th Mtg, UN Doc CERD/C/CAN/CO/18 (25 May 2007) at para 17; CEDR, 85th Sess, Concluding observations on the combined seventh to ninth periodic reports of the United States of America, 2317th Mtg, UN Doc CERD/C/USA/CO/7-9 (25 September 2014) at para 10.

¹⁷ *Implementation of the International Covenant on Economic, Social and Cultural Rights*, ESC Res 1985/17, UNESCO, 1985.

¹⁸ Since the entry into force of the Optional Protocol to *ICESCR* on 5th May 2013, the Committee in Economic, Social and Cultural Rights receives and considers inter-state or individual communications claiming that the Covenant has been violated. It may undertake inquiries on grave or systematic violations of the Covenant.

¹⁹ *Case concerning Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)*, [2010] ICJ Rep 639 at 66 (about the Human Rights Committee).

²⁰ See Malcolm Lanford et al, eds, *Global Justice, State Duties, The extraterritorial scope of Economic, Social and Cultural Rights* (Cambridge: Cambridge University Press, 2013).

²¹ See for instance: CESCR, 46th Sess, Consideration of reports submitted by states parties under articles 16 and 17 of the Covenant, 29th Mtg, UN Doc E/C.12/DEU/CO/5 (12 July 2011) at para 10; CESCR, 51st Sess, Concluding observations on the fourth periodic report of Austria, 68th Mtg, UN Doc E/C.12/AUT/CO/4 (13 December 2013) at para 12; CESCR, 52nd Sess, Concluding observations on the second periodic report of China, including Hong Kong, China, and Macao, China, 40th Mtg, UN Doc E/C.12/CHN/CO/2 (13 June 2014) at para 13; CESCR, 57th Sess, Concluding observations on the sixth periodic report of Canada, 20th Mtg, UN Doc E/C.12/CAN/CO/6 (23 March 2016) at para 16; CESCR, 58th Sess, Concluding observations on the fourth periodic report of France, 49th Mtg, UN Doc E/C.12/FRA/CO/4 (13 July 2016) at para 13; CESCR, 61st Sess, Concluding observations on the fifth periodic report of Australia, 47th Mtg, UN Doc E/C.12/AUS/CO/5 (11 July 2017) at para 14.

²² See for example: CESCR, 20th Sess, Substantive issues arising in the implementation of the International Covenant on Economic, Social and Cultural Rights: General comment No. 12, UN Doc E/C.12/1999/5 (12 May 1999) at para 20; CESCR, 22nd Sess, Substantive issues arising in the implementation of the International Covenant on Economic, Social and Cultural Rights, UN Doc E/C.12/2000/4

developed a doctrine regarding the obligation to protect with respect to businesses operating in a state's national territory but also with respect to businesses' transnational activities. It systematized its interpretation in 2011 in a Statement on the obligations of state parties regarding the corporate sector and economic, social and cultural rights,²³ and more recently in 2017 in a General Comment No. 24 on State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities.²⁴ These statements apply to purely domestic as well as transnational entities, privately or state-owned, whatever their size, sector, location, ownership or structure.²⁵

Going against the neoliberal logic–entrepreneurial, partnership-focused, self-regulatory, incentive-based–the Committee on economic, social and cultural rights fiercely decided to put the welfare state back on centre stage (I) and to put businesses back in their place: playing a leading role in the realization of economic, social and cultural rights, in particular through the creation of jobs and through investments supporting development;²⁶ but also, a role with responsibilities in light of potential violations of human rights they may channel, at the transnational level in particular (II).

I. Putting Welfare States back at the Heart of the Game

Despite their individualistic and state-sovereignty-limitative philosophy, human rights are not immediately fungible within the free market where human beings, free and equal in rights, decide of their own destiny. At least, this is the position stemming from General Comment No. 24 of the Committee on Economic, Social and Cultural Rights. Going against the neoliberal trend, according to which the state is “in charge of providing a legal framework to enable private agents to undertake whatever they deem to be most profitable,”²⁷ the UN entity, through its recommendations, promotes a welfare state that effectively circumscribes economic freedoms (A) and that resolutely protects those whom the market forces tend to exclude (B).

(11 August 2000) at paras 26, 35, 42; CESCR, 29th Sess, Substantive issues arising in the implementation of the International Covenant on Economic, Social and Cultural Rights, UN Doc E/C.12/2002/11 (20 January 2003) at paras 23, 24, 31, 33, 49; CESCR, 39th Sess, General comment No. 191: The right to social security (art. 9), UN Doc E/C.12/GC/19 (4 February 2008) at paras 45, 54, 65, 71; CESCR, 44th Sess, General comment No. 23 (2016) on the right to just and favourable conditions of work (article 7 of the International Covenant on Economic, Social and Cultural Rights), UN Doc E/C.12/GC/23 (7 April 2016) at paras 69, 70, 74, 75.

²³ CESCR, 46th Sess, Statement on the obligations of States parties regarding the corporate sector and economic, social and cultural rights, UN Doc E/C.12/2011/1 (12 July 2011).

²⁴ CESCR, 61st Sess, General comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities, UN Doc E/C.12/GC/24 (10 August 2017) [General comment No. 24].

²⁵ *Ibid* at para 3.

²⁶ *Ibid* at para 1.

²⁷ Yves Nouvel, “L’État néo-libéral au cœur de la mondialisation économique” in Société française pour le droit international, ed, *L’État dans la mondialisation* (Paris: Pedone, 2013) 133 at 135 [translated by author].

A. Circumscribing Economic Freedoms

In its effort of systematisation, the Committee has adopted the triptych according to which the State is under the obligation to respect, to protect and to fulfil human rights.²⁸ With regard to businesses, the obligation to protect is particularly relevant.²⁹ Nevertheless, the first statement of the Committee relates to the obligation to respect: this obligation “is violated when states parties prioritise the interests of business entities over Covenant rights without adequate justification.”³⁰ What appears to be sought here is, at a minimum, a balance between economic freedoms and *ICESCR* rights. In this respect, the Committee encourages States to be particularly vigilant with regard to trade and investment agreements, which entails: a human rights impact assessment during negotiations; no ratification if there are actual conflicts; regular assessment of reciprocal impacts; the adoption of corrective measures in the event of conflict; an interpretation of applicable treaties compatible with the respect of human rights; the inclusion of “human rights” clauses in such treaties; a dispute settlement mechanism taking into account human rights when interpreting provisions.³¹ This diligence is probably the price to pay for allowing states to

escape their own schizophrenia, the one that makes them, on the one hand, refrain from adopting legislation that would adversely affect, if not the rights they’ve already granted to investors, at least in the interests of those they seek to attract, and, at the same time, want to legislate to protect their consumers, their workers or their environment.³²

In fact, it is not only free trade and free investment that the Committee seeks to restrict in the name of human rights; for instance, according to the Committee, intellectual property rights should not lead to restricting access to essential medicines necessary to the right to health, or to seeds crucial to the right to food³³. The Committee defies the idea of free and independent consumerism when it invites states to regulate of various products in order to protect public health or to fight stereotypes,³⁴ acknowledging the ability of unregulated market forces to durably impede the realization of rights. The Committee is thereby limiting advertising and commercial free speech.

Thus, States’ interference in economic activities should be driven by the respect of human rights. States must adopt legislative, administrative, educative and other appropriate measures in order to protect individuals effectively against violations

²⁸ Asbjørn Eide, “Economic, Social and Cultural Rights as Human Rights” in Asbjørn Eide, Catarina Krause & Allan Rosas, eds, *Economic, Social and Cultural Rights - A textbook* (Boston: Nijhoff, 2001) 9 at 9.

²⁹ General comment No. 24, *supra* note 24 at para 10.

³⁰ *Ibid* at para 12.

³¹ *Ibid* at para 13.

³² Laurence Dubin, “Rapport introductif: l’entreprise multinationale, de la fragmentation à la reconstruction par le droit international” in Laurence Dubin et al, eds, *L’entreprise multinationale et le droit international* (Paris: Pedone, 2017) 13 at 19 [translated by author].

³³ General comment No. 24, *supra* note 24 at para 24.

³⁴ *Ibid* at para 19.

arising from business activity,³⁵ even if it means restricting contractual freedom. They must require that businesses undertake due diligence procedures in order to identify risks of violation, prevent them, mitigate them and to account for the negative impacts of their decisions and activities. More specifically, “states should adopt measures such as imposing due diligence requirements to prevent abuses of Covenant rights in a business entity’s supply chain and by subcontractors, suppliers, franchisees, or other business partners.”³⁶ They should inflict criminal or administrative sanctions for violations of the Covenant by businesses or for failing to act with the required due diligence. In this respect, incentivising measures (subsidies or other means of support, award of public procurement contracts, fiscal measures for example) and business licences should be aligned (and potentially revoked) with sanctions for violations of the Covenant.³⁷

Nevertheless, while economic freedoms should be restricted to ensure the respect of human rights, the idea is not to sacrifice them in favour of a state’s economy. The Committee noted that privatizations are not forbidden as such by the Covenant, although when they relate to services in connection with the realization of economic, social and cultural rights, they must be strictly limited by “public service obligations.”³⁸ Thus, it is the traditional French expression that was adopted here, which is more restrictive and has a more liberal connotation than expressions such as “service of general interest”, “universal service”³⁹ or “services supplied in the exercise of governmental authority.”⁴⁰ These obligations relate to the “universality of coverage and continuity of service, pricing policies, quality requirements, and user participation.”⁴¹ Access to rights should in no way depend on the ability to pay, or lead to the exclusion, of marginalized populations and privatizations should not result in different levels of services contingent on the socio-economic resources of individuals. These caveats mean that sometimes, States, in order to implement the Covenant, will have to directly supply goods and services essential to the enjoyment of these rights.⁴² In this case, potential violations will be attributable directly to the State. More generally, the Committee points out that the State can be held directly liable for the (in)action of a business when the entity acts upon the instructions, guidelines or is under the control of the State, if it exercises elements of governmental authority as a result of empowering legislation or because of the default status of public authorities, or if the conduct of the company is adopted by the State as its own.⁴³

³⁵ *Ibid* at para 14.

³⁶ *Ibid* at para 16.

³⁷ *Ibid* at para 15.

³⁸ *Ibid* at para 21.

³⁹ Expressions preferred by EU law.

⁴⁰ General Agreement on Trade in Services, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B (15 April 1994) art I(3)(b).

⁴¹ General comment No. 24, *supra* note 24 at para 21.

⁴² *Ibid* at paras 22–23.

⁴³ *Ibid* at para 11. For more detail on this issue, see De Schutter, *supra* note 6 at 741–49. Pierre Bodeau-Livinec strongly nuances the direct enforcement of a state’s liability in these scenarios (Pierre Bodeau-Livinec “La responsabilité des États à raison des activités des entreprises multinationales” in Laurence

The State must therefore regulate public and private businesses to prevent them from violating human rights. But, at the same time, it must also act to support vulnerable individuals and populations in order to prevent the market from simply reinforcing inequalities.

B. Protecting Vulnerable Populations from Market Forces

Here, the idea is not only to restrict economic freedom, but also to promote the effective enjoyment of social rights, by guaranteeing to those in the most difficult situations access to a minimum of rights such as “a minimum wage consistent with a living wage and a fair remuneration” or “affordable and adequate housing” through rent control.⁴⁴ However, the Committee is mostly concerned with those populations that are often disproportionately affected by businesses’ activities: in particular women, children, indigenous peoples, peasants, fisherfolk and other rural communities, ethnic and religious minorities, persons with disabilities, asylum seekers and undocumented migrants. States are thus required to prohibit acts of discrimination in the exercise of economic, social and cultural rights, which are frequently carried out by the private sector, in particular in the job, housing and lending markets.⁴⁵

The Committee is particularly preoccupied with certain specific categories: persons with disabilities for whom the absence of special attention often results in the denial of their rights, and for whom the State should promote research and development in order to create universally designed goods and services and “incorporate a requirement linked to reasonable accommodation [...] in public contracts.”⁴⁶ Women, who often suffer from intersectional and multiple discrimination, physical and sexual abuse, and who are overrepresented in the informal economy and less likely enjoy social protection benefits. States must therefore include a gender policy lens in all regulation of businesses and they must adopt temporary special measures to foster the presence of women in the labour market.⁴⁷

But above all, the Committee looks out scrupulously for the rights of indigenous peoples that are often the victims of the most serious human rights violations by businesses, in particular in the context of investment-linked evictions and displacements. Human rights impact assessments should thus incorporate their needs and interests. In exercising due diligence with respect to human rights, businesses should consult and cooperate in good faith with representatives of indigenous communities and their institutions to obtain their free, prior and informed consent before any activity begins. They should put in place mechanisms guaranteeing indigenous peoples a share in the benefits derived from the activities carried out on

Dubin et al, eds, *L'entreprise multinationale et le droit international* (Paris: Pedone, 2017) 409 at 410-19 [Bodeau-Livinec]).

⁴⁴ *Ibid* at paras 18–19.

⁴⁵ *Ibid* at paras 7–8.

⁴⁶ *Ibid* at paras 18, 24.

⁴⁷ *Ibid* at para 9.

their traditional territories.⁴⁸ Against the patenting by businesses of indigenous peoples' traditional knowledge, States should recognize the right of these peoples "to control the intellectual property over their cultural heritage, traditional knowledge and traditional cultural expressions."⁴⁹ Lastly, they should guarantee these populations effective access to legal remedies in the event of a violation, which entails the diffusion of information, translation services, legal aid, but also educating the courts as to their culture and their legal customs in particular.⁵⁰

In the event of a violation of the *ICESCR* by a business, the desire to restore equality of arms during potential proceedings is a constant concern of the Committee. In this case, it acknowledges the economic imbalance between the parties involved and recommends, for example, the implementation of class actions, a reversed burden of proof when the probative elements are in the sole hands of the corporate defendant or restrictions on using trade secrets and other grounds for refusing disclosure of relevant elements.⁵¹

The regulations, controls and obligations that States must put in place to meet their obligation to protect extend to their national territory. In theory, this is where, *vis-à-vis* any operating business regardless of its nationality, States must act, pursue or make available legal remedies in a case of abuse. Yet, when confronting transnational business, when the host State does not act, shouldn't the home State's obligation to protect be invoked? It is the highly controversial issue of extraterritorial obligations in human rights matters that is at stake here and that the Committee has decided to tackle.

II. Putting Transnational Businesses back in their Place

Among various interpretations of instruments and extraterritorial obligations, the Committee on Economic, Social and Cultural rights clearly chose a teleological approach, without disrupting the economy of the treaty (A), but by decidedly opting for the control of transnational businesses by the only actors that it can reach, given its mandate: States (B).

A. Teleological and Voluntarist Interpretation of Extraterritorial Obligations

In order to support the existence of extraterritorial obligations arising out of the *International Covenant on Economic, Social and Cultural Rights*, the Committee relies on several rules of international law.⁵² First, the Covenant itself—contrary to Article 2(1) *ICCPR* which refers to the rights of individuals "within [the] territory and

⁴⁸ *Ibid* at para 17.

⁴⁹ *Ibid* at para 24.

⁵⁰ *Ibid* at paras 46, 54, 56.

⁵¹ *Ibid* at paras 44–45.

⁵² *Ibid* at para 27.

subject to [the] jurisdiction” of the State party⁵³—does not provide any restriction linked to territory or jurisdiction. Only Article 14 of the *ICESCR* on primary education national plans includes such restrictions, which seems to suggest that the authors expressly specified when this limitation seemed relevant. Secondly, Article 2(1) *ICESCR* “refers to international assistance and cooperation as a means of fulfilling economic, social and cultural rights”. A state’s inaction against an actor, domiciled on its territory or subject to its jurisdiction, likely to cause a violation of rights abroad seems “contradictory” to this provision.⁵⁴ Other Articles, left out by the Committee, insist on the necessity to cooperate to implement the *ICESCR* (Articles 11, 15, 22, 23). But the issue as to whether there is an obligation to cooperate is more controversial,⁵⁵ as is the issue of its scope, which could be limited to economic and technical assistance⁵⁶ or extend to much wider activities pursuant to Article 23.⁵⁷ The Committee does not strictly go into that topic and prefers pointing to the contradiction between the cooperation mentioned in Article 2(1) and the possible inaction of States.

With regard to cooperation, the Committee also invites States to take into account Articles 55 and 56 of the *United Nations Charter*, according to which UN Members undertake to take joint and separate action in co-operation towards universal respect of human rights. This is not, for the CESCR, a legal basis for extraterritorial obligations, but an element weighing in their favour, given that the articles of the *Charter* are worded “without any territorial limitation.”⁵⁸

Referring to the Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*,⁵⁹ the Committee underlined that “the International Court of Justice has acknowledged the extraterritorial scope of core human rights treaties, focusing on their object and purpose, their legislative history and the lack of territorial limitation provisions in the text.”⁶⁰ Perhaps this reference was not the most pertinent one, as, in this advisory opinion, the Court specifically provided that the *ICESCR*, contrary to the *ICCPR*, guaranteed rights that were essentially territorial and that its extraterritoriality only related to effective (and military) control over occupied territories.⁶¹ Yet perhaps this statement, for which the

⁵³ De Schutter, *supra* note 6 at 732.

⁵⁴ General comment No. 24, *supra* note 24 at para 27.

⁵⁵ Takhmina Karimova, “The Nature and Meaning of ‘International Assistance and Cooperation’ under the International Covenant on Economic, Social and Cultural Rights” in Eibe Riedel, Gilles Giacca & Christophe Golay, eds, *Economic, Social, and Cultural Rights in International Law: Contemporary Issues and Challenges* (Oxford: Oxford University Press, 2014) 163 at 164.

⁵⁶ Riccardo Pisillo Mazzeschi, “Violation d’obligations positives de *due diligence* relatives aux droits de l’homme” (2008) 333 *Recueil des Cours de l’Académie de Dr Intl de La Haye* 390 at 456.

⁵⁷ De Schutter, *supra* note 6 at 736.

⁵⁸ General comment No. 24, *supra* note 24 at para 27.

⁵⁹ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, [2004], ICJ Repat 109–12.

⁶⁰ General comment No. 24, *supra* note 24 at para 27.

⁶¹ Hélène Tigroudja, “A Critical Appraisal of the UN Committee on Economic, Social and Cultural Rights’ General Comment n° 24, on States’ Obligations in the context of Business Activities” (2017), to be published.

Court provided no basis,⁶² was in fact not worthy of being used by the Committee, as it seemed to be based implicitly on an overused vision of the difference between the two Covenants,⁶³ according to which the *ICCPR* would contain obligations to refrain (which would logically apply abroad) and the *ICESCR* obligations to act or perform (which would logically apply only within a given territory).

Lastly, relying on international case law, the Committee was slightly optimistic when pointing out that “customary international law also prohibits a state from allowing its territory to be used to cause damage on the territory of another state.”⁶⁴ Indeed, recent rulings focused more on an obligation of means, on the fact of “avoiding” rather than “not allowing” and on the significance of the damage;⁶⁵ however, this cautionary approach will, in our view, be respected when the Committee concretely outlines consequences related to the breach of extraterritorial obligations by transnational businesses.

Indeed, according to General Comment n° 24, these legal texts and case law give rise to extraterritorial obligations that “arise when a state party may influence situations located outside its territory, [...] by controlling the activities of corporations domiciled in its territory and/or under its jurisdiction,”⁶⁶ “whether they were incorporated under their laws, or had their statutory seat, central administration or principal place of business on the national territory.”⁶⁷ The extraterritorial obligation may at first seem vague, but its recognition within the General Comment seems to rather encourage States not to look away from transnational corporations’ activities by reasonably regulating the situations they can influence.

B. Reasonable Regulation of Transnational Activities

According to the Committee, the extraterritorial obligation to respect requires state parties not to interfere with the enjoyment of the rights of persons that are not on their territory, including by preventing another state from complying with the Covenant. The Committee uses the example of economic sanctions, which are likely to harm the economic, social and cultural rights of the targeted populations. Care must also be taken during the negotiation of trade and investment agreements and of financial

⁶² De Schutter, *supra* note 6 at 735; Wouter Vandenhole, “Extraterritorial Human Rights Obligations: Taking Stock, Looking Forward” (2013) 5 *European J Human Rights* 804 at 815.

⁶³ Sophie Grosbon, “Chapitre introductif : Les mutations du droit international” in Diane Roman, ed, *La justiciabilité des droits sociaux : vecteurs et résistance* (Paris: Pedone, 2012) 137 at 138.

⁶⁴ General comment No. 24, *supra* note 24 at para 27.

⁶⁵ *Case concerning Pulp Mills on the River Uruguay (Argentina v Uruguay)*, [2010] ICJ Rep 14 at 101: “A State is thus obliged to use all the means at its disposal in order to avoid activities which take place in its territory, or in any area under its jurisdiction, causing significant damage to the environment of another State”; Yann Kerbrat & Sandrine Maljean-Dubois, “La Cour internationale de justice face aux enjeux de protection de l’environnement : réflexions critiques sur l’arrêt du 20 avril 2010, Usines de pâte à papier sur le fleuve Uruguay (Argentine c. Uruguay)” (2011) 115 *RGDIP* 39 at 50.

⁶⁶ General comment No. 24, *supra* note 24 at para 28.

⁶⁷ *Ibid* at para 26.

and tax treaties.⁶⁸ This comment may seem vague and ambiguous,⁶⁹ but it can also simply mean that before the conclusion of such agreements, an assessment of the impact on the human rights of populations in the relevant States should be carried out, that the inclusion of “human rights” clauses should be encouraged, that economic stability clauses⁷⁰ should be avoided, as should fiscal agreements that encourage excessive optimization. Investment agreements could also deny protection to actors who have contributed to a violation of the Covenant.⁷¹

The extraterritorial obligation to protect consists mainly in adopting reasonable measures to prevent violations of the Covenant by private businesses. The Committee illustrates the content thereof in the conditional rather than imperative tense: thus, states should “require”—rather than must “enforce”—businesses to “deploy their best efforts to ensure”—rather than “ensure”—that the *ICESCR* is respected by “entities whose conduct those corporations may influence.”⁷² This constitutes a wide range of entities: “subsidiaries (including all business entities in which they have invested, whether registered under the state party’s laws or under the laws of another state) or business partners (including suppliers, franchisees and subcontractors).”⁷³ Furthermore, the Committee specifies that businesses “should be required to act with due diligence to identify, prevent and address abuses to Covenant rights by such subsidiaries and business partners, wherever they may be located”.⁷⁴ They must also “report on their policies and procedures to ensure respect for human rights” and “provide effective means of accountability and redress for abuses”.⁷⁵

As for states, the goal is mostly to be proactive, and to adopt mechanisms such as the duty of diligence of parent companies,⁷⁶ due diligence plans, and disclosure or reporting obligations, with available remedies if the information publicly disclosed by the corporation does not reflect its conduct or if the entity could have effectively contributed to preventing a violation. In no way does the Committee make corporations liable for all the action of their subsidiaries and subcontractors. This is clearly a duty of diligence, which must nevertheless be taken seriously (for what it actually is) by the legislative and judicial institutions of the State.

The State can in no way be directly liable for the conduct of a business. It is in breach of its obligations only if it has failed “to take reasonable measures that could have prevented the occurrence of the event.”⁷⁷ The Committee specifies that this applies “even if other causes have also contributed to the occurrence of the violation” and even

⁶⁸ *Ibid* at para 29.

⁶⁹ Tigroudja, *supra* note 61.

⁷⁰ These clauses, which limit potential legislative amendments with an impact on the investment’s economic environment, can prevent the adoption of public health, environmental, social or other types of measures.

⁷¹ General comment No. 24, *supra* note 24 at para 50.

⁷² *Ibid* at para 33.

⁷³ *Ibid.*

⁷⁴ *Ibid.*

⁷⁵ *Ibid.*

⁷⁶ See the French law on the duty of diligence of parent and subcontracting companies: *Loi n° 2017-399 du 27 Mars 2017*, JO, 28 March 2017.

⁷⁷ General comment No. 24, *supra* note 24 at para 32.

if the violation wasn't anticipated, so long as it was "reasonably foreseeable."⁷⁸ Admittedly, these circumstances may seem to overburden States with even more obscure obligations.⁷⁹ But, with regard to the obligation to adopt reasonable measures, the idea is only that States should legislate in order to best prevent reasonably foreseeable violations. In this respect, the Committee used a particularly striking illustration: "considering the well-documented risks associated with the extractive industry, particular due diligence is required with respect to mining-related projects and oil development project."⁸⁰ States must therefore exercise a particular diligence (and potentially strengthen their authorisation and control mechanisms) with regard to this type of project for which one can no longer pretend that violations are not foreseeable.

The Committee makes it clear that "although the imposition of such due diligence obligations does have impacts on situations located outside these states' national territories, this does not imply the exercise of extraterritorial jurisdiction by the states concerned."⁸¹ Indeed, "no obligation is directly imposed on a foreign company, and if the foreign company is affected by the adoption of such regulations, it is only because the parent company complies with the obligations imposed thereon by legislation in its home state."⁸² Furthermore, one

advantage of this approach is that instead of being encouraged to look away from the conduct of its subsidiaries, on the basis that too strict a control over the activities thereof would risk lifting the social veil by making the autonomy of the subsidiary's decision seem purely fictitious (in which case the parent company could be held liable for the conduct of its subsidiary), the parent company would be encouraged to monitor more rigorously its subsidiaries, this constituting in and of itself a legal obligation and its liability being incurred only if the control mechanisms put in place turned out to be deficient.⁸³

But the obligation to protect is not limited to an obligation to legislate on the due diligence of parent companies. It also requires a strengthened international judicial cooperation, in order to reduce the risks of a denial of justice, of negative or positive conflicts of jurisdiction, of hurdles in the collection of evidence and of non-enforcement of rulings. "The *forum non conveniens* doctrine, according to which a court may decline to exercise jurisdiction if another forum is available to victims" should only be relied upon when "an effective remedy is available and realistic in the alternative jurisdiction."⁸⁴ States should also remove the hurdles specific to the remedies sought against transnational companies, by adopting adequate liability regimes, putting in place legal aid services, allowing for class actions, and facilitating the collection of evidence abroad.⁸⁵

⁷⁸ *Ibid.*

⁷⁹ Tigroudja, *supra* note 61.

⁸⁰ General comment No. 24, *supra* note 24 at para 32.

⁸¹ *Ibid* at para 33.

⁸² De Schutter, *supra* note 6 at 768 [translated by author].

⁸³ *Ibid* at 767 [translated by author].

⁸⁴ General comment No. 24, *supra* note 24 at paras 34–35, 43–44.

⁸⁵ *Ibid.*

Lastly, the extraterritorial obligation to fulfil is the one that seems, at first, to be the most utopic. It relies on Article 28 of the *Universal Declaration of human rights*, which prescribes that “everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized” and opens up the realm of possibilities for humanist imagination without providing the clarity, predictability and security that a legal norm requires. The Committee infers therefrom an obligation for States “to contribute to creating an international environment that enables the fulfilment of the Covenant rights’ through their policies, their laws or their diplomatic relations.”⁸⁶ This statement might leave one somewhat sceptical.⁸⁷ Yet, once again, meaning can be found in the illustrations: the main idea is to fight, at the national and international levels, against “tax avoidance strategies” used by businesses, to strengthen international fiscal cooperation, to “explore the possibility to tax multinational groups of companies as single firms”⁸⁸, to fight social dumping or increase corporation tax. The idea is thus effectively to enable States to have at their disposal the resources necessary to the full enjoyment of economic, social and cultural rights, in accordance with Article 2(1);⁸⁹ to re-regulate a legal and institutional framework that, in the name of trade liberalization, has fostered fiscal fraud and optimization and the decrease of taxes to the detriment of the realisation of social rights.

Therefore, it is irrelevant that the concept of “jurisdiction” does not match the canons of international law. What matters is that a State obligation was clearly acknowledged. The obligation to adopt reasonable measures to prevent the violation of the *ICESCR* by businesses it can influence: entities incorporated according to its laws, or whose domicile, registered office, central administration or main place of business is located on its territory. What matters is that indications and directions were given as to the content of these reasonable measures (duty of diligence, judicial cooperation, fight against fiscal optimization). Other than for the failure to adopt due diligence measures, the State cannot incur liability for violations committed by multinational businesses.

The Human Rights Committee has confirmed this analysis in a recent decision *Basem Ahmed Issa Yassin and others*.⁹⁰ In this instance, Palestinian villagers submitted an individual communication against Canada, because two companies domiciled on Canadian territory built housing within Israeli colonies located on their land. In its decision, the Committee did not delve into the issue of the “jurisdiction” of persons affected by companies’ activities abroad. That did not prevent it from recognizing that the State has “an obligation to ensure that rights under the Covenant are not impaired by extraterritorial activities conducted by enterprises under its jurisdiction,” “that is particularly the case where violations of human rights that are as serious in nature as the ones raised in this communication are at stake” (§6.5). In this particular case, the communication was inadmissible because the authors could not prove the “nexus”

⁸⁶ *Ibid* at para 37.

⁸⁷ Tigroudja, *supra* note 61.

⁸⁸ General comment No. 24, *supra* note 24 at para 37.

⁸⁹ *Ibid*.

⁹⁰ HRC, 120th Sess, Decision adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2285/2013, UN Doc CCPR/C/120/D/2285/2013 (7 December 2017).

between the State party's obligations, the conduct of the business and the violation of the right. And as well because they could not establish that the State had breached its due diligence obligations vis-à-vis the transnational activities of these businesses; they did not provide sufficient information on existing Canadian regulations in this regard, on the effective ability of the State to regulate the challenged transnational activities, and on the State's awareness of said activities and of the foreseeable consequences thereof (§ 6.7). Thus, the obligation at stake here was an "obligation to regulate as much as possible," an obligation to weave "a 'normative tapestry,'" to "implement at a domestic level a regulatory and institutional framework supporting the effective enforcement of the liability of multinational corporations for the violation of fundamental rights."⁹¹

Yet, beyond the necessarily limited mandate of the Committees, that can only "look for the responsibility of states in connection with acts carried out by corporations (responsibility by catalysis),"⁹² when drawing up an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights, "there is nothing preventing states from adopting a treaty defining international obligations for multinational businesses, the violation of which could be established by jurisdictions of the international order," since they "perfectly accept the recognition in investment treaties of rights in favour of companies/investors, the violation of which can be established in arbitral jurisdiction."⁹³ The Committee on Economic, Social and Cultural Rights has properly played its part in the fight against violations committed by businesses, now it is up to treaty negotiators to do theirs, with equal conviction and responsibility.

⁹¹ Bodeau-Livinec, *supra* note 43 at 423 [translated by author].

⁹² Olivier de Frouville, "Rapport introductif : les mécanismes onusiens de protection et de promotion" in Emmanuel Decaux, ed, *La responsabilité des entreprises multinationales en matière de droits de l'Homme* (Bruxelles: Bruylant, 2010) 163 at 183 [translated by author].

⁹³ Dubin, *supra* note 32 at 47 [translated by author].