

EXTRATERRITORIAL OBLIGATIONS CONSORTIUM

Extraterritorial State Obligations and Economic Social and Cultural Rights: Legal Principles of Interest for Middle East/North Africa¹

Economic, social and cultural rights (ESCR) have been progressively developed as human rights for over 20 years. But almost exclusive attention has been placed on the domestic side of states' obligations. But the actions and inactions of states do also affect the enjoyment of ESCR by those living beyond their borders.

Economic globalization increases the number of transborder activities with extraterritorial effects. The concept of extraterritorial obligations (ETOs), which signify human rights obligations of states towards individuals and groups outside their own territories, gained importance as a human rights response to globalization. The ETOs are related to a number of current transnational challenges faced by all regions of the world, but particularly the African continent, including those relating to international trade, foreign investment, official development assistance, privatization of basic services, land grabbing, destruction of environment and ecosystem by extractive industries, lack of regulation of transnational companies, climate change and the impact of policies approved by intergovernmental organizations and international finance institutions, including the World Bank, the World Trade Organization and the International Monetary Fund.

The human rights obligations of states do not stop at their borders. They have obligations to respect, protect and fulfill human rights domestically as well as beyond their borders. ETOs are a cross-cutting issue for the effective enjoyment of human rights in general and ESCR in particular. ETOs could be a tool to open up the road to the much needed human rights regulation of transnational corporations and development cooperation. It may also be a tool for making international economic law (investment and trade) consistent with human rights and for submitting international financial institutions to international human rights law.

Treaties like the International Covenant on Economic, Social and Cultural Rights and the Convention on the Rights of the Child do not limit the obligations of states to the territories of states. The importance of ETOs has been recognized, in particular, in various general comments of the United Nations Committee on Economic, Social and Cultural Rights and also by the UN Special Rapporteurs on the right to food and the right to health.

In the African context, ETOs could become a strategic legal and political tool to protect the human rights of the people living in African states against externally sourced acts of breach. In fact, Africa appears to be among the most affected by the absence of a regime governing the obligations of states beyond their borders. Needless to say, ETOs also include obligations owed by African states towards people living in other African states. It is appreciable in this respect that the African Commission recognizes the existence of extraterritorial state obligations among African states at least in circumstances where states or their agents act beyond their borders. In its decision in the case *DRC v Burundi, Rwanda and Uganda*, the Commission found the respondent states in (extraterritorial) violation of a range of rights of the Congolese, including ESCR.² The African Commission further recognizes the obligation of African states to protect their people from the infringement of their rights by nonstate actors, including transnational corporations.³ But the Commission can do only so much to enforce ETOs and related obligations. It cannot apparently hold non-African states responsible for their part in transnational activities that result in the violations of the rights of people in Africa. Holding African states responsible for failing to protect their people from foreign (non-African) companies also deals with only part of the problem.

The African Commission has also noted the insufficient attention that States give to ESCR and the continued marginalization of these rights.⁴ In its recent resolution on the impact of the ongoing global financial crisis, the Commission recalled that “the realization of economic and social rights *vis-à-vis* civil and political rights remains elusive to many on the African continent as a result of several factors such as persistent conflicts, lack of human and food security due to poverty and underdevelopment, corruption and lack of good governance.”⁵ The Special Rapporteur on the rights of women in Africa of the African Commission also stressed “the need for African governments to take into account and satisfy women’s economic and social rights is becoming an essential component for sustainable development.”⁶

The above show that there is a need for a strengthened promotion and protection of ESCR in Africa with full recognition of the significance of ETOs. This could help African states to further fight against poverty, hunger, malnutrition, underdevelopment as well as to protect their peoples’ rights to self-determination in accordance with the African Charter on Human and Peoples’ Rights. African States should understand that the recognition of the existence of ETOs is important for the protection of their own peoples and communities and their access to land and natural resources. In light of the foregoing, it is important that the African Commission as well as African states promote the recognition and application of ETOs in international human rights law.

In 2007, an ETO Consortium was formed with a number of civil society organizations (CSOs) and universities from all over the world. It is currently a network of some 50 human rights NGOs, universities and institution-based individuals. It is open to include further universities, nongovernmental organizations and individuals, especially from Africa. The Consortium’s aims are to:

1. Increase the awareness on the concept of ETOs and promote its further development and utilization among CSOs, selected governments and expert circles;
2. Serve as a platform for exchange of ideas and enhanced research towards an international expert opinion on the principles of ETOs.

In 2010, one of the priorities of the ETO Consortium is to organize a number of regional consultations on ETOs in various regions, including Latin America, Africa, North America, Europe and Asia. These consultations will contribute to design a global strategy for the upcoming ETO promotional campaign.

Case Studies Introduced by Thematic Studies according to Policy Field

Members of the ETO consortium have carried out research on the applicability of extraterritorial obligations in the following situations:

1. Trade and Investment

Thematic study: ETOs in Trade and Investment

- A. Trade impoverishes tomato farmers in Koluedor: Ghana/EU/IMF
- A2. ETOs of States as Members of Regional Trade Blocs: The Case of Small-Scale Farmers in Kenya and the EU’s EPAs: Kenya/EU
- B. The Human Right to Water in Buenos Aires: Argentina/France
- C. Bilateral Investment Treaty (BIT) Hinders Land Reform: Paraguay/Germany
- D. Mubende: Coffee Plantation Threatens the Right to Food of People: Uganda/Germany
- E. Pulp Mill Case: Uruguay, Argentina/Uruguay, Finland, Sweden, France, and states within the World Bank Group’s operating structure (particularly that of the IFC and MIGA)
- F. Baba & Santa Elena Projects: Ecuador/Brazil
- G. Gold Mine Marlin: Human rights of Guatemalan indigenous communities abused by mining activities of Canadian company: Guatemala/Canada

- H. The Madeira case: human rights violations related to the construction of mega dams on the Madeira River: Brazil/France
- I. The Lekki case: Chinese “Free trade” zone threatens Nigerian communities: Nigeria/China

2. Development Assistance

Thematic study: The ET fulfill-bound obligation in the developmental context

- J. Ilisu Dam Project: Turkey/Germany, Switzerland, Austria, France
- J. Illegitimate Debt and Human Rights: The Case of Ecuador and Norway: Ecuador/Norway
- K. Land Management and Administration Project: Cambodia/Germany, World Bank
- L. The Mexico City Policy (“global gag rule”) violates the right to health and the reproductive rights in Kenya: Kenya/USA
- M2. Freedom from Hunger: Zambia/Germany et al.

3. Intergovernmental Organizations

Thematic study 1: ETOs in the context of IGOs

Thematic study 2: ETOs of states when acting as members of IGOs – with particular reference to international financial institutions (IFIs)

- M. The Chixoy Dam case in Guatemala: Guatemala/IFI, World Bank, Inter-American Development Bank
- N. State Responsibilities as Members of the IFC: The Case of Ghana’s Ahafo Mines
- O. Project and the IFC Board’s Approval of a \$75 million loan for Newmont Mining
- P. Company: Ghana/IFC

4. TNC’s, private actors and their regulation Thematic study 1: Extraterritorial State Obligations to Monitor, Regulate, Adjudicate Transnational Corporations

Thematic study 2: Toward home state’s control of TNCs operating abroad: the extraterritorial dimension of the duty to protect

- Q. The Euzkadi-Continental case: Mexican workers’ successful struggle against human rights abuse by German tire producer: Mexico/Germany
- R. Trafigura, harm from waste disposal: Cote d’Ivoire/The Netherlands
- S. Veolia and Alstom transport corporations as subcontractors of illegal infrastructure project in occupied territory: Palestine/France

5. Cross-border issues

- T. Attacks to the South of Lebanon and ESC Rights: Lebanon/Israel
- U. Clemenceau ship-breaking: India/France
- V. Israeli state institutions operating extraterritorially to carry out population transfer and colonization: World Zionist Organization/Jewish Agency and Jewish National Fund: Israel/states hosting population transfer institutions (WZO/JA & JNF)
- W. Fisheries’ Agreement: West Sahara/Morocco/EU

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¹ Based on ETO Consortium’s oral statement before the African Commission on Human and Peoples’ Rights, 47th Ordinary Session (12–26 May 2010), delivered by Sisay Alemahu Yeshanew, member of the ETO Consortium Steering Group.

² Communication 227/1999, Democratic Republic of Congo v Burundi, Rwanda and Uganda (2004) AHRLR 19 (ACHPR 2004) (20Annual Activity Report).

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- ³ Communication 155/96, Social and Economic Rights Action Center and Another v Nigeria (2001) AHRLR 60 (ACHPR 2001) (15th Activity Report); and Communication 245/2002, Zimbabwe Human Rights NGO Forum v Zimbabwe (2006) AHRLR 128 (ACHPR 2006) (21st Activity Report).
- ⁴ For instance: ACHPR/RES.735(XXXVI)04, Resolution on Economic, Social and Cultural Rights in Africa, adopted at the 36th Ordinary Session of the African Commission on Human and Peoples' Rights in Dakar, Senegal, on 7 December 2004.
- ⁵ ACHPR/Res159(XLVI)09, Resolution on the Impact of the Ongoing Global Financial Crisis on the Enjoyment of Social and Economic Rights in Africa, African Commission on Human and Peoples' Rights, adopted in Banjul, The Gambia, 25 November 2009.
- ⁶ Press release on the occasion of the International Women's day, Banjul, 8 March 2008.