

- Courseware (/courses/LouvainX/Louv2.01x/1T2014/courseware)
- Course Info (/courses/LouvainX/Louv2.01x/1T2014/info)
- Discussion (/courses/LouvainX/Louv2.01x/1T2014/discussion/forum)
- Wiki (/courses/LouvainX/Louv2.01x/1T2014/course_wiki)
- Progress (/courses/LouvainX/Louv2.01x/1T2014/progress)
- Reading Materials (/courses/LouvainX/Louv2.01x/1T2014/pdfbook/0/)
- Syllabus (/courses/LouvainX/Louv2.01x/1T2014/3517b9300b554b118f11224b8c05eb10/)

It is increasingly acknowledged that the human rights obligations of States extend beyond those located on their national territory, to all individuals that are affected by the actions or omissions of the State. The basic argument in favor of this extension is that the Charter of the United Nations imposes on all Members of the UN a duty to cooperate in the fulfilment of the purposes of the UN, which include "... universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion" (Art. 55), and that Article 56 of the Charter of the United Nations, which expresses this obligation, is not limited territorially: "All Members pledge themselves to take joint and separate action in cooperation with the Organization..." to achieve the purposes set out in Article 55 of the Charter. But can extraterritorial obligations also be imposed under specific human rights instruments, that contain a reference to "jurisdiction" or a similar expression? And what are the limits to the notion? For instance, do extraterritorial obligations to support human rights outside its national territory justify a State in adopting laws that regulate conduct on another State's territory? Consider the following potential implications of extraterritorial obligations, and try to anticipate the position of human rights bodies in these different scenarios, before turning to the answers :

EXERCISE - EXTRATERRITORIAL OBLIGATIONS (6/6 points)

1. Extraterritorial obligations in the area of human rights include a duty to assess the impacts of trade policies on the realization of human rights in the country with which the State concerned concludes a trade agreement, enters into commercial relationships, or increases trade. Do you agree? If so, how would you recommend that such impacts should be assessed?

- ☐ The human rights impacts of trade should be managed by each state at domestic level and should not interfere with the negotiation or conclusion of trade agreements;
- ☒ The human rights impacts of trade should be assessed prior to the conclusion of trade agreements, or the design of trade policies; ✓
- ☐ Since human rights trump trade obligations, it does not matter whether or not trade agreements conflict with human rights commitments, since courts shall recognize the priority of human rights.

EXPLANATION

The duty to assess the impacts on human rights of trade or investment agreements, or other international agreements, has been repeatedly affirmed by the Committee on Economic, Social and Cultural Rights (Committee on Economic, Social and Cultural Rights, General Comment No. 12 (1999), *The right to adequate food (art. 11)*, E/C.12

right to adequate food is given due attention'); Committee on Economic, Social and Cultural Rights, General Comment No. 14 (2000), *The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights)*, E/C.12/2000/4 (2000), para. 39 ('In relation to the conclusion of other international agreements, States parties should take steps to ensure that these instruments do not adversely impact upon the right to health'); Committee on Economic, Social and Cultural Rights, General Comment No. 15 (2002), *The right to water (arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights)*, U.N. Doc. E/C.12/2002/11 (26 November 2002), paras. 31 and 35-36 ('States parties should ensure that the right to water is given due attention in international agreements and, to that end, should consider the development of further legal instruments. With regard to the conclusion and implementation of other international and regional agreements, States parties should take steps to ensure that these instruments do not adversely impact upon the right to water. Agreements concerning trade liberalization should not curtail or inhibit a country's capacity to ensure the full realization of the right to water'). In order to provide guidance to States as to how they should comply with this obligation, the Special Rapporteur on the right to food presented guiding principles for a methodology of human rights impact assessments (see Report of the Special Rapporteur on the Right to food to the 19th session of the Human Rights Council, Olivier De Schutter, *Addendum: Guiding Principles on human rights impact assessments of trade and investment agreements*, UN Doc. A/HRC/19/59/Add.5 (19 December 2011)).

2. Extraterritorial obligations in the area of human rights require that States seek to control the private actors over which they can exercise influence, for instance by regulating their activities or by making their support conditional upon complying with certain requirements linked to human rights, in order to ensure that such actors -- transnational corporations, in particular -- do not violate human rights in foreign territories, or do not contribute to such violations. Do you agree?

- ☐ Yes, States should regulate the conduct of private actors over which they may exercise control in order to ensure that they will not violate human rights, even outside the State's territory;
- ☒ There is a duty to control private actors even outside the national territory, unless this conflicts with the sovereignty of the territorially competent State: therefore, no enforcement action may take place on the territory of the second State; ✓
- ☐ States are prohibited from seeking to regulate conduct outside their national territory, even as regards private actors whose conduct the State may influence.

EXPLANATION


The United Nations treaty bodies have repeatedly expressed the view that States should take steps to prevent human rights violations abroad by business enterprises that are incorporated under their laws, that have their main seat or their main place of business under their jurisdiction. The Committee on Economic, Social and Cultural Rights in particular affirms that States parties should 'prevent third parties from violating the right (protected under the International Covenant on Economic, Social and Cultural Rights) in other countries, if they are able to influence these third parties by way of legal or political means, in accordance with the Charter of the United Nations and applicable international law' (Committee on Economic, Social and Cultural Rights, General Comment No. 14 (2000), *The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights)*, E/C.12/2000/4 (2000), para. 39; Committee on Economic, Social and Cultural Rights, General Comment No. 15 (2002), *The right to water (arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights)*, E/C.12/2002/11 (26 November 2002), para. 31). Specifically in regard to corporations, this committee has further stated that: "States Parties should also take steps to prevent human rights contraventions abroad by corporations that have their main

seat under their jurisdiction, without infringing the sovereignty or diminishing the obligations of host states under the Covenant" (Committee on Economic, Social and Cultural Rights, 'Statement on the obligations of States Parties regarding the corporate sector and economic, social and cultural rights', E/C.12/2011/1 (20 May 2011), para. 5).

Similar views have been expressed by other human rights treaty bodies. The Committee on the Elimination of Racial Discrimination (CERD) considers that State parties should also protect human rights by preventing their own citizens and companies, or national entities from violating rights in other countries (CERD, concluding observations for Canada, CERD/C/CAN/CO/18, para. 17; concluding observations for the United States, CERD/C/USA/CO/6, para. 30). Under the International Covenant on Civil and Political Rights (CCPR), the Human Rights Committee noted in 2012 in a concluding observation relating to Germany: "The State party is encouraged to set out clearly the expectation that all business enterprises domiciled in its territory and/or its jurisdiction respect human rights standards in accordance with the Covenant throughout their operations. It is also encourages to take appropriate measures to strengthen the remedies provided to protect people who have been victims of activities of such business enterprises operating abroad" (CCPR/C/DEU/CO/6, para 16).

3. Do extraterritorial obligations in the area of human rights require that States ensure that victims of human rights violations abroad have access to remedies before their domestic courts? Do you agree? When should such remedies to guaranteed to victims, in your view?

Help

- ☒ The duty to provide effective remedies to victims of human rights violations should logically extend to victims of human rights violations abroad, provided there is a sufficiently close link between the situation concerned and the forum State (the State before the courts of which the remedy is exercised). 
- ☐ The duty to provide effective remedies does not extend to situations having occurred outside the national territory, as this would infringe on the sovereignty of the territorially competent State;
- ☐ Whereas a State may seek to incentivize conduct outside its national territory by positive incentives, it may not sanction human rights violations by extending the competence of its courts to such situations.

EXPLANATION

International human rights imposes on all States a duty to regulate the conduct of private groups or individuals, including corporations, in order to ensure that such conduct shall not result in violating the human rights of others. It also imposes a duty to provide an effective remedy to victims of human rights violations: Article 8 of the Universal Declaration on Human Rights requires that any person or group who is a victim of a violation of any of the rights listed in the Declaration should have access to effective judicial or other appropriate remedies at both national and international levels.

Both the duty to protect human rights by controlling private actors and the duty to ensure access to effective remedies for human rights violations apply in transnational situations. The Guiding Principles on Business and Human Rights endorsed in 2011 by the United Nations Human Rights Council in its resolution 17/4 recall in this regard that "States should take appropriate steps to ensure the effectiveness of domestic judicial mechanisms when addressing business-related human rights abuses, including considering ways to reduce legal, practical and other relevant barriers that could lead to a denial of access to remedy," noting that such legal barriers can include "where claimants face a denial of justice in a host State and cannot access home State courts regardless of the merits of the claim" (UN doc. A/HRC/17/31 (21 March 2011) (Principles 2 and 3 to 10 (operationalizing the duty of States to protect human rights) and Principle 26))). Such a duty to guarantee access to remedies to victims would only apply in

situations where the State concerned should have sought to prevent the violation in the first place, whether such a violation is committed by its organs (for instance, by diplomats posted abroad, or by military personnel involved in conflicts or in occupation), or whether the violation is committed by a non-State agent, for instance a corporation, over which the State could have exercised control. It is this situation that the Guiding Principles on Business and Human Rights have in mind: the scenario envisaged here is where a company, based in State A, is involved in human rights violations in State B, and where victims have no access to remedies in that State: State A is in such a situation expected to provide access to remedies before its own courts.

4. Do extraterritorial obligations in the area of human rights require from rich countries, that are in a position to assist poorer countries, to do so?


- ☐ Rich countries are duty-bound under international law to dedicate 0.7% of their gross domestic product (GDP) to official development assistance in favor of low-income countries;
- ☐ There is no duty for rich countries to help poorer countries comply with their human rights obligations;
- ☒ Rich countries are expected to provide international assistance and cooperation to low-income countries in support of the progressive realization of human rights, however this duty is not quantified. ✓

EXPLANATION

The duty of international assistance and cooperation is given a particular emphasis in the International Covenant on Economic, Social and Cultural Rights. Article 2(1) of the Covenant provides that the States parties to the Covenant undertake to 'take steps, individually and through international assistance and co-operation, especially economic and technical', to the maximum of their available resources, 'with a view to achieving progressively the full realization of the rights' recognized in the Covenant. The notion of international co-operation also is mentioned in relation to the right to an adequate standard of living in Article 11(1) of the Covenant, according to which 'States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent'. Under Part IV of the Covenant, which relates to the measures of implementation, two provisions relate to international assistance and co-operation. Article 22 states that the Economic and Social Council may bring to the attention of other UN bodies and agencies concerned with furnishing technical assistance any information arising out of the reports submitted by States under the Covenant which 'may assist such bodies in deciding, each within its field of competence, on the advisability of international measures likely to contribute to the effective progressive implementation of the present Covenant'. Article 23 specifies the different forms international action for the achievement of the rights recognized in the Covenant may take: such international action 'includes such methods as the conclusion of conventions, the adoption of recommendations, the furnishing of technical assistance and the holding of regional meetings and technical meetings for the purpose of consultation and study organized in conjunction with the Governments concerned'. The International Covenant on Economic, Social and Cultural Rights is not alone in this regard. For instance, the Convention on the Rights of the Child (CRC) requires states to take measures to implement the economic, social and cultural rights in the treaty "... to the maximum extent of their available resources and, where needed, within the framework of international cooperation" (art. 4). Thus, as noted by the Committee on the Rights of the Child, "(w)hen States ratify the Convention, they take upon themselves obligations not only to implement it within their jurisdiction, but also to contribute, through international cooperation, to global implementation" (Committee on the Rights of the Child, General Comment No. 5: General Measures of Implementation for the Convention on the Rights of the Child, UN Doc. CRC/GC/2003/5, at para. 5).

in the International Covenant on Economic, Social and Cultural Rights, or other human rights instruments referring to international assistance and cooperation as a means to support the full realization of human rights. Neither the drafting history of the Covenant nor subsequent State practice provide a definitive answer. When negotiating what came to be Article 2(1) of the International Covenant on Economic, Social and Cultural Rights, the drafters agreed that international cooperation and assistance was necessary in order to realise economic, social and cultural rights, but they disagreed as to whether it could be claimed as a right. Even where it is recognized that there may exist legal duties to provide assistance and cooperation, it may be questioned whether this should be at any specified level. Since 1970, it is agreed that "Each economically advanced country will progressively increase its official development assistance to the developing countries and will exert its best efforts to reach a minimum net amount of 0.7 percent of its gross national product at market prices by the middle of the decade" (General Assembly, International Development Strategy for the Second United Nations Development Decade, GA Res. 2626, UN GAOR (Twenty-fifth session, 1970), UN Doc. A/RES/25/2626 (XXV), at 43 (1970)). This joint commitment has been re-affirmed in subsequent international declarations, including in the Monterrey Consensus on Financing for Development ((22 March 2002), UN Doc. A/AC.257/32, at 42 (2002)) and in the Doha Declaration on Financing for Development: Outcome Document of the Follow-up International Conference on Financing for Development to Review Implementation of the Monterrey Consensus (annexed to GA Res. 63/239, UN Doc. A/RES/63/239, at 43 (2009)). The Committee on Economic, Social and Cultural Rights has affirmed this benchmark as a necessary component of giving effect to the obligation of international assistance, and regularly asks industrialized countries whether they are reaching this target (only a handful of countries do in fact). However, whether this corresponds to a legal obligation (as opposed to a desirable objective, that States should be encouraged to strive towards), remains contested.

5. Do extraterritorial obligations in the area of human rights require that developed States allocate between themselves the responsibility of supporting the progressive realization of human rights in developing countries, *inter alia* by the conclusion of agreements to that effect? If so, should such allocation of responsibilities be paired with commitments from benefiting developing countries? Or should such "conditionalities" be avoided?

- ☒ Though it might be desirable for rich countries to spread the effort of international cooperation and assistance between themselves, this is not an obligation under international law; 
- ☐ There is a duty for rich countries to allocate responsibilities between themselves in order to ensure that the duty of international assistance and cooperation is complied with;
- ☐ The duty of rich countries to allocate responsibilities between themselves in order to ensure that the duty of international assistance and cooperation is complied with is conditional upon beneficiary countries committing to improve the situation of human rights under their jurisdiction.

EXPLANATION

The Maastricht Principles on the extraterritorial obligations of States in the area of economic, social and cultural rights, adopted in 2011 by a number of international experts, includes a Principle 30 providing that "States should coordinate with each other, including in the allocation of responsibilities, in order to cooperate effectively in the universal fulfilment of economic, social and cultural rights. The lack of such coordination does not exonerate a State from giving effect to its separate extraterritorial obligations."

The purpose of this suggestion is to make duties that are recognized in principle, but remain "imperfect" because of a lack of clarity as to which States, to which level, are expected to provide support. The Committee on Economic, Social and Cultural Rights has repeatedly affirmed that international assistance and cooperation for the realization of

economic, social and cultural rights is "particularly incumbent on those States in a position to assist" (see, for instance, Committee on Economic, Social and Cultural Rights, *General Comment No. 3: The Nature of States Parties' Obligations* (Fifth session, 1993), U.N. Doc E/1991/23, para. 14; Committee on Economic, Social and Cultural Rights, *General Comment No. 14 (2000): The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights)*, U.N. Doc. E/C.12/2000/4 (2000), para. 45), as well as "other actors in a position to assist" (Committee on Economic, Social and Cultural Rights, *General Comment No. 14 (2000): The right to the highest attainable standard of health*, cited above, para. 45). But the lack of precision in this regard remains an obstacle to the fulfilment of the duty to assist.

The suggestion made in Principle 30 of the Maastricht Principles is remindful of the proposal for "development compacts" made by Arjun Sengupta as the Independent Expert on the right to development to the United Nations Commission on Human Rights between 1999 and 2004, a position he occupied before becoming the Independent Expert on Human Rights and Extreme Poverty. An Indian economist from West Bengal and longtime member of the Indian Parliament, Sengupta pioneered the idea of "development compacts", as a reciprocal deal between rich countries and poor countries. Rich countries entering into such a "development compacts" could ensure that they provide financial support and remove a range of obstacles to a developing country's ability to fulfil human rights, in exchange for a firm commitment by that country to work towards the full realization of human rights, under the supervision of an independent body such as a human rights commission: in essence, instead of having vague commitments of the international community to facilitate the process of development, and equally vague promises of developing countries to focus on human development priorities for the benefit of their populations, there would be a contractualization of the efforts made on both sides, and a corresponding shift from promises to binding obligations. Thus conceived, Sengupta wrote, development compacts are "a mechanism for ensuring that all stakeholders recognize the mutuality of obligations, so that the obligations of developing countries to carry out rights-based programmes are matched by reciprocal obligations of the international community to co-operate to enable the implementation of the programmes. The purpose of development compacts is to assure the developing countries that if they fulfil their obligations, the programme for realizing the right to development will not be disrupted owing to lack of financing" (*Fifth Report of the Independent Expert on the Right to Development*, E/CN.4/2002/WG.18/6, para. 14). Though this scheme smacks of conditionalities, it differs from conditionalities in that the commitments and the accountability are conceived as the result of a negotiated agreement rather than imposed, and as mutual rather than unilateral.

6. Do extraterritorial obligations in the area of human rights require that States vote, within the international organizations in which they are members, in accordance with their duties to respect, protect and fulfil human rights abroad, which includes the countries that shall be affected by the policies of those organizations? What if a State has transferred powers to an international organization and has not reserved the right to veto measures adopted by that organization, so that that State finds itself unable to ensure that human rights are taken into account in the policies of that organization?

- ☒ Upon transferring powers to international organizations, States should ensure that the organizations in question shall exercise such powers in accordance with the requirements of human rights; ✓
- ☐ International organizations are required to comply with human rights in the exercise of their powers, therefore States establishing such organizations should not concern themselves with this issue upon transferring powers;
- ☐ International organizations are not States: since human rights apply to States, international organizations should not be obstructed by human rights considerations in the fulfillment of their mandates.

EXPLANATION

States are indeed expected to contribute to the decision-making procedures within the organization of which they are members, by taking into account their (pre-existing) human rights obligations. This has been affirmed explicitly, and repeatedly, by the Committee on Economic, Social and Cultural Rights (see, for instance, its *General Comment No. 15 (2002), The right to water (arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights)*, U.N. Doc. E/C.12/2002/11 (26 November 2002), para. 36: 'States parties should ensure that their actions as members of international organizations take due account of the right to water. Accordingly, States parties that are members of international financial institutions, notably the International Monetary Fund, the World Bank, and regional development banks, should take steps to ensure that the right to water is taken into account in their lending policies, credit agreements and other international measures'). This is also consistent with the position of the European Court of Human Rights, which has noted that while the European Convention on Human Rights "does not exclude the transfer of competences to international organizations", this is "provided that Convention rights continue to be "secured". Member States' responsibility therefore continues even after such a transfer" (Eur. Ct. HR (GC), *Matthews v. the United Kingdom* (Appl. N° 24833/94) judgment of 18 February 1999, para. 32 ; Eur. Ct. HR (GC), *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* (Appl. N° 45036/98) judgment of 30 June 2005, para. 154).

Of course, it may occur that a State transfers powers to an international organization, only to discover later that it is unable to influence the policies adopted by that organization in order to secure human rights. In that case however, the responsibility of the State would be engaged for the initial transfer of powers, if such a transfer did not include the necessary safeguards. According to the Draft Articles on Responsibility of International Organisations, adopted on second reading by the International Law Commission at its sixty-third session, on 3 June 2011: "A State member of an international organization incurs international responsibility if, by taking advantage of the fact that the organization has competence in relation to the subject-matter of one of the State's international obligations, it circumvents that obligation by causing the organization to commit an act that, if committed by the State, would have constituted a breach of the obligation" (Article 61, para. 1, of the Articles on Responsibility of International Organizations (Circumvention of international obligations of a State member of an international organization), UN doc. A/CN.4/L.778 (30 May 2011); the obligation in question applies whether or not the act in question is internationally wrongful for the international organization itself). It is therefore incumbent on a State establishing an international organisation or joining an international organisation that it ensures that the powers delegated to that organisation shall not be exercised in ways that may result in a violation of the human rights that the State has committed to uphold. The measures that the State may take to avoid such a consequence may include retaining a veto power over some of the decisions of the organisation that may have such an impact ; ensuring that the decision-making procedure within the organisation shall ensure that no measure shall be adopted by the organisation that may result in a violation of human rights ; and/or ensuring that those affected by the measures adopted by the organisation will have access to a court empowered to adjudicate human rights claims.

In 2011, an attempt was made to restate the existing international human rights law on the subject of extraterritorial obligations in the area of economic, social and cultural rights, in the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights. This restatement was endorsed by a number of international human rights experts, as well as organizations; and it has been increasingly influential within the United Nations human rights system. This may be seen for instance from the endorsement by consensus in 2012, within the Human Rights Council, of the Guiding Principles on Human Rights and Extreme Poverty. These Guiding Principles state that "as part of international cooperation and assistance, States have an obligation to respect and protect the enjoyment of human rights, which involves avoiding conduct that would create a foreseeable risk of impairing the enjoyment of human rights by persons living in poverty beyond their borders, and conducting assessments of the extraterritorial impacts of laws, policies and practices" (*Guiding Principles on Extreme Poverty and*

Exercise introduction Exercise - Extraterritori...

<https://courses.edx.org/courses/LouvainX/Lo...>

Human Rights. Final draft submitted by the Special Rapporteur on extreme poverty and human rights, Magdalena Sepúlveda Carmona (UN doc. A/HRC/21/39) (endorsed by consensus by the Human Rights Council in res. 21/11 of 27 September 2012), para. 61).

Check

Hide Answer(s)



About (<https://www.edx.org/about-us>) Jobs (<https://www.edx.org/jobs>)
Press (<https://www.edx.org/press>) FAQ (<https://www.edx.org/student-faq>)
Contact (<https://www.edx.org/contact>)



EdX is a non-profit created by founding partners Harvard and MIT whose mission is to bring the best of higher education to students of all ages anywhere in the world, wherever there is Internet access. EdX's free online MOOCs are interactive and subjects include computer science, public health, and artificial intelligence.

Help



(<http://www.meetup.com/edX-Global-Community/>)



(<http://www.facebook.com/EdxOnline>)



(<https://twitter.com/edXOnline>)



(<https://plus.google.com/108235383044095082735/posts>)



(<http://youtube.com/user/edxonline>)

© 2014 edX, some rights reserved.

Terms of Service and Honor Code -
Privacy Policy (<https://www.edx.org/edx-privacy-policy>)