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CONSEJO DE DERECHOS HUMANOS  
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**APLICACIÓN DE LA RESOLUCIÓN 60/251 DE LA ASAMBLEA  
GENERAL, DE 15 DE MARZO DE 2006, TITULADA  
"CONSEJO DE DERECHOS HUMANOS"**

**Informe del Representante Especial del Secretario General sobre  
la cuestión de los derechos humanos y las empresas transnacionales  
y otras empresas comerciales**

**Adición**

**Responsabilidades de los Estados en materia de regulación y arbitraje  
de las actividades empresariales con arreglo a los tratados básicos de  
derechos humanos de las Naciones Unidas: panorama general de los  
comentarios de los órganos creados en virtud de tratados\* \*\***

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\* El resumen del presente informe se distribuye en todos los idiomas oficiales. El informe propiamente dicho figura en el anexo al resumen y se distribuye únicamente en el idioma en que se presentó.

\*\* Este informe se presenta con retraso para incluir en él la información más reciente.

## Resumen

Esta adición contiene un resumen de las principales conclusiones y ejemplos de una serie de informes preparados en nombre del Representante Especial del Secretario General de las Naciones Unidas (el Representante Especial) sobre la cuestión de los derechos humanos y las empresas transnacionales y otras empresas comerciales, nombrado de conformidad con la resolución 2005/69 de la Comisión de Derechos Humanos. Los informes esbozan la función que incumbe a los Estados en la regulación y arbitraje del papel de las actividades empresariales con arreglo a los tratados básicos de derechos humanos de las Naciones Unidas. En la adición se delinean las tendencias generales que figuran en informes específicos presentados con arreglo a diferentes tratados, y se hacen observaciones preliminares respecto de cómo aplicar el mecanismo de derechos humanos basado en los tratados para fortalecer aún más la protección y promoción de los derechos humanos en el contexto de la actividad empresarial.

Los tratados, según han sido interpretados por los respectivos órganos creados en virtud de tratados, exigen que los Estados desempeñen un papel fundamental en la regulación y arbitraje efectivos de las actividades empresariales con respecto a los derechos humanos. En general, se considera que ese papel es parte del deber de los Estados de proteger contra el abuso por terceras partes. Los comentarios de los órganos creados en virtud de tratados emitidos en el último decenio demuestran una tendencia a aumentar la presión sobre los Estados para que cumplan su deber en relación con las actividades empresariales, sin tener en cuenta que las entidades de que se trate sean de propiedad privada o controladas por el sector privado o de propiedad pública y controladas por ese sector.

Además, si bien los tratados más antiguos tienen mayores probabilidades de referirse en general al deber de los Estados de proteger contra la interferencia en el disfrute de los derechos, los tratados aprobados más recientemente mencionan explícitamente a las empresas privadas a este respecto. Todo ello indica el surgimiento de obligaciones claras de los Estados de impedir y castigar el abuso empresarial, en los casos en que, de no hacerlo, ello se consideraría una violación de las obligaciones dimanadas de los tratados.

El deber del Estado de proteger se aplica a todos los derechos. Sin embargo, algunos derechos se han examinado más frecuentemente en relación con el papel de los Estados para poner freno a los abusos derivados de las actividades empresariales. Entre ellos cabe citar los derechos a la no discriminación y la igualdad; los derechos de las minorías; los derechos laborales; los derechos a la vida privada; los derechos relacionados con la salud y las condiciones de vida; las prohibiciones relacionadas con el odio racial y los estereotipos y prejuicios nocivos relacionados con el género; y los derechos de que disfrutaban los pueblos indígenas, incluidos sus derechos culturales.

Los órganos creados en virtud de tratados también tienden a centrarse en ciertos tipos de empresas y sectores comerciales que requieren regulación, si bien ello no va en detrimento de los amplios deberes de los Estados de proteger contra todo abuso por todos los tipos de entidades. Por ejemplo, al proporcionar recomendaciones a Estados determinados en el contexto del empleo, los órganos creados en virtud de tratados no sólo se refieren en general a los "empleadores", sino que también expresan particular preocupación por las industrias minera, manufacturera y agrícola. Los órganos creados en virtud de tratados también recomiendan frecuentemente que los Estados adopten medidas para la regulación y el arbitraje de los actos de

las empresas mineras, extractivas, de explotación forestal y de promoción de bienes raíces, especialmente en el contexto de la explotación de recursos en las tierras y territorios de poblaciones indígenas. En relación con la salud, los órganos creados en virtud de tratados no sólo se refieren a los proveedores privados de atención de la salud sino también a las empresas farmacéuticas, las empresas de comercialización, las empresas extractivas y manufactureras que se ocupan de actividades que podrían amenazar los recursos alimentarios e hídricos. Finalmente, las redes de los medios de información y comunicación se examinan con respecto a la explotación sexual de los niños, y a su papel para impedir la divulgación de prejuicios sobre la base de la raza, el sexo o en relación con las personas con discapacidad.

Los Estados deben adoptar diversas medidas para protegerse eficazmente contra el abuso empresarial. En general, deben vigilar el cumplimiento por terceras partes, y en la mayoría de los casos, introducir medidas legislativas para prohibir el abuso y proscribir ciertos comportamientos; establecer mecanismos administrativos y judiciales para investigar eficaz e imparcialmente todas las denuncias y hacer que los autores comparezcan ante la justicia; y facilitar el suministro de remedios eficaces, incluido el suministro de indemnización a las víctimas cuando corresponda. Los órganos creados en virtud de tratados también han pedido que se establezcan medidas para aumentar la conciencia entre el sector privado acerca de las repercusiones que sus actividades tienen en lo que respecta a los derechos humanos y alentar la promoción por las empresas privadas de códigos de conducta sobre los derechos humanos.

Hay menos orientación respecto de si el Estado puede cumplir su deber de proteger centrándose en los actos de las personas naturales dentro de la empresa comercial infractora o si está obligado a la regulación y el arbitraje de la empresa comercial como una entidad. La razón puede ser que, de conformidad con la latitud otorgada por los tratados en lo que respecta a la aplicación, los órganos creados en virtud de tratados se centran en la protección contra el abuso y a favor del disfrute de derechos. Sin embargo, los tratados más nuevos, en particular el Protocolo Facultativo de la Convención sobre los Derechos del Niño en relación con la venta de niños, la prostitución infantil y la pornografía infantil y la Convención Internacional sobre la protección de los derechos de todos los trabajadores migratorios y de sus familiares parecen como mínimo contemplar la responsabilidad de las empresas comerciales.

La mayor parte de los órganos creados en virtud de tratados no se han ocupado de si se debe exigir a los Estados que ejerzan jurisdicción extraterritorial sobre los actos de las empresas comerciales en el exterior. Por cierto, la modalidad más firme que puede observarse es una tendencia a que los órganos creados en virtud de tratados recomienden que los Estados influyan en las medidas que las empresas comerciales adoptan en ultramar respecto de las cuales pueden ejercer jurisdicción, si bien los Estados parecen tener amplia latitud para decidir qué medidas deben utilizarse a esos efectos. Ninguno de los tratados o de los órganos creados en virtud de tratados sugiere que se prohíba el ejercicio de la jurisdicción extraterritorial, si bien es evidente que los Estados deben actuar dentro de los límites impuestos por el principio de no intervención en virtud del derecho internacional.

Esta investigación ha demostrado que el mecanismo de derechos humanos basado en tratados ha venido prestando cada vez más atención a la regulación de los Estados y el arbitraje de las actividades empresariales y desempeña un papel importante en la elaboración de los deberes de los Estados. Sin embargo, si hubiera más orientaciones de los órganos creados en virtud de tratados acerca del alcance y el contenido de las obligaciones de los Estados derivadas

de los tratados con respecto a tales actividades sería posible apoyar aún más a los Estados en el cumplimiento de sus deberes y aclarar más la posición de las empresas comerciales y de los derechohabientes. Con este fin, parecería positivo que los órganos creados en virtud de tratados se ocuparan de examinar entre ellos esta cuestión, así como de abordar esos deberes en forma más específica.

**Annex**

**REPORT OF THE SPECIAL REPRESENTATIVE OF THE  
SECRETARY-GENERAL ON THE ISSUE OF HUMAN  
RIGHTS AND TRANSNATIONAL CORPORATIONS  
AND OTHER BUSINESS ENTERPRISES**

**STATE RESPONSIBILITIES TO REGULATE AND ADJUDICATE  
CORPORATE ACTIVITIES UNDER THE UNITED NATIONS  
CORE HUMAN RIGHTS TREATIES: AN OVERVIEW OF  
TREATY BODY COMMENTARIES**

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### **Table of acronyms**

CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; Committee against Torture
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women; Committee on the Elimination of Discrimination against Women
CERD	Committee on the Elimination of All Forms of Racial Discrimination
CESCR	Committee on Economic, Social and Cultural Rights
CMW	Committee on Migrant Workers
CRC	Convention on the Rights of the Child; Committee on the Rights of the Child
HRC	Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICRMW	International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
ICRPD	International Convention on the Rights of Persons with Disabilities
NHRI	National Human Rights Institution
OPSC	Optional Protocol to the CRC on the sale of children, child prostitution and child pornography
SRSG	Special Representative of the Secretary-General
UNC	Charter of the United Nations

## Introduction

1. This addendum to the report of the Special Representative of the United Nations Secretary-General (SRSG) on the issue of human rights and transnational corporations and other business enterprises, appointed pursuant to Commission on Human Rights resolution 2005/69, summarizes information, trends and preliminary findings contained in a series of reports examining States' obligations in relation to corporate activity under the United Nations' core human rights treaties.<sup>1</sup> Each report in the series is specific to a particular treaty and maps the scope and content of States parties' responsibilities to regulate and adjudicate the actions of business enterprises under that treaty,<sup>2</sup> and as clarified by the relevant treaty body.<sup>3</sup>

2. The mapping of States' obligations under the human rights treaties has been undertaken to assist the SRSG in implementing paragraph (b) of his mandate from the then Commission on Human Rights to "elaborate on the role of States in effectively regulating and adjudicating" business enterprises with regard to human rights.<sup>4</sup>

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<sup>1</sup> The following treaties were considered as part of this series: the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD); the International Covenant on Civil and Political Rights (ICCPR); the International Covenant on Economic, Social and Cultural Rights (ICESCR); the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW); the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), the Convention on the Rights of the Child (CRC); the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (ICRMW); and the International Convention on the Rights of Persons with Disabilities (ICRPD). See the individual reports for more detail. All reports will be made available as they are completed at <http://www.business-humanrights.org/Gettingstarted/UNSpecialRepresentative>. Given time and resource constraints, a summary of the ICRPD (adopted by the General Assembly in December 2006) will supplement the individual treaty reports in the series but it is not analysed in detail here. This Convention, which has not yet entered into force, contains specific references to business.

<sup>2</sup> It should be noted that the reports do not discuss direct obligations for corporations - their focus is on State obligations.

<sup>3</sup> The human rights treaty bodies are committees of independent experts that monitor implementation of the core international human rights treaties. They are usually established under the provisions of the treaty that they monitor.

<sup>4</sup> Commission on Human Rights resolution 2005/69. The SRSG now reports to the Human Rights Council.



3. The reports analyse a representative sample of primary materials associated with each treaty.<sup>5</sup> the treaty provisions; general comments or recommendations by the Committees; concluding observations on States' periodic reports;<sup>6</sup> and Opinions on communications as well as Decisions under Early Warning Measures and Urgent Procedures.<sup>7</sup>
4. The reports are based on references by the treaties and treaty bodies to States' duties to regulate and adjudicate corporate activities.<sup>8</sup> However, as it is less common for the treaty bodies to refer explicitly to corporations, the reports also highlight more general references to State obligations regarding acts by non-State actors.
5. It should be noted that the research focused on States' obligations in relation to rights impacted by corporate activities, rather than on corporate entities as possible rights-holders.<sup>9</sup>
6. Finally, while basic research has been completed for all of the treaties, not all of the treaty-specific reports have been finalized and this addendum therefore summarizes only preliminary trends.<sup>10</sup>

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<sup>5</sup> The ICRMW report relies to some extent on secondary sources because of the scarcity of primary sources from the recently established Committee on Migrant Workers (CMW).

<sup>6</sup> Due to time and resource constraints, the research was limited to examination of concluding observations and decisions from the eight most recent sessions of the various treaty bodies. See each report for information on the specific research methodology used. As the research for most of the treaties was concluded by November 2006 or earlier for some of the treaties, information from the treaty bodies' most recent sessions could not always be included.

<sup>7</sup> The ICCPR, CAT, ICERD, CEDAW and ICMW all have associated individual complaints mechanisms. CEDAW and CAT also have procedures for urgent inquiries. CERD has an early warning procedure.

<sup>8</sup> Drawing on the SRSG's mandate, this report uses "regulation" to refer to treaty body language recommending legislative or other measures designed to prevent or monitor abuse by business enterprises, and "adjudication" to refer to judicial or other measures to punish or remediate abuse.

<sup>9</sup> The United Nations human rights treaties have not been interpreted to protect the rights of corporate bodies. This is in contrast to e.g. the European Convention on Human Rights, many rights of which have been extended to benefit companies or other (non-state) legal entities.

<sup>10</sup> While research on all treaties has been done, at the time of writing, only reports for ICERD, ICRMW, ICCPR and ICESCR have been finalized or are in the process of being finalized. Thus readers should be aware that more specific references to those four treaties in this addendum should not be seen as any indication that the CRC, CAT and CEDAW are less relevant for this project.

## I. THE DUTY TO PROTECT

7. The treaty specific reports show that in discussing corporate activity, the treaty bodies are mainly concerned with States' obligations to protect rights against interferences occurring in the context of that activity - in other words, States' obligations as part of the duty to protect. The treaty bodies describe the duty to protect against human rights violations as being part of the duty to ensure enjoyment of rights. States have positive obligations to prevent and punish third party interference with the enjoyment of rights.<sup>11</sup> Failure to abide by these obligations may amount to a violation of the State's treaty obligations.<sup>12</sup> An examination of the treaties and treaty bodies' commentary and jurisprudence (as will be discussed below) confirms that the duty to protect includes preventing corporations - both national and transnational, publicly or privately owned - from breaching rights and taking steps to punish them and provide reparation to victims when they do so.

8. Unlike secondary rules of State attribution, the duty to protect has been interpreted by the treaty bodies to be a substantive duty which will only be breached if the State fails to take steps to prevent and punish abuse.<sup>13</sup> Where the State does act to fulfil its positive obligations by the adoption of all reasonable measures which could be expected in the circumstances but is still unable to prevent interference, it is unlikely to be considered to have breached any treaty obligations - it will not be held responsible for corporate abuse per se.

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<sup>11</sup> CAT requires instigation, consent or acquiescence of a public official or other person acting in an official capacity to an act of torture in order for the Convention to apply. This means the duty to protect only arises from that Convention where the third party abuse has somehow been instigated, acquiesced in or consented to by the State. However, "acquiescence" has been interpreted quite broadly so that the State's failure to police abuses by non-State actors may amount to acquiescence.

<sup>12</sup> For example, CESCR general comment 18 on the right to work explains that violations of the duty to protect could include the failure to "regulate the activities of individuals, groups or corporations so as to prevent them from violating the right to work of others". General comment 18, 'The Right to Work', UN Doc. E/C.12/GC/18, adopted 24 November 2005 at para. 35. (Hereinafter referred to as CESCR general comment 18.)

<sup>13</sup> The secondary rules of State responsibility are beyond the scope of this addendum. Suffice to say that the State may be held accountable where corporations perform public functions or are state-controlled. See the International Law Commission's articles on "Responsibility of States for Internationally Wrongful Acts", adopted in November 2001 by the ILC (UN Doc. A/56/10 2001) and taken note of by the United Nations General Assembly (Res 56/83); both available at <http://daccessdds.un.org/doc/UNDOC/GEN/N01/477/97/PDF/N0147797.pdf?OpenElement>. For detailed commentary, see James Crawford, "The International Law Commission's Articles on State Responsibility" (Cambridge: CUP, 2002).

9. The Human Rights Committee (HRC), which monitors the implementation of the ICCPR, refers specifically to the need to act with “due diligence” in fulfilling the duty to protect.<sup>14</sup> However, while the Committee on the Elimination against Women (CEDAW) has also adopted the concept, mainly in relation to violence against women,<sup>15</sup> other treaty body references are more piecemeal and do not suggest that the concept is widely used within the United Nations treaty bodies system.

10. The emphasis on the duty to protect does not mean that other State duties usually associated with human rights, such as the duties to respect, promote and fulfil, are irrelevant to strengthening corporate responsibility and accountability. Indeed, the Committee on Economic, Social and Cultural Rights (CESCR) has confirmed that the States parties can violate the duty to respect if they fail to take into account their Covenant obligations “when entering into bilateral or multilateral agreements with other States, international organizations and other entities such as multinational entities.”<sup>16</sup> States can also be found to breach the duty to respect if State-owned or

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<sup>14</sup> General comment No. 31, ‘The Nature of the General Legal Obligation Imposed on States Parties to the Covenant’, adopted 29 March 2004 (80th Session), at para. 8, reproduced in ‘Compilation of General Comments and general recommendations Adopted by Human Rights Treaty Bodies’, UN Doc. HRI/GEN/1/Rev.7, 12 May 2004, at 192. (Hereinafter referred to as “UN Human Rights Compilation”) (General comment hereinafter referred to as HRC general comment 31). The concept of “due diligence” as applied to human rights law is generally associated with the Inter-American Court of Human Rights’ decision in *Velasquez Rodriguez* which confirmed that States could be held responsible for private acts where they fail to act with “due diligence” to prevent or respond to violations. *Velasquez Rodriguez Case*, Judgment of July 29, 1988, Inter-Am.Ct.H.R. (Ser. C) No. 4 (1988) paragraphs 166-174. The case concerned violations by State sponsored forces but the opinion notes that States have similar obligations to prevent or respond to private acts not directly attributable to the State. See at para. 172: “An illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the state, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention ...”

<sup>15</sup> For example, see general recommendation 19, ‘Violence against women’, 11th Session (1992) at para. 9, UN Human Rights Compilation at 246. (Hereinafter referred to as CEDAW general recommendation 19.) The Committee refers to article 2 (e) of the Convention which calls on States to take all appropriate measures to eliminate discrimination by any person, organization or enterprise and provides that “under general international law and specific human rights covenants, States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation”.

<sup>16</sup> CESCR general comment 18, at para. 33.

controlled enterprises or other companies exercising public functions (in situations where their acts may be attributed to the State) do not refrain from abuse or if the State has laws or policies which facilitate abuse by business enterprises.<sup>17</sup> Furthermore, the treaty bodies suggest that it is important for States to promote human rights awareness for business enterprises.

## II. REFERENCES TO BUSINESS ENTERPRISES

11. This Part focuses on treaty provisions and treaty body commentaries which explicitly and implicitly refer to State obligations in relation to acts by business enterprises, including particular sectors or industries. Implicit references are considered to be where the treaties or treaty bodies refer generally to the duty to protect against third party abuse and it can be implied that corporate abuse must also be prevented.

### A. Treaties

12. References to business enterprises in the actual treaties are not very common. When treaties do refer to business, they tend to mention particular sectors rather than generally referring to private business. There are exceptions, however, with the newer treaties being more explicit in their references to business.

13. Of the older treaties, CEDAW is most explicit in referring to business by requiring States in article 2 (e) to take all appropriate measures to eliminate discrimination against women by any enterprise. In relation to more recently adopted treaties, the Optional Protocol to the CRC on the Sale of Children, Child Prostitution and Child Pornography (OPSC), adopted in May 2000, requires States to prohibit practices such as the sale of children, child prostitution and child pornography, including taking action against “legal persons” where appropriate.<sup>18</sup> The ICRPD (which has not yet been researched in detail for the purposes of this project), adopted in December 2006, is the most explicit and refers directly to both private enterprises and private entities. For example, article 4 requires States parties “to take all appropriate measures to eliminate discrimination on the basis of disability by any person, organization or private enterprise.” Article 9 requires that States ensure private entities offering public services and facilities “take into account” accessibility to persons with disabilities.

14. The treaties are also increasingly referring to particular sectors, implying that the State must regulate and adjudicate the acts of business enterprises in those sectors. Starting with the older treaties, article 5 (f) of ICERD requires States parties to undertake to prohibit and eliminate

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<sup>17</sup> See note 15.

<sup>18</sup> See art. 3 (4) OPSC. Note that the CRC report will also briefly discuss the Optional Protocol on the Involvement of Children in Armed Conflict (OPAC). It was considered less relevant for this addendum as unlike the OPSC it does not specifically mention legal persons or commercial industries.

racial discrimination in the right of access to places or services intended for use by the general public, including transport, hotels, restaurants, cafes and theatres. As explained further below, the Committee on the Elimination of Racial Discrimination (CERD) has interpreted this provision as requiring States to regulate so as to prevent private owners of such facilities from engaging in racial discrimination. Article 13 (b) of CEDAW seems to necessitate regulation of the banking industry by requiring States to eliminate discrimination in economic and social life, including concerning the right to bank loans, mortgages and other forms of financial credit. Similarly, article 14 (2) (g) requires States to take appropriate measures to ensure equal rights for rural women, including access to agricultural credit and loans and marketing facilities.

15. Article 17 (a) of the CRC requires States to encourage the mass media to disseminate information of social and cultural benefit to children.<sup>19</sup> Furthermore, the Preamble to the OPSC specifically expresses concern about sex tourism and the availability of child pornography on the Internet. It also stresses the importance of closer cooperation between governments and the Internet industry in combating child pornography.

16. There are a number of ways in which the treaties implicitly require States to protect against corporate abuse. First, some of the treaties specifically require States to regulate the acts of third parties or organizations, which - unless explicitly stated otherwise - may include business enterprises, depending on the particular context. For example, article 2 (1) (d) of ICERD requires States to prohibit and end racial discrimination by any “persons, group or organization”. Article 16 (2) of the ICRMW provides that migrant workers and members of their families are entitled to “effective protection” by States parties against “violence, physical injury, threats and intimidation, whether by public officials or by private individuals, groups or institutions”.

17. Second, a treaty may require particular State actions to protect rights which would be difficult to fulfil without regulation or adjudication of the acts of third parties, including business enterprises. For example, a State’s duty to ensure the enjoyment of rights under a treaty may require that the State takes appropriate or effective measures, including proscriptive legislation and sanctions, to prevent abuse.<sup>20</sup> Indeed, such directions often concern rights which relate to certain contexts and situations in which business enterprises are so closely involved that it is unlikely the State could fulfil its obligations without regulating these entities. Examples

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<sup>19</sup> The CRC also requires some monitoring of private social welfare institutions and educational institutions (the latter are also mentioned in CEDAW and ICESCR) but this is not explored in detail here as such institutions are not considered as falling within the mandate’s conception of business enterprises.

<sup>20</sup> Examples abound from the treaties and appear in the individual treaty reports. Once finalized, all reports will be made available at <http://www.business-humanrights.org/Gettingstarted/UNSpecialRepresentative>.

include provisions dealing with employment situations and access to services without discrimination.<sup>21</sup> The treaty bodies tend to interpret these provisions as including a requirement for States to protect against abuse by all third parties, including business enterprises.

## **B. Treaty body commentaries**

### **(i) General comments and recommendations<sup>22</sup>**

18. There are no general comments or recommendations focusing solely on States' duties to protect rights in the context of corporate activities - rather, they tend to refer to business enterprises as part of discussions regarding various rights or vulnerable groups requiring protection. General comments and recommendations in this context tend to mention specific business sectors, such as the extractive industry or pharmaceutical companies. In addition, many general comments and recommendations refer to protection against corporate abuse in broad terms, for instance by confirming State duties to protect against abuse by "the private sector", "the labour market", "employment", "the informal sector", or in relation to "privately provided services".<sup>23</sup>

19. Beginning with the more explicit references, general comments from CESCR dealing with the right to work, the right to health, and the right to water specifically confirm the State's duty to protect against abuse by business enterprises.<sup>24</sup> In fact, every CESCR general comment since general comment 12 on the right to adequate food in 1999 asserts, usually explicitly, that in order to fulfil the duty to protect States must regulate and adjudicate the acts of business enterprises.

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<sup>21</sup> See for example OPSC art. 3; CRC art. 3(3), 19 and 32; and ICERD art. 2(1)(d) and 5(f).

<sup>22</sup> Only general comments or recommendations relating to ICESCR, ICERD, CEDAW, the CRC and the ICCPR are discussed. The CMW has not yet published any general comments and CAT only has one general comment which is not relevant to this research (see general comment No. 1, 'Implementation of article 3 of the Convention in the context of article 22', 27 November 1997, contained in annex IX of UN Doc. A/53/44 and UN Human Rights Compilation at 291).

<sup>23</sup> These terms are used by CESCR, CERD, CEDAW, and CRC in their general comments.

<sup>24</sup> See CESCR general comment 18, at para. 35; general comment 15, 'The Right to Water (arts. 11 and 12)', adopted 26 November 2002, at para. 23, UN Human Rights Compilation at 106 (Hereinafter referred to as CESCR general comment 15); and general comment 14, 'The Right to the Highest Attainable Standard of Health (Art. 12)', adopted 11 August 2000, at para. 35, UN Human Rights Compilation at 86. (Hereinafter referred to as CESCR general comment 14.)

20. General comments from the Committee on the Rights of the Child (CRC) also highlight that the State has ultimate responsibility for preventing abuse by the private sector, including business enterprises.<sup>25</sup> For example, general comment 5 on measures of implementation confirms that “the process of privatization of services can have a serious impact on the recognition and realization of children’s rights”,<sup>26</sup> and that even where services have been privatized, the State must ensure private sector compliance with the convention.<sup>27</sup> The Committee specifically defines the phrase “private sector” as including businesses.<sup>28</sup> The most recent general recommendation from CEDAW confirms the Committee’s view that States must protect women against discrimination by private enterprises in the public as well as private spheres.<sup>29</sup>

21. Some general comments also refer to specific business sectors. For example, CESCR general comment 15 on the right to water focuses on public and private water providers, stressing that the “obligation to protect requires States parties to prevent third parties from interfering in any way with the enjoyment to the right to water. Third parties include individuals, groups, corporations and other entities as well as agents acting under their authority.”<sup>30</sup> General comment 14 on the right to the highest attainable standard of health

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<sup>25</sup> See generally: general comment No. 1, ‘The aims of education’, 26th Session (2001) at para. 21, UN Human Rights Compilation at 294 (Hereinafter referred to as CRC general comment 1); general comment No. 4, ‘Adolescent health and development in the context of the Convention on the Rights of the Child’, 33rd Session (2003), at para. 18, UN Human Rights Compilation at 231 (Hereinafter referred to as CRC general comment 4); general comment No. 5, ‘General measures of implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44, para. 6)’, 34th Session (2003) at paras. 43-44, UN Human Rights Compilation at 332 (Hereinafter referred to as CRC general comment 5); and general comment No. 7, ‘Implementing child rights in early childhood’, UN Doc. CRC/C/GC/7/Rev.1, 20 September 2006 at para. 36. (Hereinafter referred to as CRC general comment 7.)

<sup>26</sup> CRC general comment 5, at para. 42. Indeed, in 2002 the Committee held a General Day of Discussion on “The private sector as service provider and its role in implementing child rights”. General comment 5 incorporates recommendations from that discussion. For the recommendations see: Committee on the Rights of the Child, Report on its thirty-first session, September-October 2002, Day of General Discussion on “The private sector as service provider and its role in implementing child rights”, paras. 630-653.

<sup>27</sup> CRC general comment 5, at paras. 43-44.

<sup>28</sup> *Id.* at para. 42.

<sup>29</sup> CEDAW general recommendation 25, ‘article 4, paragraph 1, of the Convention (temporary special measures)’, 30th session (2004), at paras. 7, 29, 31 and 32, UN Human Rights Compilation at 282.

<sup>30</sup> CESCR general comment 15, at para. 23.

discusses food and medicine manufacturers and the extractive and manufacturing industries. For example, it provides that the duty to protect includes “the duties of States ... to control the marketing of medical equipment and medicines by third parties”<sup>31</sup> and highlights that the State could violate the duty to protect if among other things it fails to regulate the activities of corporations; protect consumers and workers; “discourage production, marketing and consumption of tobacco, narcotics and other harmful substances” and “enact or enforce laws to prevent the pollution of water, air and soil by extractive and manufacturing industries”.<sup>32</sup>

22. Similarly, the CRC mentions the need to “regulate or prohibit information on and marketing of substances such as alcohol and tobacco, particularly when it targets children and adolescents”.<sup>33</sup> And in general comment 28 on the equality of rights between men and women, the HRC said that States should “take the lead in implementing all measures necessary to eliminate discrimination against women in all fields, for example by prohibiting discrimination by private actors in areas such as employment, education, political activities and the provision of accommodation, goods and services”.<sup>34</sup>

23. Among other things, CERD has focused on companies involved in major infrastructure and extractives projects affecting indigenous peoples. For example, general recommendation 23 on the rights of indigenous peoples notes that indigenous peoples have lost resources to commercial companies and calls for recognition and protection of indigenous people’s rights to “own, develop, control and use their communal lands, territories and resources”.<sup>35</sup> Where deprivation of land or resources does occur, States should “take steps to return those lands and territories”.<sup>36</sup> The implication is that States are obliged to regulate and adjudicate the acts of commercial companies to prevent abuse of rights enjoyed by indigenous peoples and to ensure effective remedies, including reparation, where necessary.

24. Further, CERD general recommendation 27 on discrimination against the Roma notes that States should “encourage awareness among professionals of all media” regarding the need to avoid dissemination of prejudicial material and even recommends that States encourage

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<sup>31</sup> CESCR general comment 14, at para. 35.

<sup>32</sup> *Id.* at paras. 35 and 51.

<sup>33</sup> CRC general comment 4, at para. 25.

<sup>34</sup> HRC general comment 28, ‘general comment No. 28: article 3 (The equality of rights between men and women)’, adopted 29 March 2000 (68th Session) at para. 31, UN Human Rights Compilation at 178. (Hereinafter referred to as HRC general comment 28.)

<sup>35</sup> General recommendation XXIII on the rights of indigenous peoples, 51st Session (1997), at paras. 3 and 5, UN Human Rights Compilation at 215. (Hereinafter referred to as CERD general recommendation 23.)

<sup>36</sup> CERD general recommendation 23, at para. 5.



self-monitoring by the media, including codes of conduct to avoid racial discrimination or biased language.<sup>37</sup> CERD general recommendation 29 on article 1 (1) of the Convention recommends that States, as appropriate, adopt measures “against public bodies, private companies and other associations that investigate the descent background of applicants for employment”.<sup>38</sup>

25. CEDAW general recommendations reference States’ duties to prevent abuse by private health-care providers,<sup>39</sup> private organizations,<sup>40</sup> private sector agencies,<sup>41</sup> enterprises (including those owned by family members),<sup>42</sup> the labour market<sup>43</sup> and the media.<sup>44</sup> The CRC general comments contain directions to States regarding the mass media and the “working environment” (including the entertainment industry).<sup>45</sup>

26. Finally, as suggested above, general comments and recommendations also confirm more generally that States have duties to protect against abuse by non-state actors, describing such

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<sup>37</sup> General recommendation XXVII on discrimination against Roma, 57th Session (2000) at paras. 37 and 40, UN Human Rights Compilation at 219. (Hereinafter referred to as CERD general recommendation 27.)

<sup>38</sup> General recommendation XXIX on article 1, paragraph 1, of the Convention (Descent), 61st Session (2002) at para. 38, UN Human Rights Compilation at 226. Other examples can be found in the ICERD report, available at <http://www.business-humanrights.org/Gettingstarted/UNSpecialRepresentative>.

<sup>39</sup> General recommendation 24, ‘article 12 of the Convention (women and health)’, 20th Session (1999), at para. 14, UN Human Rights Compilation at 274. (Hereinafter referred to as CEDAW general recommendation 24.)

<sup>40</sup> *Id.* at paras. 15, 31 (d) and (e). See also general recommendation 23, ‘Political and public life’, 16th Session (1997) at para. 29, UN Human Rights Compilation at 263.

<sup>41</sup> CEDAW general recommendation 24, at para. 17.

<sup>42</sup> CEDAW general recommendation 19, at para. 9. See also CEDAW general recommendation 16, ‘Unpaid women workers in rural and urban family enterprises’, 10th Session (1991) at paras. 2 and 5 (c), UN Human Rights Compilation at 244.

<sup>43</sup> CEDAW general recommendation 19, at paras. 24 (j) and 24 (t). See also CEDAW general recommendation 13, ‘Equal remuneration for work of equal value’ 8th Session (1989) at para. 3, UN Human Rights Compilation at 240; CEDAW general recommendation 12, ‘Violence against women’, 8th Session (1989) at para. 1, UN Human Rights Compilation at 240.

<sup>44</sup> CEDAW general recommendation 19, at para. 24 (d).

<sup>45</sup> In relation to state duties regarding the *mass media*, see: CRC general comment 1, at para. 21; in relation to the *working environment* see: CRC general comment 4, at para. 18; in relation to the *entertainment industry*, see: CRC general comment 7, at para. 36.

actors in a number of ways, including “third parties”, “private actors”, “private entities”, “legal persons” and “private agencies”. Unless stated otherwise, the treaty bodies’ use of these terms implies that States must take action against abuse by a broad range of non-State actors, including business enterprises.

27. A good example in this respect is the HRC’s most recent general comment 31 on the nature of the general legal obligation imposed on States parties to the Covenant, which contains strong wording about the duty to protect against violations by private persons or entities.<sup>46</sup> It says that “the positive obligations on States Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities...”<sup>47</sup> The HRC confirms that States could breach their Covenant obligations where they permit or fail “to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities”.<sup>48</sup> Other general comments from the HRC also implicitly refer to corporations by confirming the State’s duty to protect against private actions and abuses by “private agencies”, “legal persons” and “private bodies”.<sup>49</sup>

## (ii) Concluding observations

28. Concluding observations contain the treaty bodies’ responses to States parties’ periodic reports on their compliance with the relevant treaty. They provide general guidance as well as recommendations on specific issues of concern, which may relate to State obligations regarding the activities of particular businesses or sectors operating in the State.

29. When issues before the treaty bodies involve activities related to business activity, concluding observations often contain general expressions of concern about such activities, rather than specifying whether or how States are expected to regulate or adjudicate the entities behind those activities.<sup>50</sup> The Committees’ focus is on the protection of rights - whether the

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<sup>46</sup> HRC general comment No. 31, at para. 8.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> In relation to States’ duties regarding acts by *natural or legal persons* and *private individuals or bodies*, see HRC general comment 16, ‘article 17 (Right to privacy)’, 8 April 1988 (32nd Session) at paras. 1 and 10, UN Human Rights Compilation at 142; in relation to acts by *private persons or bodies* see general comment 18, ‘Non-discrimination’, 10 November 1989 (37th Session) at para. 9, UN Human Rights Compilation at 146; in relation to acts by *private agencies in all fields*, the *private sector* and *private practices* see HRC general comment 28, at paras. 4, 20 and 31.

<sup>50</sup> This should be contrasted to discussions about labour rights, in which the Committees regularly provide directions as to which measures which must be taken to protect against abuse by employers.

violation is caused by a State organ, a business entity or any other private actor seems less relevant than the result (the protection and promotion of human rights).<sup>51</sup> Yet expressions of concern from the Committees about corporate activities strongly imply that in order to achieve this result, States are expected to take steps to regulate and adjudicate the acts of business enterprises involved in such activities.

30. The following table provides examples of the various types of business enterprises/ sectors referred to in concluding observations.<sup>52</sup> The fact that the Committees have referred to particular sectors should not be taken as a sign that they do not consider States responsible for protecting against abuse by other types of enterprises. On the contrary, Committees may examine States' obligations in relation to any corporate act in any field of activity.

Treaty	Sectors/industries
ICCPR	Labour market, commercial and agricultural sectors (including the cotton industry), logging and mining concessions and media.
ICESCR	Labour market, private prisons, natural resource extracting companies (including transnational companies), "mineral, timber and other commercial interests", development projects, private social security schemes and funds, private health-care system and private organizations using public funds.
ICERD	Extractive and forestry industries, transnational corporations, large business ventures (particularly in indigenous areas), media and communication networks, private employers, private banks, housing agencies, hotels, restaurants and cafés.
CEDAW	Private companies, public companies, private enterprises, business, labour market, private sector, media and advertising agencies, credit facilities, media, service sector, agricultural sector and informal sector, maquila (textile) industries, sex industry, public joint stock companies and private industry.
CRC, OPSC	Radio and television broadcasters, educational institutions, childcare professionals, institutions for mental illness, legal persons, Internet service providers, private adoption houses, private institutions, labour market, informal sector (including agriculture, small scale family enterprises and domestic service) and private sector.
ICRMW	Agricultural sector
CAT	Privately operated detention facilities

<sup>51</sup> Although the conditions of finding State responsibility may differ depending on the source of the violation.

<sup>52</sup> See individual reports for exact references.

31. Many concluding observations also refer generally to the need to protect against abuse by employers, especially in order to prevent and punish forced labour, unsafe working conditions and discrimination. Most of these recommendations are drafted broadly so that they require action against both private and public employers.

32. Further, concluding observations from CESCR, CERD and CEDAW in particular tend to express concern about major infrastructure development and extractives projects affecting indigenous peoples. While the Committees do not always specify that the State should take steps to regulate and adjudicate the activities of companies involved in such projects, the implication appears to be that they should do so in order to address the Committees' concerns.<sup>53</sup>

33. Concluding observations also highlight that States are responsible for abuses associated with both privately and publicly run detention facilities.<sup>54</sup>

### **(iii) Decisions under individual communications**

34. The ICCPR, CAT, ICERD, CEDAW and ICRMW all have associated individual complaints mechanisms for alleged violations by a State party of rights under its jurisdiction.<sup>55</sup>

35. Both the HRC and CERD have shown a willingness to declare admissible communications concerning a State's failure to protect against abuse by business enterprises.

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<sup>53</sup> For example, CERD's concluding observations in relation to the protection of indigenous peoples apply to cases of both public and private extractive companies active in indigenous areas. Even when private mining companies seem to be the main cause of environmental pollution in indigenous areas, CERD emphasizes the State obligation to remedy any health or environmental damage in this respect, without mentioning the need to adjudicate the company. This does not necessarily mean that States should not adjudicate companies. It means that what is most important is the protection of rights and redress for any violation thereof. See ICERD Report, Part III(A), available at <http://www.business-humanrights.org/Gettingstarted/UNSpecialRepresentative>

<sup>54</sup> In relation to concerns about violations of the right to life and prohibition against torture by contractors acting on behalf of the state, see HRC, concluding observations, United States, UN Doc. CCPR/C/USA/CO/3/Rev.1, 18 December 2006, at para. 14; CAT concluding observations, UN Doc. CAT/C/USA/CO/2, 25 July 2006, at para. 36. In relation to working conditions in private prisons, see for example, CESCR: concluding observations, Luxembourg, UN Doc. E/C.12/1/Add.86, 23 May 2003, at paras. 20 and 32.

<sup>55</sup> At the time of writing, analysis of the CEDAW and CAT decisions remained incomplete so the trends in this section only apply to the ICCPR (under the First Optional Protocol) and ICERD procedures. The ICRMW procedure is not yet operative. References to ICERD trends relate to Individual Communications and Decisions under Early Warning Measures and Urgent Procedures.

Indeed, the HRC has rejected arguments from States that such communications are inadmissible, making it clear that the State may be held responsible under the First Optional Protocol for failing to protect against third party abuse.<sup>56</sup>

36. The HRC communications concerning business enterprises tend to involve discrimination by companies in their roles as employers or complaints regarding interference with the rights of indigenous peoples by mining, logging and property development companies.<sup>57</sup> Similarly, CERD communications in this area mainly relate to racial discrimination by various private companies, such as textile, construction or insurance companies, and in relation to access to services, such as banking/lending services, recreational venues and private housing agencies.<sup>58</sup> Further, Decisions under Early Warning Measures and Urgent Procedures have expressed concern about large scale mining operations and companies, including multinationals.

### C. Trends

37. The above analysis highlights the ever-increasing recognition by the treaty bodies of States' obligations to protect against human rights abuses arising from corporate activities, especially in the last five to ten years. For example, of the eight CESCR general comments which explicitly refer to business enterprises, it is the four most recent (with a date range of 1999-2005) which most strongly identify a duty to protect in relation to corporations. And nearly all of the Committee's general comments since 1999 discuss the duty to protect as requiring State action against abuse by third parties. Further, the HRC's most explicit statement on the duty to protect in relation to private entities comes from 2004.

38. The treaty body commentaries together with newly adopted treaties expressly mentioning State duties regarding business activities indicate the emergence of a concrete duty for States to prevent and punish a wide range of corporate abuse, where failure to do so will be considered a violation of treaty obligations.

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<sup>56</sup> See individual report for the ICCPR and *Arenz et al v. Germany*, communication 1138/2001, UN Doc. CCPR/C/80/D/1138/2002, 29 April 2004, at para 8.5 and *Cabal and Pasini Bertran v. Australia*, communication 1020/2001, UN Doc. CCPR/C/78/D/1020/2001, 19 September 2003, at para. 7.2, where the HRC commented on the admissibility of claims relating to private abuse even though the state itself did not appear to base admissibility challenges on this issue.

<sup>57</sup> See for example *Love et al. v. Australia*, communication 983/2001, UN Doc. CCPR/C/77/983/2001, 28 April 2003; *Hopu and Bessert v. France*, communication 549/1993, UN Doc. CCPR/C/60/D/549/1993/Rev.1, 29 December 1997; *Ilmari Lämsman et al. v. Finland*, communication 511/1992, UN Doc. CCPR/C/52/D/511/1992, 8 November 1994; and *Chief Bernard Ominayak and the Lubicon Lake Band v. Canada*, communication 167/1984, UN Doc. CCPR/C/38/D/167/1984, 10 May 1990.

<sup>58</sup> See ICERD report available at <http://www.business-humanrights.org/Gettingstarted/UNSpecialRepresentative>.

### III. MEASURES STATES ARE REQUIRED TO TAKE

#### A. Monitoring

39. The State's duty to take steps to prevent and punish abuse may necessitate a variety of measures. In particular, the treaty bodies require in most cases that abuse is prohibited by law, that alleged violations are properly investigated, that the State brings perpetrators to justice and that victims are provided with an effective remedy.

40. The treaty bodies also highlight the importance of consistent, independent monitoring by States of third party compliance, even before abuse has been alleged. For example, CESCR requires that States put in place effective monitoring mechanisms in the labour context and in relation to privatized social services.<sup>59</sup> Such mechanisms must be properly equipped and resourced.<sup>60</sup> It also appears that States' reporting obligations require monitoring of corporate conduct, particularly privatized business entities providing social services. Indeed, CEDAW maintains that "States parties should report on how public and private health care providers meet their duties to respect women's rights to have access to health care".<sup>61</sup> CERD has recommended that independent monitoring bodies be set up to conduct environmental impact assessments before any operating license is issued, as well as health and safety checks on the sites of gold mining activities.<sup>62</sup> Furthermore, the obligation to ensure effective

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<sup>59</sup> See general comment 16, 'The equal right of men and women to the enjoyment of all economic, social and cultural rights (art. 3 of the International Covenant on Economic, Social and Cultural Rights)', UN Doc. E/C.12/2005/4, 11 August 2005 at para. 24 (Hereinafter referred to as CESCR general comment 16); CESCR general comment 15, at para. 24. See also CRC general comment 7, at para. 32 (in relation to the private service providers). The Committee "reminds States Parties that they have an obligation to monitor and regulate the quality of provision to ensure that children's rights are protected and their best interests served".

<sup>60</sup> See for example CESCR concluding observations for Bosnia and Herzegovina, UN Doc. E/C.12/BIH/CO/1, 24 January 2006, at para. 36; Uzbekistan, UN Doc. E/C.12/UZB/CO.1, 24 January 2006, at para. 51; China, UN Doc. E/C.12/1/Add.107, 13 May 2005, at para. 53; Malta, UN Doc. E/C.12/1/Add.101, 14 December 2004, at para. 16; Ecuador, UN Doc. E/C.12/1/Add.100, 7 June 2004, at para. 41; Spain, UN Doc. E/C.12/1/Add.99, 7 June 2004, at para. 31; Guatemala, UN Doc. E/C.12/1/Add.93, 12 December 2003, at paras. 15 and 33; and Russian Federation, UN Doc. E/C.12/1/Add.94, 12 December 2003, at para. 47.

<sup>61</sup> CEDAW general recommendation 24, at para. 14.

<sup>62</sup> See for example CERD concluding observations, Suriname, UN Doc. CERD/C/64/CO/9, 28 April 2004, at para. 15.

participation of indigenous peoples in infrastructure development decisions implies that States must monitor whether participating business enterprises are consulting with such communities.<sup>63</sup>

41. National Human Rights Institutions (NHRIs) are seen as important players in relation to monitoring third party compliance in general.<sup>64</sup> Some treaty bodies have now also recognized that it is important for such institutions to consider complaints and issues in relation to “private actors and entities”.<sup>65</sup>

## **B. Regulation**

42. Most treaties impose obligations on States to adopt legislative measures as a means to ensure enjoyment of rights. Consequently, the treaty bodies have generally confirmed that adopting appropriate legislation to prevent and address third party abuse is among States’ minimum obligations under the treaties in order to fulfil the duty to protect.<sup>66</sup>

43. The treaty bodies generally do not specify the required content of legislation or other forms of regulation. It is more common for commentaries simply to refer to the State’s obligation to take legislative measures to prevent abuse. This follows from the treaties themselves which give States some latitude in deciding how to implement provisions. Nevertheless, the treaty bodies have given some specific guidance in relation to the protection of specific rights or concerning specific sectors.

44. The role of legislation in relation to corporate activities is discussed most frequently in relation to the employment context. The treaty bodies confirm that, inter alia, States must legislate to prohibit discrimination, forced labour, child labour and unsafe working conditions.

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<sup>63</sup> See for example, HRC: general comment 23, ‘Article 27 (Rights of minorities)’, 8 April 1994 (50th Session), at para. 7, UN Human Rights Compilation at 158 (Hereinafter referred to as HRC general comment 23); and CERD general recommendation 23, at para. 4 (d).

<sup>64</sup> See for example, CESCR general comment 16, at paras. 19 and 38; and CESCR general comment 15, at paragraph 28 (i).

<sup>65</sup> CRC: general comment No. 2, ‘The role of independent national human rights institutions in the promotion and protection of the rights of the child’, 31st Session (2002) at para. 9, UN Human Rights Compilation at 301.

<sup>66</sup> Note that this section provides trends in relation to the treaty bodies’ recommendations to States on how to best regulate the acts of business enterprises so as to prevent abuse. Neither it nor the next section on adjudication is intended as a general analysis of treaty implementation in domestic systems.

Legislation is also seen as key in relation to discrimination in access to services and protection against industrial accidents or actions likely to jeopardize rights related to health and living conditions. Indeed, CESCR has highlighted that legislation may be “indispensable” for protection in relation to non-discrimination more generally and in relation to health.<sup>67</sup> And its general comment 15 specifically refers to the need to restrain third parties, including corporations, from interfering with the right to water and provides that a State could violate the duty to protect by failing to “enact or enforce laws to prevent the contamination and inequitable extraction of water”.<sup>68</sup>

45. States are expected to take legislative or administrative measures to protect local communities and prevent violations by business enterprises in the course of conducting large infrastructure or mining projects, particularly those affecting indigenous peoples.<sup>69</sup> In this respect, CERD emphasized that: “Development objectives are no justification for encroachments on human rights, and that along with the right to exploit natural resources there are specific, concomitant obligations towards the local population.”<sup>70</sup>

46. Accordingly, treaty bodies have recommended various measures, such as:

- States should adopt a legislative framework that clearly sets forth the broad principles governing exploitation of land, including the obligation to abide by strict environmental standards and equitable revenue distribution.<sup>71</sup>

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<sup>67</sup> General comment 3, ‘The nature of States parties’ obligations (art. 2, para. 1, of the Covenant)’, 5th Session (1990) at para. 3, UN Human Rights Compilation at 15. See also general comment 5, ‘Persons with disabilities’, 11th Session (1994) at para. 16, UN Human Rights Compilation at 25 (Hereinafter referred to as CESCR general comment 5) and general comment 7, ‘The right to adequate housing (art. 11 (1) of the Covenant): Forced evictions’, 60th Session (1997) at paras. 8-9, UN Human Rights Compilation at 46.

<sup>68</sup> CESCR general comment 15, at para. 44 (b).

<sup>69</sup> See for example CESCR concluding observations, Ecuador, UN Doc. E/C.12/1/Add.100, 7 April 2004, at paras. 12 and 35. For an example not specifically mentioning indigenous peoples but referring to the enforcement of laws and regulations prohibiting forced evictions in the context of rural and urban development projects, see CESCR concluding observations, China, UN Doc. E/C.12/1/Add.107, 13 May 2005, at paras. 31 and 61.

<sup>70</sup> CERD concluding observations, Suriname, UN Doc. CERD/C/64/CO/9, 28 April 2004, at para. 15.

<sup>71</sup> See CERD concluding observations for Suriname, UN Doc. CERD/C/64/CO/9, 28 April 2004, at para. 15; and Nigeria, UN Doc. CERD/C/NGA/CO/18, 1 November 2005, at para. 19.



- States should gather information on and monitor the possible environmental effects of large development or mining projects before they get underway.<sup>72</sup>
- Rules and procedures should also be put in place to ensure the right of affected communities, especially indigenous peoples, to participate in decisions related to these projects,<sup>73</sup> including ensuring that their free and informed consent is sought before allowing a development project to start.<sup>74</sup>

47. Some Committees appear to have introduced a balancing test in relation to rights held by individuals related to their involvement in business enterprises. Such rights include those relating to the protection of moral and material interests resulting from scientific, literary or artistic productions.<sup>75</sup> For example, CESCR has said that States parties must prevent unreasonably high medicine, food and education costs resulting from protecting intellectual property.<sup>76</sup> Products should be denied patentability where “commercialization would jeopardize the full realization” of other rights.<sup>77</sup> The Committee even suggests human rights impact assessments before increasing intellectual property protection. The implication from all of these statements is that States must regulate intellectual property rights holders (including those claiming rights as part of their participation in business enterprises) to protect other rights.

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<sup>72</sup> See for example CESCR concluding observations, China, UN Doc. E/C.12/1/Add.107, 13 May 2005, at para. 63 where the Committee requested China to include detailed information in its next report on “environmental policies formulated by the State party, in particular, policies to reduce atmospheric pollution, and to evaluate the impact of large infrastructure development projects on the environment”. It is difficult to see how China could evaluate such impacts without seeking information from participating business enterprises, whether privately or publicly owned. See also CERD concluding observations for Suriname, UN Doc. CERD/C/64/CO/9, 28 April 2004, at para. 15; and Guyana, UN Doc. CERD/C/GUY/CO/14, 4 April 2006, at para. 19.

<sup>73</sup> See CERD concluding observations, Guatemala, UN Doc. CERD/C/GTM/CO/11, 15 May 2006, at para. 19.

<sup>74</sup> See generally CERD general recommendation 23. It is hard to see how such measures could be implemented without some form of regulation of companies and monitoring of their actions.

<sup>75</sup> This right is expressly recognized in art. 15 (1) (c) of ICESCR.

<sup>76</sup> General comment 17, ‘The right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he or she is the author (article 15, paragraph 1 (c), of the Covenant)’, UN Doc. E/C.12/GC/17, 12 January 2006, at para. 35. (Hereinafter referred to as CESCR general comment 17.)

<sup>77</sup> Id.

48. Some of the treaty bodies require “temporary special measures” in an effort to facilitate equal participation in various aspects of society. Assorted measures are suggested in this respect, such as legislative measures (the adoption and implementation of a national strategy, programs and projects to ensure the rights of a specific group in relation to employment, housing or education), promotional measures (incentive schemes for employers or special training programs to increase participation for marginalized groups in the labour market),<sup>78</sup> as well as penalty schemes for employers.<sup>79</sup> While the treaty bodies rarely say expressly that States should regulate corporations to ensure respect for such special measures, it would seem difficult for States to implement such measures effectively without some form of regulation and adjudication.

49. All forms of regulation must be enforced so as to provide real protection against third party abuse - States must provide the policies and resources necessary to implement and enforce legislation, including monitoring mechanisms as discussed above and adjudicative measures as discussed next.<sup>80</sup>

### C. Adjudication

50. The treaty bodies generally do not mention the term adjudication. However, they regularly call for investigation, sanction by judicial, administrative, legislative or other authorities and remediation of violations by third parties, including business enterprises. Such measures are generally related to the right to an effective remedy for human rights violations.

#### (i) Investigation

51. Several treaty bodies confirm that a State’s failure to adequately investigate and redress violations will be deemed a violation of the duty to protect. The HRC’s general comment 31 highlights that a failure to investigate violations by private actors or entities could amount to a “separate breach of the Covenant”.<sup>81</sup> Such investigations should be carried out “promptly, thoroughly and effectively through independent and impartial bodies”.<sup>82</sup>

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<sup>78</sup> See for example CESCR concluding observations, China, UN Doc. E/C.12/1/Add.107, 13 May 2005, at para. 121, where the Committee recommended the Macao Special Administrative Region to “take effective measures to promote the integration of people with disabilities into the labour market, including through providing incentives to employers and strengthening the system of job quotas for persons with disabilities”.

<sup>79</sup> See for example CERD general recommendation 27.

<sup>80</sup> Examples abound, especially in CESCR, CEDAW and CRC concluding observations which frequently express concern that labour codes are not adequately enforced in the private sector. See by way of example only: CEDAW: concluding observations, Paraguay, UN Doc. A/60/38 (SUPP), 9 May 1996, at para. 285; CESCR: concluding observations, China, UN Doc. E/C.12/1/Add.107, 13 May 2005, at paras. 24, 50, 52, 53 and 54.

<sup>81</sup> HRC general comment 31, at para. 15.

<sup>82</sup> *Id.*

52. Concluding observations from CESCR in particular make it clear that the State must investigate allegations of abuses by employers, suggesting that inspection mechanisms should not only have general monitoring functions but also the ability to investigate allegations and impose penalties on offenders. CERD has confirmed the importance of investigating all allegations of both indirect and direct discrimination, even if such investigations do not always result in prosecution.<sup>83</sup> Indeed, it found a State liable for failing to properly investigate the “real reasons” behind a bank’s loan policies which had discriminatory effects.<sup>84</sup>

**(ii) Prosecution leading to sanctions and remedies**

53. The treaty bodies regularly confirm that the State is obliged to ensure that third party abuse is punished, including abuse by business enterprises, and that the perpetrators, whether public or private, are brought to justice. Indeed, as discussed below in section D, some treaties even suggest that legal as well as natural persons should be punished.

54. The treaty body commentaries reiterate the importance of sanctions in order to enforce compliance. Indeed, the HRC considers that a State’s failure to bring perpetrators to justice for “recognized breaches of domestic or international law” could amount to a violation of the Covenant.<sup>85</sup> Other treaty bodies also recognize the importance of sanctions where third parties, including business enterprises, fail to comply with regulations, especially in employment contexts. In particular, the treaty bodies tend to support penalties in relation to employers’ violations regarding non-discrimination, failure to provide fair wages and equal pay for work of equal value, failure to provide safe working conditions, slave labour, child labour and trafficking.<sup>86</sup>

55. There is less guidance as to the type of sanctions which should be imposed, for example whether they should be monetary and whether they should be imposed through the criminal, civil or administrative regimes, thereby reflecting the general latitude given to States in terms of treaty implementation.

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<sup>83</sup> See for example CERD general recommendation XXX, ‘Discrimination against non-citizens’, UN Doc. CERD/C/64/Misc/11/Rev.3, 1 October 2004 (64th Session) at para. 23.

<sup>84</sup> See *ZIAD Ben Ahmed Habassi v. Denmark*, communication No. 10/1997, CERD/C/54/D/10/1997, 6 April 1999.

<sup>85</sup> HRC general comment 31, at para. 18.

<sup>86</sup> See for example CESCR concluding observations for China, UN Doc. E/C.12/1/Add.107, 13 May 2005, at paras. 53 and 54; Russian Federation, UN Doc. E/C.12/1/Add.94, 12 December 2003, para. 47; Mexico, UN Doc. E/C.12/MEX/CO/4, 9 June 2006, at para. 33. See also CEDAW concluding observations, Ecuador, UN Doc. A/58/38(SUPP), 18 July 2003, at paras. 311 – 312.

**(iii) The right to an effective remedy**

56. The treaties tend to speak broadly of the right to an effective remedy. Examples include article 2 (3) of the ICCPR, where States undertake to ensure that any persons whose rights are “recognized as violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity”, and article 6 of ICERD which requires States to assure “to everyone within their jurisdiction effective protection and remedies, as well as the right to seek just and adequate reparation or satisfaction”. Even where the particular treaty does not specifically require the State to provide effective remedies, the treaty bodies commonly imply such an obligation, whether the primary perpetrator was a State or non-State actor.<sup>87</sup>

57. States should ensure appropriate processes are in place to assist rights-holders to bring claims against corporate abuse. For example, CESCR’s general comment 4 provides that the right to adequate housing requires remedies such as the right to appeal a planned eviction or demolition, the right to obtain compensation after an illegal eviction and the right to complain about illegal actions by public or private landlords.<sup>88</sup> Article 71 of the ICRMW provides that in relation to compensation for the death of a worker or a member of his or her family, States parties “shall, as appropriate, provide assistance to the persons concerned with a view to the prompt settlement of such matters”.

58. Further, CERD has reiterated the importance of the State ensuring equal access to the justice system, including through defining clear and just criteria to resolve land claims by indigenous communities.<sup>89</sup> CEDAW and the CRC also discuss the need for “protective measures” such as refuge, rehabilitation, counseling and support for victims, with CEDAW emphasizing the importance of such measures in situations relating to trafficking, sexual exploitation (including prostitution) and gender-specific violence in the workplace, regardless of whether public or private actors were primarily responsible.<sup>90</sup>

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<sup>87</sup> See for example CESCR general comment 9, ‘The domestic application of the Covenant’, 19th Session (1998), UN Human Rights Compilation at 55.

<sup>88</sup> See CESCR general comment 4, ‘The right to adequate housing (art. 11 (1) of the Covenant),’ 6th Session (1991), UN Human Rights Compilation at 19. (Hereinafter referred to as CESCR general comment 4.)

<sup>89</sup> See CERD concluding observations for Guatemala, UN Doc. CERD/C/GTM/CO/11, 15 May 2006, at para. 19; and for Guyana, UN Doc. CERD/C/GUY/CO/14, 4 April 2006, at para. 16.

<sup>90</sup> See for example CEDAW general recommendation 19, at para. 24.

**(iv) Reparation**

59. The treaty bodies generally consider the requirement to provide effective remedies as necessitating some form of reparation, which they interpret broadly to include compensation, restitution, guarantees of non-repetition, changes in relevant laws and public apologies.<sup>91</sup> Treaty bodies do not generally privilege any form of reparation.

60. Nevertheless, the treaty bodies have suggested that compensation or restitution through the return of land may be considered the most effective form of reparation in certain situations involving business enterprises, in particular where indigenous peoples have lost land or resources due to major development projects or resource exploitation activities.<sup>92</sup>

61. While the treaty bodies do not generally interpret the treaties as including a right to compensation per se, the Committees frequently recommend compensatory measures to redress abuse.<sup>93</sup> For example, CESCR's general comment 17 on moral and material interests relating to scientific, literary and artistic productions suggests that a failure by a State to ensure that third parties adequately compensate authors for harm could amount to a breach of the Covenant.<sup>94</sup>

62. Similar to the situation with sanctions, it seems that States have wide discretion as to whether reparation should be provided through criminal, civil or administrative actions. In other words, there does not appear to be a general obligation to make civil actions available.<sup>95</sup>

**D. Natural v. legal persons**

63. While the above analysis confirms that the duty to protect requires States to regulate and adjudicate the acts of business enterprises, there is less guidance from the treaties and the treaty body commentaries regarding whether the State may fulfil this duty by focusing on the acts of

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<sup>91</sup> See for example HRC general comment 31, at para. 16.

<sup>92</sup> See CERD general recommendation 23, at para. 5; CESCR concluding observations, Mexico E/C.12/MEX/CO/4, 9 June 2006, at para. 28.

<sup>93</sup> CERD suggests that when compensation is provided, it should be "adequate, fair, prompt and just". (See footnote 61 ICERD Report, available at <http://www.business-humanrights.org/Gettingstarted/UNSpecialRepresentative>.) It is possible to imply a similar requirement from the other treaty body commentaries, especially because of the common references to "adequate" compensation.

<sup>94</sup> CESCR general comment 17, at paras. 31, 45 and 53.

<sup>95</sup> See ICERD Report, available at: <http://www.business-humanrights.org/Gettingstarted/UNSpecialRepresentative>. For a discussion of the various ways in which States hold corporations liable see, *Crime, Commerce and Conflict: Legal Remedies for Private Sector Liability for Grave Breaches of International Law*, FAFO, available at <http://www.fafo.no/liabilities/index.htm>.

natural persons within the “offending” business enterprise or whether it is obliged to regulate and adjudicate the business enterprise in its own right. For instance, is there any requirement to ensure that legal persons are sanctioned as well as or instead of natural persons? The reason for the lack of guidance may be that the treaty bodies are focused on protection against abuse and enjoyment of rights and give States wide discretion as to how they ensure enjoyment.

64. While some treaties and their respective treaty bodies do not seem to express a preference for regulation or adjudication of legal persons as opposed to natural persons - or are inconclusive in this respect,<sup>96</sup> newer treaties, in particular the OPSC to the CRC and the ICRMW, seem at a minimum to contemplate liability for business enterprises. For example, article 3 (4) of the OPSC to the CRC provides that “subject to the provisions of its national law, each State Party shall take measures, where appropriate, to establish the liability of legal persons for offences established in paragraph 1 of the present article. Subject to the legal principles of the State Party, such liability of legal persons may be criminal, civil or administrative.” While this provision means that the required criminal penalties discussed in earlier paragraphs of article 3 may not apply to legal persons, the treaty at least recognizes liability for business enterprises, though it is clear that States have discretion in deciding how to establish such liability.

65. The CRC clearly supports States establishing such liability for legal persons. In its concluding observations regarding the OPSC, the CRC has expressed concern at situations where “legal persons may not be held liable for offences established in article 3, paragraph (1) of the Optional Protocol” and has encouraged States to “extend liability” for those offences to “legal persons”.<sup>97</sup> Indeed, in line with the OPSC’s preamble, the CRC has specifically focused on the Internet industry in this regard, encouraging States to adopt specific legislation on the obligations of Internet service providers and recommending that States introduce legislative provisions to combat the dissemination of child pornography, “including the full mandatory cooperation of Internet providers in this regard”.<sup>98</sup>

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<sup>96</sup> This is the case concerning CERD’s decisions on communications. The Committee seems to accept the adjudication of either natural or legal persons in some communications, without expressing a clear opinion on a privileged procedure. See ICERD Report, available at <http://www.business-humanrights.org/Gettingstarted/UNSpecialRepresentative>.

<sup>97</sup> CRC concluding observations for Iceland under the OPSC, UN Doc. CRC/C/OPSC/ISL/CO/1, 21 June 2006, at paras. 13 and 14(d). See also the concluding observations for Andorra, UN Doc. CRC/C/OPSC/AND/CO/1, 17 March 2006, at paras. 12 and 13; and Kazakhstan, UN Doc. CRC/C/OPSC/KAZ/CO/1, 17 March 2006, at para. 15.

<sup>98</sup> CRC concluding observations for Kazakhstan under the OPSC, UN Doc. CRC/C/OPSC/KAZ/CO/1, 17 March 2006, at para. 16 (b); see also concluding observations for Norway UN Doc. CRC/C/OPSC/NOR/CO/1, 21 September 2005, at para. 17. See also the concluding observations for Azerbaijan under the CRC, UN Doc. CRC/C/AZE/CO/2, 17 March 2006, at para. 33 in which the Committee expressed concern “about the lack of legislation regarding Internet service providers and the exposure of children to violence, racism and pornography, especially through the Internet”.

66. Further, in outlining measures required to combat trafficking, article 68 (1) (b) of the ICRMW provides that such measures “shall include” imposing effective sanctions on “persons, groups or entities” involved, suggesting that States are encouraged to impose sanctions directly onto entities such as business enterprises assisting in illegal movements of migrant workers.

67. Finally, as mentioned above, the treaty bodies frequently express concern about the need to provide effective remedies for indigenous peoples affected by major infrastructure projects involving corporations. This may imply a need for States to ensure that such effective remedies include the ability to bring actions directly against such corporations for compensation.

### **E. Promotional measures**

68. The treaty bodies encourage States to adopt various kinds of promotional measures aimed at corporations. Such measures include steps to provide human rights education for private actors or at least to encourage such actors to consider human rights in their activities. CESCR in particular has recognized the importance of ensuring that promotional measures, including educational ones, accompany legislative measures. In its general comment 5 on persons with disabilities, CESCR recognized that alongside legislative measures, promotional measures may be needed as a means of seeking to eliminate discrimination within the private sphere. The Committee emphasized that in this respect, “[T]he Standard Rules place particular emphasis on the need for States to ‘take action to raise awareness in society about persons with disabilities, their rights, their needs, their potential and their contribution.’”<sup>99</sup> Similarly, the ICRPD stresses the importance of awareness-raising, including promoting “recognition of the skills, merits and abilities of persons with disabilities, and of their contributions to the workplace and the labour market”, and “encouraging all organs of the media to portray persons with disabilities in a manner consistent with the purpose of the present Convention”.<sup>100</sup>

69. Concluding observations by various treaty bodies recommend awareness-raising for employers in relation to working conditions and non-discrimination.<sup>101</sup> It is also common to see directions to States to raise awareness amongst the media, as well as the Internet industry, of the need to eliminate stereotypes and dissemination of harmful material.<sup>102</sup> And the treaty bodies

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<sup>99</sup> See CESCR general comment 5, at para. 11. The reference to “the Standard Rules” is to the Standard Rules on the Equalization of Opportunities for Persons with Disabilities, annexed to General Assembly resolution 48/96 of 20 December 1993 (Rule 1).

<sup>100</sup> Art. 8 (2) (a) (iii) and (2) (c), ICRPD.

<sup>101</sup> See for example CESCR concluding observations, Iceland, UN Doc. E/C.12/1/Add.89, 23 May 2003, at para. 23.

<sup>102</sup> See for example CEDAW concluding observations for Italy UN Doc. A/60/38 (SUPP), 32nd Session (10 -28 January 2005) at para. 323; Dominican Republic, UN Doc. A 59/38 (SUPP), 31st Session (6-23 July 2004) at para. 293; Spain, UN Doc. A 59/38 (SUPP), 31st Session (6-23 July 2004) at para. 333.

suggest States have significant educational obligations regarding recently privatized companies carrying out government functions, such as private contractors in detention facilities and private health providers.<sup>103</sup>

70. Second, the treaty bodies also encourage promotion of human rights through the involvement of the private sector in adopting legislation which establishes national policies and mechanisms to protect rights.<sup>104</sup>

71. Finally, some of the treaty bodies, particularly CRC, CERD and CESCR, suggest a role for States in encouraging private entities to develop or amend codes of conduct and institutional charters that would include the respect and promotion of various rights. For example, CESCR's general comment 12 on the right to food mentions that the private business sector has "responsibilities" in realizing the right and that "the State should provide an environment that facilitates implementation of these responsibilities. The private business sector - national and transnational - should pursue its activities within the framework of a code of conduct conducive to respect of the right to adequate food, agreed upon jointly with the Government and civil society."<sup>105</sup>

#### **IV. BUSINESS AND RIGHTS SPECIFIC INFORMATION**

72. This section discusses the rights most commonly discussed by the treaty bodies when elaborating on the duty to protect against corporate abuse, as well as the types of business enterprises/sectors most frequently mentioned. It is purely illustrative of past and current trends and does not intend to suggest that the treaty bodies may or will focus only on certain types of abuses by certain types of business enterprises. Rather, the above analysis confirms that States have a broad duty to protect against the abuse of all rights which business enterprises are capable of violating.

73. The most commonly discussed rights and prohibitions are the right to non-discrimination and equality; minority rights; labour rights; privacy rights; rights related to health and living conditions; prohibitions related to racial hatred and harmful gender stereotypes and prejudices; and rights enjoyed by indigenous peoples, including cultural rights. The treaty bodies also frequently express concern about rights enjoyed by minorities (particularly in relation to access to services), children (especially in the employment context and in relation to the dissemination of child pornography) and women (also especially in employment contexts).

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<sup>103</sup> See generally CRC general comment 5.

<sup>104</sup> See CESCR general comment 18, at para. 38.

<sup>105</sup> CESCR general comment 12, at para. 20. See also CESCR general comment 18, at para. 52; CESCR general comment 14, at para. 42; CRC general comment 5, at paras. 43 and 56. See Part III of A./HRC/4/035 for a discussion of whether these commentaries can be used to support the existence of legal responsibilities for corporations under international law.



74. Furthermore, the treaty bodies seem more likely to discuss certain sectors. For example, in providing recommendations to particular States in the employment context, the treaty bodies not only refer generally to “employers”, but have also expressed particular concern about the mining, manufacturing and agricultural industries, mainly where those industries are prevalent in those States. Regarding rights enjoyed by indigenous peoples, particularly in relation to health, living conditions, cultural rights and access to justice, the treaty bodies frequently recommend that States take steps to regulate and adjudicate the acts of extractive, logging and property development companies.

75. Concerning privacy rights and the prohibitions against incitement of racial or religious hatred or harmful gender stereotypes, the treaty bodies have discussed marketing, advertising and media companies. Internet service providers have also been mentioned in relation to the State’s duty to protect against exploitation of children, particularly through preventing the dissemination of child pornography.

76. In relation to health, the Committees not only refer to health-care providers but also companies marketing medical equipment and medicines to ensure that consumers remain fully informed; companies producing and marketing tobacco and narcotics; and extractive and manufacturing companies capable of polluting food and water resources.<sup>106</sup> As suggested above, CESCR also indicates some regulation of pharmaceutical companies may be necessary, at least in limiting their intellectual property rights where such rights could result in “unreasonably high medicine, food and education costs”.<sup>107</sup>

77. Finally, most of the treaty bodies have reiterated States’ duties to monitor and regulate private companies which provide government services to ensure that such services are provided without discrimination and in full compliance with international human rights obligations.<sup>108</sup>

78. The treaty bodies do not often separately discuss State-owned enterprises. It is understood that under general international law the issue of whether particular business entities are State-owned or not is of less importance in deciding whether their acts can be attributed to the State; if a company has a legal personality distinct from the State, it will be treated like any other entity. What matters is whether the business entity performs governmental duties or acts under the instructions, direction or control of the State.<sup>109</sup> However, given mounting concern in the public space about human rights protection and State-owned enterprises, the intention here

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<sup>106</sup> See CESCR, general comment 14, at paragraphs 35 and 51.

<sup>107</sup> General comment 17, at para. 35.

<sup>108</sup> As indicated above, it is not always clear if the treaty bodies are focusing on the duty to protect in this regard or if they are relying on the duty to respect by using secondary rules of state attribution to hold the state responsible for such companies’ behavior given they perform government functions.

<sup>109</sup> See arts. 5 and 8 of the International Law Commission Articles on State responsibility - see footnote 13 for additional references.

was to focus briefly on specific trends from the treaty bodies' commentaries in relation to State-owned enterprises performing business operations similar to non-state business enterprises.<sup>110</sup>

79. When the treaty bodies do discuss State-owned enterprises, they hold States responsible for abuse carried out by such enterprises even where the State argues that it has minimum control over the enterprise's daily decision-making.<sup>111</sup> What is less clear is whether the treaty bodies consider the State's responsibility to stem from the duty to protect (in situations where the enterprises may be considered in the same way as private businesses) or from the duty to respect (if State-owned enterprises are considered State organs or agents). CESCR has discussed responsibility for violations by State-owned entities in the context of the duty to respect. For example, general comment 14 on the right to the highest attainable standard of health provides that the duty to respect requires the State to refrain from "unlawfully polluting air, water and soil, e.g. through industrial waste from State-owned facilities".<sup>112</sup> General comment 15 on the right to water also suggests that States could breach the duty to respect by allowing water pollution by State-owned facilities.<sup>113</sup>

80. In any case, it appears that the State is responsible for ensuring State-owned enterprises do not abuse human rights, either as part of the obligation to respect (if State-owned enterprises are considered State organs) or as part of the obligation to protect (if they are considered private businesses).

## V. EXTRATERRITORIAL RESPONSIBILITY

### A. Scope

81. The treaties and treaty body commentaries were examined to identify any requirements for States to exercise extraterritorial jurisdiction, predominantly prescriptive extraterritorial

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<sup>110</sup> For the purposes of this report, it was not possible to explore various legal definitions of government control or ownership, including the exact situations in which a corporation may be considered government owned. Accordingly, trends in relation to State-owned enterprises were derived from commentary where the Committee expressly provides that it is discussing a State-owned or controlled business enterprise, or where it is implied that the State has a controlling interest in a business enterprise.

<sup>111</sup> For HRC decisions dealing with State-owned enterprises, see for example: *Love et al. v. Australia*, communication 983/2001, UN Doc. CCPR/C/77/983/2001, 28 April 2003 at para. 4.6; *Hopu and Bessert v. France*, communication 549/1993, UN Doc. CCPR/C/60/D/549/1993/Rev.1, 29 December 1997, at para. 10.3.

<sup>112</sup> CESCR general comment 14, at para. 34.

<sup>113</sup> CESCR general comment 15, at para. 21.

jurisdiction,<sup>114</sup> over transnational corporations or State-owned enterprises which commit abuses overseas. The main scenario in mind is where a corporation considered to have the nationality of State A (where State A is a party to the particular convention) commits abuses of treaty rights in State B.

82. The treaties and treaty body commentaries were also examined to see whether, even if there is no express duty to exercise extraterritorial jurisdiction, States are permitted to do so.

83. Accordingly, this section focuses on trends in relation to the exercise of extraterritorial jurisdiction rather than those concerning international cooperation or situations in which the State's treaty obligations may be interpreted to extend to areas outside their territory though subject to their jurisdiction, i.e. areas within their power or effective control.<sup>115</sup>

## **B. Main trends**

84. Most of the treaty bodies have not discussed State duties regarding extraterritorial jurisdiction in detail or with great clarity. At the very least though, none of the treaties or treaty bodies suggest that exercising extraterritorial jurisdiction is prohibited though States should only exercise jurisdiction over acts abroad within the limits imposed by the principle of

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<sup>114</sup> Prescriptive extraterritorial jurisdiction involves a State regulating persons or activities outside its territory, usually through legislation. Prescriptive extraterritorial jurisdiction differs from other forms of extraterritorial jurisdiction, such as situations in private international law where a national court applies another nation's law, and executive (or enforcement) extraterritorial jurisdiction, where the State sends its organs, such as its military, overseas. For more detail, see Addendum 2 to the SRSG's 2007 report UN Doc. A./HRC/4/035/Add. 2 and *Extraterritorial Jurisdiction as a tool for improving the Human Rights Accountability of Transnational Corporations* - background paper for 3-4 November 2006 seminar prepared by Prof. Olivier de Schutter, Catholic Univ. of Louvain & College of Europe, December 2006 available at <http://www.business-humanrights.org/Documents/de-Schutter-report-for-SRSG-re-extraterritorial-jurisdiction-Dec-2006.doc>.

<sup>115</sup> See for example HRC general comment 31 at para. 10 and the following HRC concluding observations: United States, UN Doc. CCPR/C/USA/CO/3/Rev.1, 18 December 2006, at para. 10; Poland, UN Doc. CCPR/CO/82/POL, 2 December 2004, at para. 3; Belgium, UN Doc. CCPR/CO/81/BEL, 12 August 2004, at para. 6 and 10; Germany, UN Doc. CCPR/CO/80/DEU, 4 May 2004, at para. 11. The individual treaty reports for the ICCPR and ICESCR will discuss how such extraterritorial responsibility may affect States being held liable for abuses committed by State-owned enterprises abroad and other enterprises carrying out government functions or subject to government control, i.e. where such enterprises can be considered the State's agents and therefore the State may be held responsible for their actions in situations where there is sufficient control over foreign rights-holders. The reports will also examine whether similar arguments are feasible in relation to private enterprises acting independently abroad over which the State exercises some form of jurisdiction.

non-intervention under international law. What is difficult to derive from the treaties or the treaty bodies is any general obligation on States to exercise extraterritorial jurisdiction over violations by business enterprises abroad.

85. For example, the HRC has suggested that States should assist “each other to bring to justice persons suspected of having committed acts in violation of the Covenant that are punishable under domestic or international law”.<sup>116</sup> However, it is unclear whether this duty requires only information exchanges and respect for extradition treaties or whether it suggests a broader duty to exercise extraterritorial jurisdiction and even then whether it could apply to legal as well as natural persons.

86. CESCR says slightly more on the topic. In particular, paragraph 33 of general comment 15 on the right to water provides that “steps should be taken by States parties to prevent their own citizens and companies from violating the right to water of individuals and communities in other countries. Where States parties can take steps to influence other third parties to respect the right, through legal or political means, such steps should be taken in accordance with the Charter of the United Nations and applicable international law.” It appears that the term “their companies” relates both to State-owned enterprises and privately owned companies under the State’s jurisdiction while “other third parties” concerns unrelated actors acting overseas.

87. However, even with CESCR’s direct reference to companies, the most one can say with certainty is that there is an obligation to take “steps” to “prevent” violations. It is not clear what types of steps should be taken, including whether an exercise of extraterritorial jurisdiction is considered necessary under the Covenant.<sup>117</sup> Nevertheless, the Committee’s statements at least suggest that the exercise of extraterritorial jurisdiction is not prohibited, in so far as it accords with the Charter of the United Nations and applicable international law. Indeed, the Committee seems to be encouraging the State to regulate corporate acts both within and outside its borders.

88. Relevant concluding observations from the CRC urge the State to establish bilateral and multilateral agreements with countries of origin/transit to “prevent the sale of and trafficking of children”.<sup>118</sup> However, there is no indication that States are required to exercise extraterritorial jurisdiction over perpetrators of trafficking. Similarly, concluding observations for CEDAW urge States to prosecute and punish those engaging in trafficking but it also remains unclear whether States are required to exercise extraterritorial jurisdiction over perpetrators or whether they are simply expected to cooperate with extradition processes. There is no suggestion that the exercise of extraterritorial jurisdiction is prohibited.

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<sup>116</sup> HRC general comment 31, at para. 18.

<sup>117</sup> See also CESCR general comments 14, at para. 39 for similar comments to general comment 15, paragraph 33 in relation to influencing third party actions abroad.

<sup>118</sup> CRC concluding observations, Lebanon, UN Doc. CRC/C/LBN/CO/3, 8 June 2006, at para. 82 (e).

89. The OPSC to the CRC provides more guidance regarding extraterritorial responsibility in relation to the crimes States must prohibit under the Protocol. Article 3 (1) requires that such offences be criminalized, whether they are committed “domestically or transnationally or on an individual or organized basis”. Article 3 (2) also requires that subject to the State’s law, attempt, complicity or participation in any of the offences should also be prohibited by legislation. Article 4 (2) requires the State to take measures as necessary to establish jurisdiction over the offences where the victim or alleged offender is a national. Article 4 (3) also requires the State to exercise jurisdiction where the alleged offender is present in the State’s territory and it does not extradite “him or her” to another State party because the offence was committed by one of its nationals.<sup>119</sup>

90. However, considering article 3 (4)’s broad wording in relation to legal persons as described in Part II.D above, it is unclear whether the extraterritorial jurisdiction requirements above could require action in relation to legal persons. The concluding observations do not illuminate this issue. There are numerous references to States parties’ duties to exercise extraterritorial jurisdiction under the OPSC but these relate to general principles affecting the effectiveness of such jurisdiction rather than discussing whether jurisdiction should be exercised over legal persons. And while the concluding observations which recommend that States extend their laws to legal persons are encouraging, it is unclear if they were intended to relate to abuses committed by legal persons beyond the State’s borders.

91. CAT also requires States parties to exercise extraterritorial jurisdiction in certain situations.<sup>120</sup> However, the requirement does not appear to extend to exercising jurisdiction over legal persons.

92. Accordingly, the strongest pattern one can ascertain is a trend towards the treaty bodies recommending that States influence the actions of business enterprises abroad though States appear to have wide latitude in deciding the type of influence in most circumstances.

## VI. PRELIMINARY OBSERVATIONS

93. This addendum has mapped the State obligations to regulate and adjudicate private corporate acts as these obligations are recognized in the United Nations core human rights treaties and further clarified by their respective treaty bodies. At this point, the research has been able to identify some trends and gaps in relation to the protection and promotion of human rights in the business context. The research has notably shown the treaty bodies’ increasing focus on State protection against corporate abuse. The forthcoming finalization of individual reports on all treaties will allow making more specific recommendations in this respect. Nevertheless, on the basis of the available materials, it is possible to make a few preliminary observations.

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<sup>119</sup> Note that while the OPAC does not require an exercise of extraterritorial jurisdiction in the same way as the OPSC, the CRC has recommended establishing extraterritorial jurisdiction over offences where either the victim or the perpetrator is a national.

<sup>120</sup> See in particular art. 5 and 7 of CAT.

94. The treaty bodies are the main international accountability and monitoring mechanism for the implementation of the treaties. The increasing attention they have shown to States' regulation and adjudication of corporate acts is an important and welcomed development. Indeed, it is vital that they continue to provide guidance to States on how they can fulfil their role in effectively regulating and adjudicating the acts of business enterprises in relation to human rights. Such guidance as well as deliberations among treaty bodies about this particular issue would not only assist States but also provide more clarity to rights-holders and business enterprises as to States' obligations in this respect. To this end, the treaty bodies could also consider issuing specific general comments or recommendations on this issue.

95. It would also seem desirable if the treaty bodies were to systematically request States parties to include information about steps taken to regulate and adjudicate corporate abuse in their periodic reports. States could also make greater efforts to include such information in their periodic reports to the treaty bodies, and to consult business representatives and civil society in this respect. Representatives from the State who are in charge of relations with business or have knowledge of State actions regarding corporate activities in the human rights context could also be part of the State delegation to treaty body sessions discussing the State's periodic report.

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