TAKING THE SOCIAL RIGHTS COVENANT MORE SERIOUSLY IN BUSINESS AND HUMAN RIGHTS: A GLOBAL GOVERNANCE PERSPECTIVE

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The business and human rights (BHR) debate has so far concentrated its attention on soft law initiatives, most notably the United Nations Guiding Principles on Business and Human Rights, resulting in rare mention of universal human rights treaties. This article reconsiders how the International Covenant on Economic, Social and Cultural Rights (ICESCR) could make a unique contribution to BHR global governance. In particular, it focuses on human rights challenges in global supply chains, the issue addressed by the Committee on Economic, Social and Cultural Rights in its General Comment No. 24. The analysis finds that the ICESCR state reporting procedure offers a relevant forum that improves state BHR measures through a pragmatic operationalization of extraterritorial obligations, while the individual communication procedure under the Optional Protocol to the ICESCR contains many obstacles to effectively deal with such matters. Ultimately, this article argues that the ICESCR could offer a vital impetus to overcome a limitation of BHR soft law instruments by obliging states to hold corporations legally accountable for their negative impacts on human rights even where enterprises do not have sufficient economic incentives to respect these rights. As such, it is essential to take the ICESCR more seriously to enhance legal responses to BHR challenges.

Keywords: business and human rights, International Covenant on Economic, Social and Cultural Rights, extraterritorial obligations, state reporting procedure, individual communication procedure

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I. INTRODUCTION

A notable trend in the contemporary debate on business and human rights (BHR) in international human rights law scholarship is its predominant focus on soft law instruments.[1] As noted by Choudhury, the current global governance framework for BHR primarily consists of the following four initiatives:[2] (i) the Organisation for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises;[3] (ii) the International Labour Organization (ILO) Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy;[4] (iii) the United Nations Global Compact;[5] and (iv) the United Nations Guiding Principles on Business and Human Rights (UNGP).[6] Interestingly, despite

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1 For BHR generally, see Nadia Bernaz, *Business and Human Rights: History, Law and Policy - Bridging the Accountability Gap* (Routledge 2016); Surya Deva and David Birchall (eds), *Research Handbook on Human Rights and Business* (Edward Elgar Publishing 2020). On the concepts of soft and hard law, see Barnali Choudhury, 'Balancing Soft and Hard Law for Business and Human Rights' (2018) 67 International and Comparative Law Quarterly 961.

2 Choudhury (n 1) 966.

3 OECD, *OECD Guidelines for Multinational Enterprises* (OECD Publishing 2011).

4 ILO, *Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy* (5th edn, ILO Office 2017).

5 Global Compact, 'The Ten Principles | UN Global Compact' <https://www.unglobalcompact.org/what-is-gc/mission/principles> accessed 4 November 2020.

6 UNHRC, *Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework*, UN Doc. A/HRC/17/31 (21 March 2011). The UNGP consists of three pillars: (i) the state duty to protect human rights; (ii) the corporate responsibility to respect human rights; and (iii) access to remedy.

forming the basis of normative content in such soft law documents,[7] the United Nations human rights treaties commonly referred to in the discussion of international protection of human rights are missing from the list. Does this mean that new challenges brought by corporations render traditional state-focused human rights treaties outdated and irrelevant in the context of BHR? What unique functions, if any, can human rights treaties perform in BHR, and how effective are they?

Against this background, this article examines the role and limitations of the International Covenant on Economic, Social and Cultural Rights (ICESCR) for BHR with some references to human rights challenges in global supply chains.[8] This core universal human rights treaty, which establishes legal obligations on state parties for the realization of economic, social and cultural (ESC) rights, offers a good starting point to rethink the significance of human rights treaties for BHR. In 2017, six years after the publication of a brief statement on the topic,[9] the Committee on Economic, Social and Cultural Rights (CESCR), the monitoring body of the ICESCR, elaborated a detailed interpretation of 'State obligations under the [ICESCR] in the context of business activities' in its General Comment No. 24.[10] The normative content

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7 See OECD (n 3) para 39; ILO (n 4) para 8; Global Compact (n 5) Principle 1 Commentary; UNHRC (n 6) Principle 12 Commentary.

8 International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (hereinafter: ICESCR).

9 CESCR, *Statement: The Obligations of States Parties regarding the Corporate Sector and Economic, Social and Cultural Rights*, UN Doc. E/C.12/2011/1 (12 July 2011).

10 CESCR, *General Comment No. 24: State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities*, UN Doc. E/C.12/GC/24 (10 August 2017). Given its non-legally-binding nature, General Comment No. 24 is a soft law instrument. However, it is different from aforementioned BHR soft law initiatives in its closer linkage to existing hard law. General Comment No. 24 is a norm-filling soft law that gives specific meaning to abstract obligations in existing legally binding standards, and as such it always has to be read together with the ICESCR. On the other hand, BHR soft law initiatives, such as the UNGP, are primarily a norm-creating soft law. They express new normative content (corporate human rights responsibilities) in areas where no binding international standards exists, potentially paving the way towards the establishment of new hard law. As such, although some of their normative content does require a reference to existing hard law treaties (see section III on the

contained therein deserves an in-depth assessment for its far-reaching significant functions. General Comments 'serve to clarify the content of the norms contained in the Covenant, to aid States in the preparation of their reports regarding the implementation of the rights enshrined therein, and to inform the activities of both State and international actors likely to impact on economic, social and cultural rights'.[11] In addition, they 'provide individuals with a foundation for their own arguments on human rights questions before national and international courts'.[12]

Whereas the term "BHR" broadly covers the whole spectrum of human rights, encompassing both civil and political rights as well as ESC rights,[13] General Comment No. 24 limits its focus on BHR as a cross-cutting issue in the protection of ESC rights. One of the ESC rights most closely related to BHR is labor rights, comprised of the right to work,[14] the right to just and favourable conditions of work,[15] and trade union-related rights.[16] That being said, the above approach implicitly recognizes the indivisibility, interdependence, and interrelatedness of labor rights with other rights in the ICESCR.[17] As such, a reference to human rights or ESC rights in the

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obligation to protect), BHR soft law initiatives have a certain degree of autonomy from existing hard law. Despite their commonality of non-legally-binding form, because of these functional differences, this article distinguishes General Comment No. 24 from BHR soft law initiatives. For the norm-filling and norm-creating functions of soft law, see Thomas Gammeltoft-Hansen, Stéphanie Lagoutte, and John Cerone, 'Introduction: Tracing the Roles of Soft Law in Human Rights' in Stéphanie Lagoutte, Thomas Gammeltoft-Hansen, and John Cerone (eds), *Tracing the Roles of Soft Law in Human Rights* (Oxford University Press 2016) 6-7.

11 Mara Tignino, 'Quasi-judicial Bodies' in Catherine Brölmann and Yannick Radi (eds), *Research Handbook on the Theory and Practice of International Lawmaking* (Edward Elgar Publishing 2016) 245.

12 Ibid 255.

13 See, for example, UNHRC (n 6) Principle 12.

14 ICESCR, art 6.

15 ICESCR, art 7.

16 ICESCR, art 8.

17 Vienna Declaration and Programme of Action (adopted 25 June 1993) UN Doc. A/CONF.157/23, chapter I para 5. For instance, a violation of the right to just and favourable conditions of work resulting from a failure to secure '[s]afe and healthy working conditions' may, at the same time, also constitute a violation of the right

following discussion is made with labor rights in mind, but it does not necessarily exclude other ESC rights, even if they are not explicitly mentioned.

The particular importance of General Comment No. 24, as discussed below in detail, lies in its articulation of the extraterritorial obligation to protect ESC rights. It is intended to address an accountability gap in global supply chains. Home states of multinational enterprises may establish strict regulations in their domestic labor law. Still, corporations can escape from such undesired requirements simply by picking countries that do not have the capacity and/or willingness to uphold international human rights and labor standards as their host states.[18] Even more worryingly, it is reported that 50 of the world's largest companies directly employ only 6 per cent of their supply chain workers, leaving the remaining 94 per cent as the hidden workforce of global production.[19]

In response to these problems, the extraterritorial obligation to protect ESC rights requires a home state to ensure that the corporations under its control do not infringe on these rights, even if their operations and those of their business partners, including subcontractors, are conducted outside its national border. Remarkably, such a requirement goes far beyond the guidance contained in any BHR soft law instrument. However, BHR literature has so far produced very little analysis of this General Comment and emerging practices applying its content.[20] Filling this gap, this article

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to health and even the protection of children and young persons in the case of child labor. See respectively ICESCR, art 7 (b), 12, and 10 (3).

[18] Anne Peters, 'Global Constitutionalism: The Social Dimension' in Takao Suami, Anne Peters, Dimitri Vanoverbeke, and Mattias Kumm (eds), *Global Constitutionalism from European and East Asian Perspectives* (Cambridge University Press 2018) 315.

[19] International Trade Union Federation, *Scandal: Inside the Global Supply Chains of 50 Top Companies* (International Trade Union Federation 2016) 4.

[20] A commentary on General Comment No. 24 by Van Ho has highlighted some of its importance, but not discussed how its normative content may be applied in the subsequent CESCR practice, because of its nature as a short introductory note. Tara Van Ho, 'General Comment No. 24 (2017) on State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities (CESCR)' (2019) 58 International Legal Materials 872. For

argues that the ICESCR contributes to the development of legal regulations that make enterprises accountable for their negative impacts on human rights even under circumstances in which corporations do not have sufficient economic incentives to comply with BHR soft law.

The discussion starts by situating the ICESCR within the global governance structure of BHR norms (section II). This is followed by an analysis of how state obligations under the ICESCR have evolved to cope with new challenges resulting from the recent expansion of global supply chains (section III). The subsequent assessment of two main compliance monitoring mechanisms for the ICESCR reveals contrasting results. On the one hand, the state reporting procedure under the ICESCR has strong potential to enhance legal responses to BHR issues through a pragmatic operationalization of extraterritorial obligations. Based on the periodic assessments of the measures taken by state parties, the CESCR has urged governments to improve their domestic legislation so that the law has positive impacts on the enjoyment of human rights in third states, for example, where corporations under their control are conducting their business activities (section IV). On the other hand, the individual communication procedure under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (OP-ICESCR) entails

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another commentary which became available only one month after the publication of General Comment No. 24, see Diane Desierto, 'The ICESCR as a Legal Constraint on State Regulation of Business, Trade, and Investment: Notes from CESCR General Comment No. 24 (August 2017)' (EJIL: *Talk!*, 13 September 2017) <https://www.ejiltalk.org/the-icescr-as-a-legal-constraint-on-state-regulation-of-business-trade-and-investment-notes-from-cescr-general-comment-no-24-august-2017/> accessed 4 November 2020. Further, notwithstanding the remarkable developments of extraterritorial obligations in General Comment No. 24, the 'Blog Symposium on Business, Human Rights and Extraterritoriality' of the Business and Human Rights Journal does not contain a detailed analysis of this General Comment except for a brief mention in relation to terminology. See 'Blog Symposium on Business, Human Rights and Extraterritoriality' (Business and Human Rights Journal - Cambridge Core Blog, 29 April 2019 – 9 May 2019) <https://www.cambridge.org/core/blog/tag/business-and-human-rights-journal/> accessed 4 November 2020.

many limitations with regard to extraterritorial obligations.[21] Save for a few very exceptional cases, the jurisdictional clause in the OP-ICESCR is likely to prevent the CESCR from deciding on communications submitted by alleged victims claiming a violation of extraterritorial obligations by a state in whose territory he/she is not present (section V).

II. THE ICESCR IN BHR GLOBAL GOVERNANCE

The normative structure of BHR is commonly characterized by the term 'global governance',[22] which emphasizes the usefulness of employing soft law in addition to hard law.[23] The present study needs to start by considering how to situate the ICESCR in BHR global governance.

A remarkable difference between BHR soft law documents and the ICESCR lies in the different addressees of the instruments, which also explains the lack of consideration of the ICESCR in the existing BHR literature. The wording of the ICESCR is so general that it applies to a broad range of factual situations, covering BHR issues as well as countless other human rights

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[21] Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (adopted 10 December 2008, entered into force 5 May 2013) UN Doc. A/63/435 (hereinafter: OP-ICESCR).

[22] Choudhury (n 1); Larry Catá Backer, 'On the Evolution of the United Nations' "Protect-Respect-Remedy" Project: The State, the Corporation and Human Rights in a Global Governance Context' (2011) 9 Santa Clara Journal of International Law 37.

[23] Global governance is concerned with management processes of social issues not only through 'formal institutions and regimes empowered to enforce compliance [certain hard law treaties]', but also through 'informal arrangements that people and institutions either have agreed to or perceive to be in their interest [soft law]'. The Commission on Global Governance, *Our Global Neighbourhood: The Report of the Commission on Global Governance* (Oxford University Press 1995) 2. Such 'growing complexity of the international legal system ... reflected in the increasing variety of forms of commitment adopted to regulate state and non-state behavior with regard to an ever-growing number of transnational problems' has also been a significant issue in international law scholarship. Dinah Shelton, 'Introduction: Law, Non-Law and the Problem of "Soft Law"' in Dinah Shelton (ed), *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System* (Oxford University Press 2000) 17.

challenges that do not involve corporations.[24] The problem is that, although corporations are the entities that primarily need to deal with BHR issues, all the ICESCR can do in this respect is to address their responsibilities indirectly,[25] due to its focus on states as its sole duty-bearers. Because it was precisely their purpose to overcome this inherent limitation of human rights treaties,[26] BHR soft law instruments are now occupying a central place in the BHR debate. The guidance contained in such documents is very specific as a result of their focus on the application of human rights in the specific context of BHR. These instruments directly indicate what enterprises should do to respect human rights in their daily operations.[27]

Another possible factor that has further diminished interest in the ICESCR in the BHR field is the principal roles assigned to specialized institutions and

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[24] Note that the denial of ESC rights as human rights is now largely, if not completely, a thing of the past. See Eibe Riedel, Gilles Giacca, and Christophe Golay (eds), *Economic, Social, and Cultural Rights in International Law: Contemporary Issues and Challenges* (Oxford University Press 2014); Christina Binder, Jane A. Hofbauer, Flávia Piovesan, and Amaya Úbeda de Torres (eds), *Research Handbook on International Law and Social Rights* (Edward Elgar Publishing 2020).

[25] See ICESCR, art 5 (1). 'Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights or freedoms recognized herein, or at their limitation to a greater extent than is provided for in the present Covenant.' It is possible to see corporations as a 'group' mentioned in this provision. See also CESCR (n 10) para 11.

[26] Alston's observation that '[i]n practice, if not in theory, too many [non-state actors, including corporations,] currently escape the net cast by international human rights norms and institutional arrangements' well describes the primary motivation behind the normative development of BHR soft law instruments. Philip Alston, 'The "Not-a-Cat" Syndrome: Can the International Human Rights Regime Accommodate Non-State Actors?' in Philip Alston (ed), *Non-State Actors and Human Rights* (Oxford University Press 2005) 6.

[27] For example, what are companies expected to do to secure '[s]afe and healthy working conditions' as a component of the right to just and favourable conditions of work? ICESCR, art 7 (b). The practical suggestions are found in the ILO (n 4), rather than General Comment No. 23, which gives specific meaning to the abstract concept of '[s]afe and healthy working conditions' but mainly indicates how states can implement their obligations. Compare ILO (n 4) paras 43-46 with CESCR, *General Comment No. 23: The Right to Just and Favourable Conditions of Work*, UN Doc. E/C.12/GC/23 (27 April 2016) paras 25-30, 74-76.

processes, rather than the generalist CESCR, in the codification and implementation of norms in those narrowly confined areas. To give a few examples, the ILO, an institution that possesses much more labor-related experience and expertise than the CESCR, is seen as 'best placed to lead global action for decent work in global supply chains'.[28] Likewise, Ruggie's consultations during the UNGP drafting process with business enterprises, an actor usually excluded from intergovernmental negotiations of international human rights instruments but situated at the core of BHR issues, contributed to a broad corporate acceptance of this soft law document.[29]

Directly defining the responsibilities of corporations, BHR soft law instruments may offer an opportunity to reduce, if not close, the gap between the doctrinal concept of 'subject of international law' and the reality of factual power that non-state actors are exercising at the global level.[30] Despite the lack of legal enforcement mechanisms, compliance with BHR soft law is still promoted through market mechanism linked to the reputation of each corporation. Companies with poor human rights records may lose their appeal to both their consumers and investors, which creates business incentives for compliance.[31]

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[28] ILO, *Conclusions concerning Decent Work in Global Supply Chains, adopted by the International Labour Conference at its 105th Session* (2016) para 14. See also Ben Saul, David Kinley, and Jacqueline Mowbray, *The International Covenant on Economic, Social and Cultural Rights: Commentary, Cases, and Materials* (Oxford University Press 2014) 275: '[b]ecause of its much wider mandate, and resource and expertise limitations, the CESCR cannot be expected to match the level of sophistication of the ILO system in reviewing labour standards even for the more limited purpose of Article 6 (or Article 7, 8 or 9 [of the ICESCR])'.

[29] See Karin Buhmann, 'The Development of the "UN Framework": A Pragmatic Process Towards a Pragmatic Output' in Radu Mares (ed), *The UN Guiding Principles on Business and Human Rights: Foundations and Implementation* (Martinus Nijhoff Publishers 2012) 85.

[30] Christoph Good, 'Mission Creeps: The (Unintended) Re-enforcement of the Actor's Discussion in International Law through the Expansion of Soft Law Instruments in the Business and Human Rights Nexus' in Lagoutte, Gammeltoft-Hansen, and Cerone (eds) (n 10) 265.

[31] See Ilias Bantekas and Lutz Oette, *International Human Rights Law and Practice* (2nd edn, Cambridge University Press 2016) 770-771, 784 (on consumers); David

It should be noted, however, that such normative content does not always build on a legal foundation. For example, while the UNGP clearly states that business enterprises must respect the core internationally recognized human rights and the ILO workers' rights,[32] this corporate responsibility arises on the basis of political, moral or social factors rather than legal ones.[33] In its wording, the UNGP thus distinguishes human rights 'abuses' committed by business enterprises from human rights 'violations' committed by states, reflecting the dichotomy of business responsibility and state obligation.[34] In short, while reliance on BHR soft law is certainly pragmatic to some extent, the problem is that corporate compliance with such instruments is expected only as long as business and moral considerations align.[35] To effectively ensure corporate respect towards human rights at all times, irrespective of market factors, the desirability of establishing legal obligations on enterprises through hard law has not disappeared in the long term. The proposed BHR treaty currently under inter-state negotiation is intended to fill that lacuna,[36]

Weissbrodt, 'Roles and Responsibilities of Non-State Actors' in Dinah Shelton (ed), *The Oxford Handbook of International Human Rights Law* (Oxford University Press 2013) 730 (on investors).

32 UNHRC (n 6) Principles 11-24.

33 Peters (n 18) 313.

34 Stéphanie Lagoutte, 'The UN Guiding Principles on Business and Human Rights: A Confusing "Smart Mix" of Soft and Hard International Human Rights Law' in Lagoutte, Gammeltoft-Hansen, and Cerone (eds) (n 10) 247.

35 See also Philip Alston, 'The Committee on Economic, Social and Cultural Rights' in Frédéric Mégret and Philip Alston (eds), *The United Nations and Human Rights: A Critical Appraisal* (2nd edn, Oxford University Press 2020) 472: '[s]tandard-setting activities [of corporate human rights obligations] in other forums [than the CESCR] have produced a plethora of largely non-binding instruments, but these have been effective mainly around the edges rather than at the heart of the problem'.

36 Open-ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights, *Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and other Business Enterprises, OEIGWG Chairmanship Second Revised Draft 06.08.2020* (released 6 August 2020) <https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session6/OEIGWG_Chair-Rapporteur_second_revised_draft_LBI_on_TNCs_and_OBEs_with_respect_to_

but there is no prospect of its adoption for the moment. The domestic implementation of the ICESCR, i.e. giving effect to its normative content through domestic legislation, thus remains an important hard law approach to BHR.

Significantly, global governance considers a sole focus on either hard or soft law inadequate. Rather, what matters is the coordination of these types of law to most effectively address the actual BHR problems. Indeed, it was precisely such 'a smart mix of reinforcing policy measures' transcending 'the [mere] mandatory-vs.-voluntary dichotomy' that Ruggie intended to create through the UNGP in order to achieve cumulative progress on BHR challenges.[37] In other words, instead of viewing itself as the exclusive BHR norm, the UNGP envisages cooperation with other laws and norms that adopt different approaches to the realization of human rights for the ultimate goal of optimization of BHR global governance. From this perspective, it is worth examining what complementary role, if any, the ICESCR may assume for BHR, bearing in mind its interaction with other relevant norms. The key is contained in the CESCR General Comment No. 24, examined below. Admittedly, a crucial limitation of the ICESCR lies in its inability to bind the United States of America, a central hub of global business activities, which has signed but not ratified the Covenant. Nevertheless, this should not distract from the impressive number of 171 state parties to the ICESCR, which demonstrates its potentially profound influence on the overwhelming majority of the international community.[38]

III. Global Supply Chains and Evolving State Obligations

The term "global supply chains" refers to 'the full range of activities that firms, farmers and workers carry out to bring a product or service from its conception to its end use, recycling or reuse ... [which is] distributed among

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Human_Rights.pdf> accessed 4 November 2020 (hereinafter: Second Revised Draft).

37 John Gerard Ruggie, *Just Business: Multinational Corporations and Human Rights* (W. W. Norton & Company 2013) xxiii.

38 'Status of Ratification Interactive Dashboard' (OHCHR) < https://indicators.ohchr.org/> accessed 4 November 2020 (hereinafter: Status of Ratification).

many firms scattered around the world'.[39] Although serving as a positive force for economic growth and job creation in a number of countries, working conditions in global supply chains vary considerably both across and within them.[40] In some cases, particularly in informal sectors associated with non-standard forms of employment, serious decent work deficits have been reported as to working conditions, including occupational safety and health, wages and working time.[41] Such situations, which often involve non-compliance with international human rights and labor standards, persist especially in those nations that lack the capacities and resources to effectively monitor and enforce labor regulations.[42] Both the production of goods and employment-related responsibilities are fragmented in global supply chains. Hiding behind the corporate veil, 'the parent company [often] seeks to avoid liability for the acts of the subsidiary [that is located in another state] even when it would have been in a position to influence its conduct'.[43] This transnational fragmentation of human rights and labor accountability

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39 Stefano Ponte, Gary Gereffi and Gale Raj-Reichert, 'Introduction to the Handbook on Global Value Chains' in Stefano Ponte, Gary Gereffi, and Gale Raj-Reichert (eds), *Handbook on Global Value Chains* (Edward Elgar Publishing 2019) 1. The quotation was originally for a description of 'global value chain', but this term is often used interchangeably with 'global supply chains'. Note that there are some variations for the definition of 'global supply chains'. See International Labour Organization Governance and Tripartism Department, *Achieving Decent Work in Global Supply Chains: Report for Discussion at the Technical Meeting on Achieving Decent Work in Global Supply Chains (Geneva, 25–28 February 2020)* (International Labour Office 2020) paras 23-29.

40 International Labour Organization Governance and Tripartism Department (n 39) paras 19, 36.

41 ILO (n 28) para 3. See also International Labour Office, *Decent Work in Global Supply Chains* (International Labour Office 2016).

42 International Labour Organization Governance and Tripartism Department (n 39) para 19.

43 CESCR (n 10) para 42. A case in point was Nike in the 1990s. When its suppliers in Pakistan were using child labor and those in Vietnam were using excessive amounts of an adhesive containing a chemical that caused respiratory illness in workers, Nike initially did not admit that it was responsible for these issues, emphasizing that these incidents did not occur at the factories owned by Nike in legal terms. Ruggie (n 37) 3-6. Although Nike later showed an increased human rights awareness by becoming a founding member of the United Nations Global Compact, such problems remain widespread.

resulting from the fragmentation of production across international borders is precisely the background of normative developments in the CESCR General Comment No. 24.

Whereas the specific content of state obligations on ESC rights is now commonly identified through the tripartite typology of state obligations (obligation to respect, to protect, and to fulfil), the following discussion focuses on the obligation to protect.[44] This is a positive obligation that requires a state to prevent human rights violations committed by non-state actors, including corporations, and to provide effective remedies to victims.[45] The UNGP also lists this obligation as its first pillar.[46] However, the UNGP itself does not establish any legal obligation. It is a mere statement that such an obligation exists in human rights treaties, requiring a substantial analysis of the ICESCR (or any other relevant human rights treaty outside the scope of the present discussion) in this regard. In response to, among other factors, 'the emergence of global supply chains' over '[t]he past thirty years',[47] General

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44 See more fully Manisuli Ssenyonjo, *Economic, Social and Cultural Rights in International Law* (2nd edn, Hart Publishing 2016) 31-36. The CESCR has adopted the tripartite typology of state obligations since its General Comment No.12. CESCR, *General Comment No. 12: The Right to Adequate Food*, UN Doc. E/C.12/1999/5 (12 May 1999) para 15. To provide a short explanation of the other two types of obligations, the obligation to respect means a negative obligation that prohibits a state from interfering with the enjoyment of human rights. A typical such measure violating labor rights is an introduction of salary scales in the public sector that discriminate against female workers. On the other hand, the obligation to fulfil refers to a positive obligation that broadly requires a state to take appropriate legislative, administrative, budgetary, judicial and other measures towards the full realization of human rights. One example in the context of labor rights is the formulation and implementation of an employment policy aimed at reducing the unemployment rate of disadvantaged and marginalized social groups.

45 See also Matthew Craven, *The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development* (Oxford University Press 1995) 112. According to Craven, the absence of an explicit intention with regard to the horizontal effect of the ICESCR during its drafting process is not conclusive: '[t]here has to be an overriding assumption, given that the drafters were committed to ensuring the fundamental rights of every individual, that States would be under an obligation to protect the rights of the individual against violation by others'.

46 UNHRC (n 6) Principles 1-10.

47 CESCR (n 10) para 25.

Comment No. 24 clarifies the specific content of the obligation to protect in the context of business activities. The elaboration is particularly based on the general obligation provided in Article 2 (1) of the ICESCR.[48] As this obligation applies to all substantive rights listed in Part III (Articles 6 - 15) of the Covenant, this normative development has profound implications in considering the function of the ICESCR as to BHR. As shown below, notwithstanding the formal distinction between two types of obligations (territorial and extraterritorial), in substance they are closely interrelated.

According to the CESCR, the territorial obligation to protect ESC rights includes, *inter alia*, a positive obligation to adopt a legal framework that requires business entities to conduct human rights due diligence to identify, prevent, and mitigate the risk of ESC rights violations.[49] Due diligence should address ESC rights abuses 'in a business entity's supply chain and by subcontractors, suppliers, franchisees, or other business partners'.[50] This pronouncement is significant. Under BHR soft law, the importance of human rights due diligence is recognized as 'a comprehensive, proactive attempt to uncover human rights risks, actual and potential, over the entire life cycle of a project or business activity, with the aim of avoiding and mitigating those risks'.[51] However, it is envisaged only as something that corporations should do,[52] and states are merely recommended to use domestic legislation to create incentives for companies to do so 'including

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48 ICESCR, art 2 (1): '[e]ach State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures'. See also CESCR, *General Comment No. 3: The Nature of States Parties' Obligations*, UN Doc. E/1991/23 (14 December 1990).

49 CESCR (n 10) para 16.

50 Ibid.

51 UNHRC, *Business and Human Rights: Towards Operationalizing the 'Protect, Respect and Remedy' Framework*, UN Doc. A/HRC/11/13 (22 April 2009) para 71.

52 OECD (n 3) paras 45-46; ILO (n 4) para 10(d); Global Compact (n 5) Principle 1 Commentary; UNHRC (n 6) Principles 17-21.

[i.e. not necessarily] through mandatory requirements'.[53] Much stronger than this, the ICESCR is now interpreted as requiring states to introduce a human rights due diligence law that establishes a mandatory requirement for corporations to perform such due diligence.

In other words, unlike the UNGP, which recognizes the obligation to protect in general as a legal obligation but leaves specific measures to states' discretion,[54] the interpretation of the ICESCR has now evolved to a level that translates some of those measures into the realm of legal obligations. Under the ICESCR general obligation, states are explicitly required to take steps by all appropriate means, including the adoption of legislative measures, towards the full realization of ESC rights.[55] As recognized during its drafting process, the idea of 'progressive realization' signals a dynamic element that 'the realization of [ESC] rights [does] not stop at a given level'.[56] It is thus possible to argue that the creation of legal, institutional and procedural conditions for the effective realization of ESC rights in accordance with changing social situations falls within the ICESCR general obligation. As such, the state parties are obliged to continuously enhance the effectiveness of such measures.[57] General Comment No. 24, although itself not legally binding, highlights this point in connection with the recent expansion of

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53 UNGA, *The Report of the Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, UN Doc. A/73/163 (16 July 2018) para 93.

54 UNHRC (n 6). Compare Principle 1 using 'must' with Principles 2-10 using 'should'.

55 ICESCR, art 2 (1).

56 Mr Whitlam (Australia) in UN Doc. E/CN.4/SR.308 (1952) reproduced in Ben Saul (ed), *The International Covenant on Economic, Social and Cultural Rights: Travaux Préparatoires 1948 – 1966* (Oxford University Press 2016) 1255-1256.

57 See also the description of evolutionary interpretation of treaties given by the International Court of Justice in *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)* (2009) ICJ Rep 213 para 66: 'where the parties have used generic terms in a treaty, the parties necessarily having been aware that the meaning of the terms was likely to evolve over time, and where the treaty has been entered into for a very long period or is "of continuing duration", the parties must be presumed, as a general rule, to have intended those terms to have an evolving meaning'.

global supply chains that had not yet occurred at the time of the adoption of the ICESCR.

In addition, extraterritorial obligations arise from the fact that the ICESCR expresses its obligations without any restriction linked to territory or jurisdiction and that it even refers to international cooperation as a means of fulfilling ESC rights:[58]

> [e]xtraterritorial obligations arise when a State party may influence situations located outside its territory, consistent with the limits imposed by international law, by controlling the activities of corporations domiciled in its territory and/or under its jurisdiction, and thus may contribute to the effective enjoyment of economic, social and cultural rights outside its national territory.[59]

Such corporations 'domiciled in its territory and/or under its jurisdiction' include enterprises that are incorporated under its laws or that have their core administration or main business area in its territory.[60] More specifically, under the extraterritorial obligation to protect ESC rights, a state is required to take steps towards the prevention of, and redress for, an infringement of ESC rights that occurs outside its territory but results from an activity of a business entity over which the government can exercise its control.[61] It must establish appropriate monitoring and accountability procedures to scrutinize whether corporations are genuinely making their best efforts to respect ESC rights.[62] A state is in breach of this obligation 'where the violation reveals a failure by the State to take reasonable measures that could have prevented the occurrence of the event'.[63]

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58 CESCR (n 10) para 27 referring to ICESCR, art 2 (1).

59 Ibid para 28.

60 Ibid para 31.

61 Ibid para 30.

62 Ibid para 33.

63 Ibid para 32. This means that the obligation to protect, particularly that of extraterritorial character, is an obligation of conduct, and not of result. Since it is impossible for states to prevent every single human rights violation committed by corporations, state responsibility for this matter is not unlimited. Daniel Augenstein and David Kinley, 'When Human Rights "Responsibilities" Become "Duties": The Extra-territorial Obligations of States that Bind Corporations' in

This pronouncement, again, stands in stark contrast to the UNGP. The UNGP's underlying position is that the question of whether the extraterritorial obligation to protect exists or not 'remains unsettled in international law'.[64] Hence, under the UNGP, such state regulations for the extraterritorial protection of human rights are neither required nor prohibited, and states are only expected to set out a clear expectation that all corporations domiciled in their territories and/or under their jurisdiction respect human rights in their operations.[65] This view has attracted much criticism. De Schutter argues that this is an area where the UNGP obviously sets the bar below the present level of international human rights law.[66] Likewise, Augenstein and Kinley criticize it as shifting extraterritorial human rights impacts of transnational corporations from law to policy issues. This means confusing two different questions, i.e. the prescriptive question (obliged) and the permissive question (permitted), which results in a marginalization of the former. By reducing the legally mandated actions under the ICESCR to ones that are at states' discretion, the UNGP *de facto* undermines the existing hard law standard of the ICESCR, instead of supplementing it.[67]

Given such controversy, the CESCR pronouncement on extraterritorial obligations in the specific context of BHR has a considerable impact. Certainly, it does not mark the end of the debate. General Comment No. 24, in itself, has not offered a complete explanation of the contested theoretical foundation and nature of extraterritorial obligations. This has led O'Brien to maintain that the position taken in the UNGP remains correct as a matter of law even after the publication of this General Comment.[68] That being said, it is now also more difficult for states to simply behave as if such extraterritorial

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Surya Deva and David Bilchitz (eds), *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (Cambridge University Press 2013) 292.

64 See UNHRC (n 51) para 15.

65 UNHRC (n 6) Principle 2 and its Commentary.

66 Olivier De Schutter, 'Towards a New Treaty on Business and Human Rights' (2015) 1 Business and Human Rights Journal 41, 45.

67 Augenstein and Kinley (n 63) 278-279.

68 Claire Methven O'Brien, 'The Home State Duty to Regulate the Human Rights Impacts of TNCs Abroad: A Rebuttal' (2018) 3 Business and Human Rights Journal 47.

obligations do not exist at all. In the words of the International Court of Justice, interpretations adopted by human rights treaty bodies should be ascribed 'great weight' to ensure the clarity and consistency of international law as well as legal security to individuals as rights-holders and states as duty-bearers.[69] What is truly interesting is that the CESCR has already found a pragmatic way to operationalize extraterritorial obligations, at least to some extent, without delving into complex doctrinal issues. In parallel with the continuing debates on the precise theoretical nature of extraterritorial obligations,[70] an analysis of such emerging practices is also necessary. This is conducted below with particular attention to global supply chains.

IV. The State Reporting Procedure as a Relevant Forum to Assess State BHR Measures

Unlike BHR soft law with no mandatory monitoring mechanism, the ICESCR offers a relevant forum to assess whether state measures have indeed contributed to the improvement of BHR issues. A case in point is the state reporting procedure, where the CESCR periodically assesses a report submitted by a state party describing its implementation of the ICESCR.[71] This procedure is substantially different from litigation. Litigation is focused on a particular individual or a group of individuals alleging a violation of human rights and demanding compensation for the damage. Nevertheless, this is often just the tip of the iceberg, since such violations frequently result from structural causes such as inadequate domestic legislation. The state reporting procedure under the ICESCR deals with this aspect. It aims to 'assess the stage of implementation of treaty obligations in a given country

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69 *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)* {2010} ICJ Rep 639 para 66.

70 A comprehensive treatment of this aspect lies beyond the scope of this short contribution. See Malcolm Langford, Wouter Vandenhole, Martin Scheinin, and Willem van Genugten (eds), *Global Justice, State Duties: The Extraterritorial Scope of Economic, Social, and Cultural Rights in International Law* (Cambridge University Press 2013).

71 ICESCR, arts 16-17. The initial report must be submitted to the CESCR within two years of the entry into force of the ICESCR for the state party concerned, and the subsequent reports at five-year intervals. CESCR, *Rules of Procedures of the Committee*, UN Doc. E/C.12/1990/4/Rev.1 (1 September 1993) Rule 58.

comprehensively and holistically' and to 'identify systemic failures in a state or shortcomings stemming from institutional weaknesses' with a view to enhancing the enjoyment of human rights.[72] Such a comprehensive assessment enables the CESCR to ensure the interdependence of ESC rights. The Committee can review the enjoyment of all ESC rights equally, even though in practice it may particularly focus on some of the rights due to their pressing importance and/or pragmatic reasons, including the limited time available for conducting an assessment.[73]

Following a constructive dialogue on the submitted report between governmental delegates and committee members, the CESCR adopts concluding observations. Concluding observations are viewed as 'authoritative pronouncements on whether States have or have not complied with the Covenant's provisions', and accumulated findings now form 'a body of jurisprudence that provides insight on the interpretation of the Covenant's provisions'.[74] Carefully tailored to the situation in respective state parties, the observations present 'considerable insight into the problems addressed and the broader context'.[75] They are not legally binding *per se*, but not completely equal to mere recommendations.[76] As the wording 'progress made in achieving the observance of the rights' indicates,[77] the procedure expects continuing improvements in the enjoyment of ESC rights.[78] Indeed, as the

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72 Walter Kälin, 'Examination of State Reports' in Helen Keller and Geir Ulfstein (eds), *UN Human Rights Treaty Bodies: Law and Legitimacy* (Cambridge University Press 2012) 60, 40.

73 Marco Odello and Francesco Seatzu, *The UN Committee on Economic, Social and Cultural Rights: The Law, Process and Practice* (Routledge 2013) 184-185.

74 Tignino (n 11) 244-245.

75 Alston (n 35) 470.

76 Christian Tomuschat, *Human Rights: Between Idealism and Realism* (3rd edn, Oxford University Press 2014) 233 (describing concluding observations as 'no more than recommendations to the state concerned').

77 ICESCR, art 16 (1): '[t]he States Parties ... undertake to submit ... reports on the measures which they have adopted and the progress made in achieving the observance of the rights recognized herein.'

78 See Kälin (n 72) 32, noting the point in relation to the International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR), art 40 (1). A very similar wording can be found in ICESCR, art 16 (1).

CESCR itself explained in its first General Comment, such periodic evaluations of the extent of progress made are particularly pertinent to the notion of 'progressive realization' in the ICESCR.[79] Combined with the principle of good faith,[80] states are expected, at a minimum, to take note of the CESCR suggestions on policies and strategies, and to give some reasoning at the next reporting if they decide not to follow the recommendations.[81] Thus, recommendations contained in concluding observations entail some legal weight.

Certainly, the state reporting procedure is not without serious shortcomings. To name only a few, substantial delays in the submission of state reports, considerable backlogs in the examination of the reports, and lack of compulsory enforcement mechanisms for concluding observations have all been well-known sources of strong frustration among human rights lawyers.[82] Nevertheless, it is also true that such regular public scrutiny, with which states are generally cooperative,[83] has had a significant impact on actual state behavior, especially in the case of ESC rights. To maintain their reputation, governments often comply with non-binding recommendations by changing their administrative practice and law, the latter not infrequently including constitutional provisions.[84] In particular, the CESCR can provide an impetus

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79 CESCR, *General Comment No. 1: Reporting by States Parties*, UN Doc. E/1989/22 (1989) Annex III paras 6-7 referring to ICESCR, art 2 (1).

80 Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT), art 26.

81 Kälin (n 72) 32.

82 Surya P. Subedi, *The Effectiveness of the UN Human Rights System: Reform and the Judicialisation of Human Rights* (Routledge 2017) 88-97.

83 Odello and Seatzu (n 73) 178.

84 Eibe Riedel, 'Economic, Social, and Cultural Rights in Armed Conflict' in Andrew Clapham and Paola Gaeta (eds), *The Oxford Handbook of International Law in Armed Conflict* (Oxford University Press 2014) 466. One recent example is the Constitution of Kenya, 2010. Influenced by the ICESCR, it 'protects what used to be considered solely as "needs" and "services" as fully justiciable entitlements at par with civil and political rights', including the right to health, to housing, to food, to water, to social security, and to education. Manisuli Ssenyonjo, 'Influence of the ICESCR in Africa' in Daniel Moeckli and Helen Keller (eds), *The Human Rights Covenants at 50: Their Past, Present, and Future* (Oxford University Press 2018) 116.

for the fuller realization of domestic human rights objectives, when engagement of non-governmental organizations (NGOs) is substantial and sustained in the examination of state reports (submission of shadow reports to the CESCR) and the domestic implementation of concluding observations (systematic follow-up of state efforts).[85]

Remarkably, the CESCR has recently started to include a BHR section in its concluding observations, offering detailed recommendations to states with references to General Comment No. 24. For example, one of the recommendations to Korea is to create a legal obligation that (i) requires companies to conduct human rights due diligence to identify, prevent and mitigate the risks of ESC rights violations and (ii) makes them accountable for the negative impacts on ESC rights resulting from their decisions and operations. The obligation needs to cover corporations domiciled in Korea as well as those entities over which such enterprises are exercising their control, including those in their supply chains such as subcontractors, suppliers, and franchisees.[86] This recommendation implies a need for new domestic legislation, a measure corresponding to the territorial obligation to protect.[87] Importantly, despite not using the term 'extraterritorial obligations', this type of territorial obligation is obviously aimed at enhancing the enjoyment of human rights in third states, and thus extraterritorial in effect.[88]

See also CESCR, *Concluding Observations: Kenya*, UN Doc. E/C.12/KEN/CO/1 (1 December 2008) para 9.

85 Scott Leckie, 'The Committee on Economic, Social and Cultural Rights: Catalyst for Change in a System Needing Reform' in Philip Alston and James Crawford (eds), *The Future of UN Human Rights Treaty Monitoring* (Cambridge University Press 2000) 129.

86 CESCR, *Concluding Observations: Korea*, UN Doc. E/C.12/KOR/CO/4 (19 October 2017) para 18. For similar findings, see also CESCR, *Concluding Observations: Denmark*, UN Doc. E/C.12/DNK/CO/6 (12 November 2019) paras 18-20; CESCR, *Concluding Observations: Switzerland*, UN Doc. E/C.12/CHE/CO/4 (18 November 2019) paras 10-11.

87 See CESCR (n 10) para 16.

88 See also ibid para 33. Such extraterritorial impacts of human rights due diligence obligations in domestic law, according to the CESCR, do not imply the exercise of extraterritorial jurisdiction by the states concerned.

Another relevant case is the concluding observations to Mauritius, where the CESCR presents the following concern with regard to its domestic law: the Public Procurement Act 2006 of Mauritius requires a procurement contract to protect the rights of workers engaged in the execution of the contract. Still, when read in conjunction with the Employment Rights Act 2008, the workers employed by subcontractors may in fact be excluded from that protection.[89] In urging the government to address this gap by extending the protection to all workers concerned under these procurement contracts, the Committee explicitly mentioned 'paragraph 33 of its general comment No. 24' that falls within the section titled '[e]xtraterritorial obligation to protect'.[90] Again, by blurring the boundaries between territorial and extraterritorial obligations through relevant domestic law, the CESCR has pragmatically operationalized the extraterritorial obligation to protect without dealing with contentious theoretical questions surrounding this obligation. For instance, it was not necessary for the Committee to decide the precise scope of extraterritorial obligation or to identify specific criteria for attribution of state responsibility for a supposed breach of this type of obligation. If properly implemented, this *de facto* application of extraterritorial obligation is likely to mitigate some of the accountability gap in global supply chains, when decent work deficits are occurring in a country that permits the suppliers' business activities but lacks the willingness and/or capacity to ensure human rights and labor standards. It is an important task for the CESCR to constantly monitor whether such complementary regulations from the buyer side of states are genuinely based on the multilaterally agreed normative content of the ICESCR. Otherwise, the regulations may simply result in an inappropriate imposition of unilateral standards that reflects power difference among nations.

Moreover, concluding observations may also complement the efforts initiated by the UNGP. Two points deserve particular attention. First, for the UNGP to be fully implemented, a national plan of action on BHR is essential. The CESCR urges states to expedite the adoption of such a plan if

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89 CESCR, *Concluding Observations: Mauritius*, UN Doc. E/C.12/MUS/CO/5 (5 April 2019) para 11.

90 Ibid para 12.

they have not done so.[91] Even if a state has a plan, the Committee may still find several legal gaps as to the guarantees to ensure that corporations comply with their obligation to exercise human rights due diligence.[92] This includes the exclusively voluntary nature of due diligence and the lack of monitoring mechanisms.[93] Indeed, because of its exclusive focus on the process of conducting due diligence, human rights due diligence law often does not oblige corporations to achieve a particular human rights outcome. This characteristic leads companies to comply with the legislation only superficially with no real prospect of change in corporate policies and practices.[94] The state reporting procedure thus offers a useful opportunity to evaluate the effectiveness of human rights due diligence law. Second, with frequent emphasis on the need for enhanced access to effective remedies through domestic law, the CESCR has been strengthening the third pillar of the UNGP, i.e. access to remedy.[95] With regard to the German legal system, for instance, the CESCR has proposed an introduction of disclosure procedure so that claimants have less difficulty in proving their rights being violated by the conduct of a corporation. This may be supplemented by an introduction of corporate criminal liability and collective redress mechanisms in civil proceedings as well as increasing legal aid for the victims, especially for non-German victims.[96]

These practices indicate that the non-binding nature of concluding observations should not necessarily be viewed as a deficit of this procedure. Rather, the fact that the observations never entail an imposition on states allows the CESCR to make bold recommendations both in terms of specific issues in global supply chains and on BHR more broadly.

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91 CESCR, *Concluding Observations: New Zealand*, UN Doc. E/C.12/NZL/CO/4 (1 May 2018) paras 16-17.

92 CESCR, *Concluding Observations: Spain*, UN Doc. E/C.12/ESP/CO/6 (25 April 2018) para 8.

93 CESCR, *Concluding Observations: Germany*, UN Doc. E/C.12/DEU/CO/6 (27 November 2018) para 7.

94 International Labour Organization Governance and Tripartism Department (n 39) paras 60, 66.

95 UNHRC (n 6) Principles 25-31.

96 CESCR (n 93) paras 9-10.

V. Limitations of the Individual Communication Procedure

The individual communication procedure, which has been put into practice following the entry into force of the OP-ICESCR in 2013, is another unique mechanism that does not exist in BHR soft law. It permits (i) an alleged victim or (ii) a group of alleged victims of a violation of ESC rights contained in the ICESCR or (iii) those working on behalf of such victims (typically NGOs) to submit their claim to the CESCR, subject to the fulfilment of admissibility criteria such as the exhaustion of domestic remedies.[97] Should the CESCR find that the alleged violation of ESC rights amounts to a violation of the ICESCR, the state concerned must 'give due consideration to the views of the Committee' despite their non-legally-binding form.[98] The views may be accompanied by recommendations which are classified, *inter alia*, into four types. That is, (i) recommending appropriate remedial action (e.g. compensation); (ii) requesting the state to remedy the situations leading to a violation of ESC rights; (iii) suggesting a range of measures to implement the CESCR recommendations; and (iv) proposing a follow-up accountability mechanism.[99] Through interpretation and application of relevant ICESCR provisions into real complex factual situations, this quasi-judicial procedure performs at least two main functions: it not only provides remedies in individual cases (though arguably not as effective as domestic courts with compulsory enforcement power of their judgments), but also develops the normative content and corresponding obligations of ESC rights, potentially contributing to greater recognition of justiciability of ESC rights in the international community.[100]

However, the capacity of the individual communication procedure under the OP-ICESCR to serve as an effective forum for addressing BHR issues in

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97 OP-ICESCR, arts 2-4. See generally Sandra Liebenberg, 'Between Sovereignty and Accountability: The Emerging Jurisprudence of the United Nations Committee on Economic, Social and Cultural Rights under the Optional Protocol' (2020) 42 Human Rights Quarterly 48.

98 OP-ICESCR, art 9 (2).

99 CESCR, *Statement: An Evaluation of the Obligation to Take Steps to the 'Maximum of Available Resources' under an Optional Protocol to the Covenant*, UN Doc. E/C.12/2007/1 (21 September 2007) para 13.

100 Liebenberg (n 97) 50.

global supply chains is severely constrained. The challenges inherent in this procedure are not solely attributable to the limited number of 24 state parties to the OP-ICESCR.[101] A more fundamental problem lies in its wording. In particular, the jurisdictional limitation set out in Article 2 of the OP-ICESCR may substantially curtail the role of extraterritoriality under the individual communication procedure. While the ICESCR does not contain any wording that limits its scope of application,[102] the OP-ICESCR confines the CESCR's competence to receive communications to those submitted by alleged victims (or their legal representatives) 'under the jurisdiction of a State Party'.[103] As illustrated below with some examples, due to this jurisdictional clause, the individual communication procedure is primarily aimed at addressing potential violations of the ICESCR at territorial level. This means that the OP-ICESCR is designed to address extraterritorial obligations on ESC rights mainly, if not exclusively, through the inter-state communication procedure or the inquiry procedure,[104] rather than via the individual communication procedure.[105] This legal structure does not conclusively deprive the CESCR of any possibility to interpret the jurisdictional clause in a creative manner when dealing with future individual

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101 Status of Ratification (n 38). Still, active participations from 11 European countries (Belgium, Bosnia and Herzegovina, Finland, France, Italy, Luxembourg, Montenegro, Portugal, San Marino, Slovakia, Spain) and 8 Latin American nations (Argentina, Bolivia, Costa Rica, Ecuador, El Salvador, Honduras, Uruguay, Venezuela) are noteworthy. The remaining are 4 African states (Cabo Verde, Central African Republic, Gabon, Niger) and 1 Asian country (Mongolia).

102 ICESCR, art 2 (1).

103 OP-ICESCR, art 2. The relevant part reads as follows: '[c]ommunications may be submitted by or on behalf of individuals or groups of individuals, under the jurisdiction of a State Party, claiming to be victims of a violation of any of the economic, social and cultural rights set forth in the Covenant by that State Party.'

104 See respectively OP-ICESCR, arts 10 and 11-12. The present contribution does not engage in further examinations of these two procedures. The availability of these opt-in procedures is so limited that it requires not only the ratification of the OP-ICESCR for the state concerned, but also additional consents from the government for the CESCR's competence on such mechanisms.

105 See also Christian Courtis and Magdalena Sepúlveda, 'Are Extra-Territorial Obligations Reviewable under the Optional Protocol to the ICESCR?' (2009) 27 Nordic Journal of Human Rights 54.

communications. Yet it poses a severe challenge to the victims of extraterritorial ESC rights violations.

The problem is exacerbated by the absence of an explicit mention of extraterritorial obligations in the OP-ICESCR. The insufficient recognition of this type of obligations is particularly evident in Article 14 on international assistance and cooperation.[106] Problematically, it reduces the question of extraterritorial obligations to a mere issue of development cooperation and further limits its focus on technical advice or assistance from United Nations institutions.[107] As a consequence, this provision covers only some segments of the extraterritorial obligation to fulfil and neglects to directly deal with the extraterritorial obligation to respect and to protect. In effect, extraterritorial obligations are given a very limited space, if any, in the OP-ICESCR. As cautioned by Vandenbogaerde and Vandenhole, '[b]y omitting or denying the existence of extraterritorial obligations ... the OP-ICESCR runs the risk of being detached from today's political, legal and economic reality'.[108] This is unfortunately the case with global supply chains as shown below.

The seven views decided on the merits so far have been concerned neither with BHR nor extraterritorial obligations.[109] This makes recourse to

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106 OP-ICESCR, art 14.

107 Arne Vandenbogaerde and Wouter Vandenhole, 'The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights: An Ex Ante Assessment of its Effectiveness in light of the Drafting Process' (2010) 10 Human Rights Law Review 207, 232. As rightly observed by the authors at 219, this is one of the regrettable results of the inter-state negotiation process of the OP-ICESCR, where its text was substantially weakened for the instrument to be eventually adopted by consensus. In the political bargaining process, the long-standing ideological prejudices against ESC rights prevailed over the attempts to create an effective mechanism to address violations of ESC rights based on the consideration of specificity of these rights.

108 Ibid 237.

109 Up to the CESCR sixty-eighth session that ended on 16 October 2020. *I.D.G. v. Spain*, CESCR Communication No.2/2014, UN Doc. E/C.12/55/D/2/2014 (13 October 2015); *Rodríguez v. Spain*, CESCR Communication No.1/2013, UN Doc. E/C.12/57/D/1/2013 (20 April 2016); *Djazia and Bellili v. Spain*, CESCR Communication No.5/2015, UN Doc. E/C.12/61/D/5/2015 (21 July 2017); *Calero v. Ecuador*, CESCR Communication No.10/2015, UN Doc. E/C.12/63/D/10/2015 (14 November 2018); *S.C. and G.P. v. Italy*, CESCR Communication No.22/2017, UN

hypothetical examples necessary to highlight the problems in the context of global supply chains.

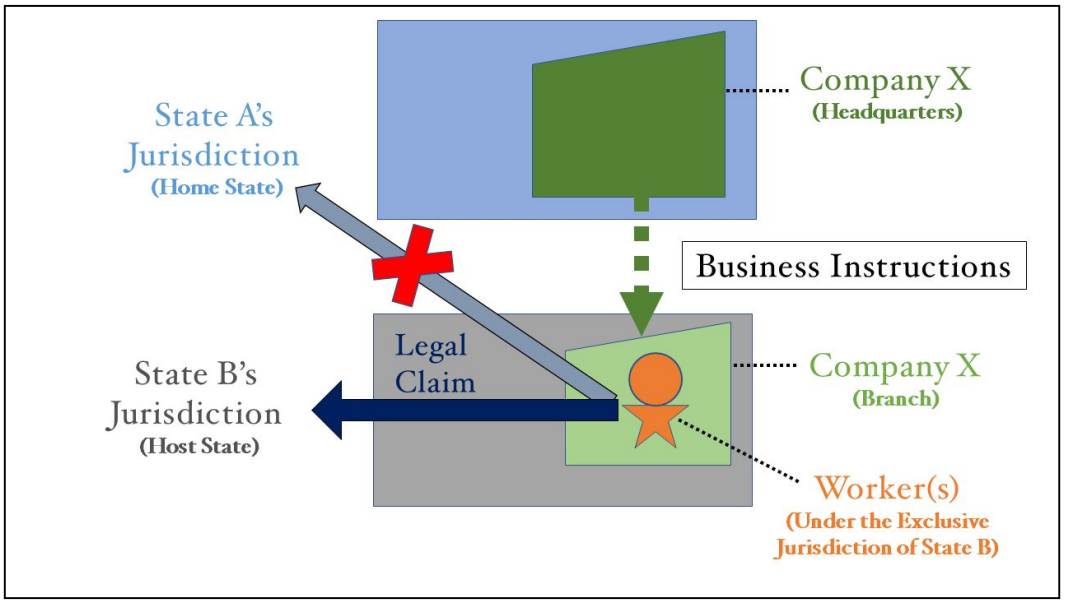

Figure (i) *A situation where workers are under the exclusive jurisdiction of a corporation's host state*

First, as visualized in Figure (i), suppose that a branch of company X, whose main headquarters are domiciled in state A, has violated ESC rights, say labor rights, of workers in state B. In this case, whereas it is possible to invoke a communication against the host state of company X (state B), it may be difficult to also include the home state (state A) in the communication. While company X is under the jurisdiction of both states A and B, workers are only under the jurisdiction of state B and do not have a direct legal linkage to state A.

Likewise, as shown in Figure (ii), it is unlikely that a worker employed by company Y in state C, a subcontractor of company Z domiciled in state D, is able to establish a violation of the extraterritorial obligation to protect imposed on state D when his/her ESC rights are violated by company Y. Since the worker has a jurisdictional link only with state C, he/she can only claim a

Doc. E/C.12/65/D/22/2017 (28 March 2019); *Albán v. Spain*, CESCR Communication No.37/2018, UN Doc. E/C.12/66/D/37/2018 (29 November 2019); *Pardo v Spain*, CESCR Communication No.52/2018, UN Doc. E/C.12/67/D/52/2018 (14 April 2020).

violation of the territorial obligation to protect imposed on state C in relation to company Y.

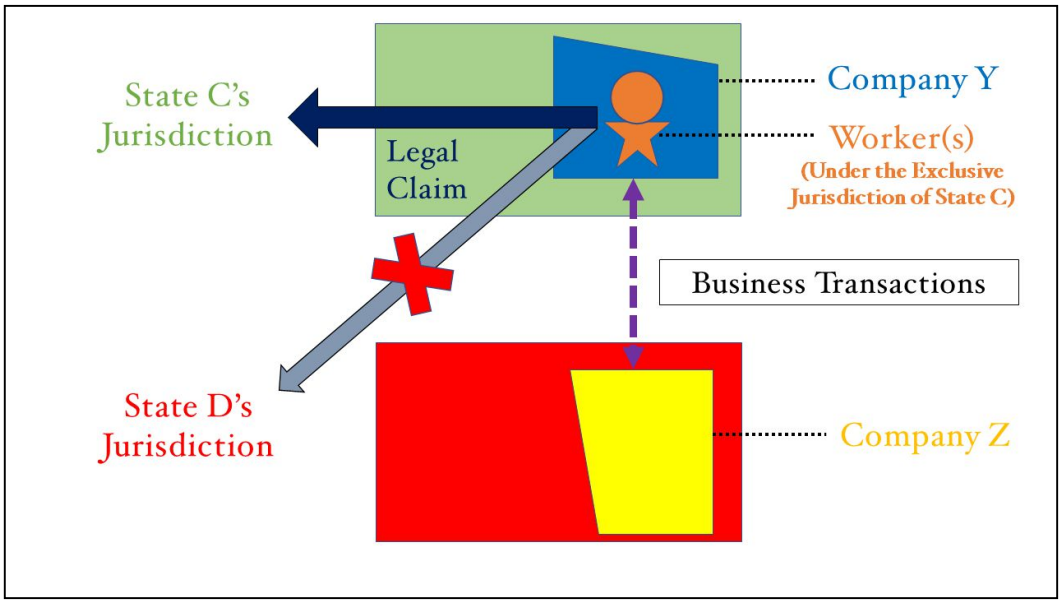

Figure (ii) *A situation where workers are under the exclusive jurisdiction of the state where a subcontractor corporation operates*

A possible exception to this case might be the situation presented in Figure (iii), where company Z is (a) exercising governmental authority of state D (e.g. a state-owned enterprise) or (b) acting under the instructions, direction, or control of state D, or (c) its conduct is acknowledged and adopted by state D as its own.[110] For example, suppose that company Z, which meets one of the above three criteria, often visits company Y's factories and demands that the latter improves its productivity by adopting working conditions that are detrimental to the health of its employees. In such cases, it might be argued that a worker in state C is also indirectly under the jurisdiction or control of state D, which then may enable him/her to claim a violation by both states C and D. Nevertheless, considering that it is the petitioners who bear the burden of proof in establishing the claim,[111] sadly it would not be surprising if they face difficulties in gathering sufficient factual evidence to demonstrate

[110] See CESCR (n 10) para 11 (three situations where states may be held directly responsible for an action or inaction of business entities). See also Robert McCorquodale and Penelope Simons, 'Responsibility Beyond Borders: State Responsibility for Extraterritorial Violations by Corporations of International Human Rights Law' (2007) 70 Modern Law Review 598, 606-615.

[111] Courtis and Sepúlveda (n 105) 58.

such a complex legal relationship.[112] After all, these situations are quite far from the usual human rights landscape in global supply chains.

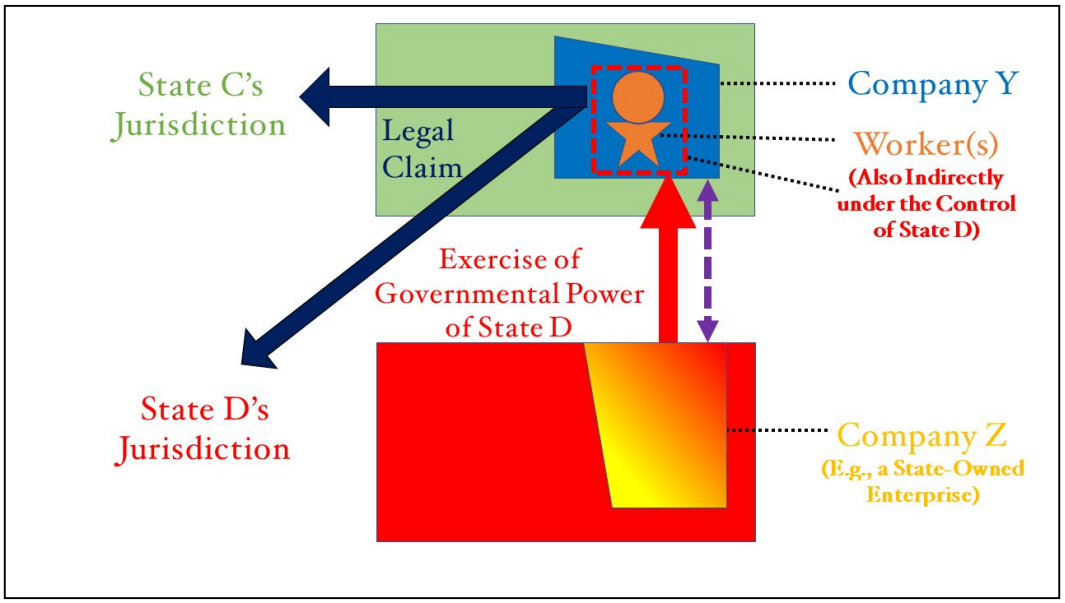

Figure (iii) *An exceptional situation where workers are under the jurisdiction of both states C and D*

It is clear from these hypothetical cases that the individual communication procedure under the OP-ICESCR maintains some difficulties to realize the full potential of extraterritorial obligations. What is a possible way to overcome this challenge? There are useful hints in the CESCR General Comment No. 24. As part of the extraterritorial obligation to protect, it mentions international cooperation in the form of the adoption of international instruments that strengthen the obligation to cooperate for improved accountability and access to remedies for the victims of transnational ESC rights violations.[113] Accordingly, one potential approach is to include a social clause, which specifies how to better deal with extraterritorial cases like those considered above, in bilateral, regional and

[112] Aubry notes a similar difficulty for the demonstration of a causal link between a state's action or omission and an alleged extraterritorial human rights violation. Sylvain Aubry, 'Advancing the Accountability of Corporations for their Impact on Economic, Social, and Cultural Rights: Reflections on the Use of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights' in Sabine Michalowski (ed), *Corporate Accountability in the Context of Transitional Justice* (Routledge 2013) 142.

[113] CESCR (n 10) para 35. It also reduces conflicts of jurisdiction.

multilateral trade and investment agreements that promote global supply chains. It may utilize existing mechanisms like domestic courts and/or establish a new system such as international arbitrations. Needless to say, the degree to which this approach succeeds considerably depends on political will of governments. Even if such clauses are incorporated, their existence alone does not necessarily guarantee its effectiveness, just like the OP-ICESCR.[114] That being said, such a dilemma between the pursuit of justice and *realpolitik* is not a concern that is unique to the extraterritorial obligations under the ICESCR. It is rather a perpetual inescapable reality for any international lawyer. At least, given that no BHR soft law instruments have proposed international cooperation towards an effective access to remedies for the victims of extraterritorial ESC rights violations, General Comment No. 24 presents an important agenda for international legal order to fully realize human rights of everyone.

VI. Conclusion

Despite being rarely mentioned in the BHR debate, the ICESCR has some unique advantages in binding and monitoring states to continuously enhance the effectiveness of ESC rights protection in global supply chains. As suggested in section II, a significant challenge for BHR global governance is how to achieve its optimization through a combination of relevant hard and soft law instruments, each with its own strength and weaknesses. Thus, a legal analysis of BHR issues cannot be completed with sole reference to soft law initiatives. As discussed in section III in relation to the obligation to protect in the UNGP, it is the ICESCR that gives substance and binding effect to some of the key concepts contained in soft law. Moreover, as shown by the extraterritorial obligation to protect in the CESCR General Comment No. 24, such normative content of the ICESCR may subsequently develop, even beyond the level initially envisaged under BHR soft law, through an

[114] For an observation of how human rights clauses in trade agreements may be abused for political purposes by powerful nations, see James Harrison, *The Human Rights Impact of the World Trade Organisation* (Hart Publishing 2007) 108-111. For an analysis of trade agreements in light of the CESCR General Comment No. 24 (although not focusing on BHR), see Shinya Ito, 'Reevaluating a Conflict between WTO law and the Right to Food: The Case of Public Food Stockholding' (forthcoming) Manchester Journal of International Economic Law.

evolutionary interpretation. Indeed, a review of the CESCR concluding observations in section IV shows the ICESCR's contributions to the overall effectiveness of BHR global governance. The state reporting procedure under the ICESCR has already engaged in *de facto* application of extraterritorial obligations and reinforcement of the efforts made by other relevant BHR domestic law and soft law. Nevertheless, these remarks are not to suggest that the ICESCR is always superior to other BHR norms in terms of effectiveness. This is especially the case with access to remedies, which is currently better dealt with by domestic law. As analyzed in section V, the individual communication procedure under the OP-ICESCR differs significantly from BHR soft law by granting access to remedies directly to the victims of ESC rights violations. However, its potential role is quite limited in the context of global supply chains, due to the jurisdictional clause in the OP-ICESCR. In addition, the fact that the ICESCR obligations are binding only on states, not on corporations, does not alter the current situation that BHR soft law instruments, most notably the UNGP, are still more relevant as the code of conduct for business enterprises.[115]

To conclude, although itself not providing a 'panacea',[116] the ICESCR constitutes a crucial part of BHR global governance that needs much more academic and practical consideration. The prevalent soft law-focused approach to BHR challenges works only under certain market conditions where companies have no option but to care about their human rights records for their own economic profits. Notwithstanding the lack of compulsory enforcement mechanisms at the international level, the ICESCR still provides a vital impetus to overcome this limitation of BHR soft law.[117] It obliges states to adopt and implement effective domestic legislation that makes corporations accountable, irrespective of their market considerations,

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[115] Note that even the second revised draft of the proposed BHR treaty has failed to directly impose legal obligations on companies. Second Revised Draft (n 36).

[116] See CESCR, *Statement: Poverty and the International Covenant on Economic, Social and Cultural Rights,* UN Doc. E/C.12/2001/10 (10 May 2001) para 6.

[117] Indeed, 'an impetus' was exactly the word that Leckie used to highlight the significance of the state reporting procedure under the ICESCR. Leckie (n 85) 130. The present contribution uses this term more broadly, covering the state reporting procedure as well as other CESCR functions such as the clarification of normative content of the ICESCR through the adoption of General Comments.

to their violations of human rights within and even beyond national borders. This is further supplemented by international cooperation towards organizing a suitable forum that effectively permits individuals to bring cases concerning extraterritorial obligations. For a variety of reasons, these measures may not be achieved all at once. Be that as it may, given that the ICESCR has the potential to induce some meaningful differences in the long term, such a prospect represents an added value of this Covenant in BHR global governance. Consequently, as far as the 171 state parties to the ICESCR, the vast majority of the international community, are concerned, taking the ICESCR more seriously in BHR[118] is an essential step for enhanced, even if not perfect, ESC rights protection for workers in global supply chains. The theoretically rudimentary stage of extraterritorial aspects of the ICESCR invites further explorations that analyze future practices.

[118] This expression is obviously inspired by Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press 1977).