



The Global Initiative

for Economic, Social and Cultural Rights

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QUESTIONNAIRE: UN SPECIAL RAPPORTEUR ON THE SITUATION OF HUMAN RIGHTS DEFENDERS

Theme: “Large-scale development projects and human rights defenders”

To human rights defenders and national institutions - Concise answers will be very much appreciated. Please provide examples to illustrate as much as possible and send additional materials if felt necessary.

1. Please indicate what you see as the main challenges and opportunities of a human rights-based approach to development, with particular attention to large-scale development projects and the role, protection and effective participation of human rights defenders. What do you think are the best measures to mitigate the challenges? Kindly provide examples of good practices in this respect.

2. Please explain how, in your view, large-scale development projects can best be elaborated in order to the effective participation of human rights defenders. Please describe participation/ consultation mechanisms in place and provide examples of good practices.

Combined answer to questions 1 and 2:

A main challenge is created by international financial institutions (IFIs) such as the World Bank and the various regional development banks, and now the BRIC bank as well, which wrongly construe that they operate outside the human rights framework including outside the human rights based approach to development. Not only does this situation inhibit active, free and meaningful participation of rights-holders, including human rights defenders, in the planning, design, implementation and monitoring of development but also inhibits accountability and remedies when human rights are violated in the context of IFI induced development.

Emerging understanding of international law, however, provides an opportunity to address this challenge. In particular, the Maastricht Principles on Extra-Territorial Obligations articulate a framework that applies to IFI induced development including large-scale development projects.

Publicizing and making use of the Maastricht Principles can go far to address this challenge, particularly since States increasingly act collectively within inter-governmental organizations (IGOs) and their decisions within IGOs can have a substantial impact on human rights ó whether beneficially or detrimentally ó and that impact is often realized in the territory of another State. This fact is quite relevant within the context of international financial institutions (IFIs) such as the World Bank and regional development banks as their financial support and other development decisions can both contribute to the extra-territorial obligation to fulfill human rights as well as result in violations of the extra-territorial obligations to respect and to protect human rights outside the territories of the Member States that sit on governing boards of IFIs.

While Member States of IFIs all have human rights obligations, those IFIs all too often seek to create immunity for human rights violations and it is a challenge to find ways to pierce that immunity. Additionally, while international judicial and quasi-judicial human rights mechanisms are beginning to grapple with the issue of ETOs, the fact that States are acting in concert (or acquiescing) within an inter-governmental organization adds an additional layer of complexity that international human rights mechanisms don't seem ready to address.

On the one hand, these States should not be able to ignore, or indeed violate, their respective human rights obligations simply by organizing themselves into IFIs or by using an IFI as an agent to carry out policies or practices that violate their respective international human rights obligations. On the other hand, by ensuring that the human rights-based approach to development is incorporated into all IFI projects, the human development outcomes of those projects can not only be more just but more sustainable.

The Maastricht Principles provide a clear articulation of customary and conventional international law as it relates to the obligations of Member States of IFIs regarding their respective human rights obligations, since such Member States make up the decision-making bodies that control or otherwise influence IFIs.

Principle 9 addresses the scope of jurisdiction, and states that:

A State has obligations to respect, protect and fulfil economic, social and cultural rights in any of the following:

a) situations over which it exercises authority or effective control, whether or not such control is exercised in accordance with international law;

b) situations over which State acts or omissions bring about foreseeable effects on the enjoyment of economic, social and cultural rights, whether within or outside its territory;

c) situations in which the State, acting separately or jointly, whether through its executive, legislative or judicial branches, is in a position to exercise decisive influence or to take measures to realize economic, social and cultural rights extraterritorially, in accordance with international law.

Extra-Territorial Obligations to Respect and to Protect

The International Law Commission (ILC) has addressed the issue of the international responsibility of States for the internationally wrongful act of an international organization. The ILC, in draft articles on the Responsibility of International Organizations, states in Article 1 that the articles apply to the international responsibility of States for the internationally wrongful act of an international organization. Furthermore, the provisionally adopted Article 4 states, *inter alia*, that an internationally wrongful act has occurred ðwhen conduct consisting of an action or omission: (a) is attributable to the international organizations under international law; and (b) constitutes a breach of an international obligation.ö

The Maastricht Principles reaffirm the obligations enunciated in the International Law Commissions draft articles, and can be relevant in the context of respecting and protecting the right of human rights defenders. Regarding State responsibility, Maastricht Principle 11 states that:

State responsibility is engaged as a result of conduct attributable to a State, acting separately or jointly with other States or entities, that constitutes a breach of its international human rights obligations whether within its territory or extraterritorially.

Regarding obligations of States as members of international organizations, Maastricht Principle 15 states that:

As a member of an international organisation, the State remains responsible for its own conduct in relation to its human rights obligations within its territory and extra-territorially. A State that transfers competences to, or participates in, an international organisation must take all reasonable steps to ensure that the relevant organisation acts consistently with the international human rights obligations of that State.

The Chixoy Dam case before the Inter-American Commission on Human Rights provides an example of using ETOs to end the impunity for human rights violations caused by IFIs. The Chixoy Dam case involves the construction of the Chixoy Hydroelectric Dam in Guatemala ó a project financed by the World Bank and the Inter-American Development Bank ó and involves extra-territorial obligations to respect, on account of

direct Member State complicity, and to protect, by not exercising influence over other actors including Guatemalan authorities.

While acquiring the land for the dam and during construction, several massacres took place as a means to forcibly evict the indigenous population from their ancestral lands. The village of Río Negro suffered several massacres which killed over 400 persons. The massacres were carried out by Guatemalan forces and associated paramilitary groups and occurred while the banks supervised the project. Materials from the project were at times used to carry out the massacres, including vehicles from construction companies used to transport the perpetrators of the massacres. After the massacres had taken place, rather than use their influence to hold Guatemalan authorities accountable the banks disbursed further loans.

To date, neither the World Bank nor the Inter-American Development Bank has acknowledged their complicity in these human rights violations. In 2005 a complaint was filed before the Inter-American Commission on Human Rights seeking accountability and remedies for the survivors of the massacres. The complaint focused on those Member States of the boards of directors of the two banks that had disproportionate decision-making authority at the time as well as human rights obligations under the inter-American human rights system. After four years before the Commission, the Secretariat of the Commission summarily rejected the complaint without explanation and has refused on several occasions to provide a rationale for this rejection.

In 2011, this dismissal was appealed by the Global Initiative for Economic, Social and Cultural Rights and Rights Action and the complaint revised to expressly cite the Maastricht Principles and the underlying international law to which the Principles refer. It is hoped that now accountability and remedies can finally be achieved and that impunity for human rights violations by IFIs can be put to an end.

Extra-Territorial Obligation to Fulfill

IFIs, and their Member States, can also play an important role in the fulfillment of economic, social and cultural rights abroad. As a Specialized Agency of the United Nations, the World Bank is obligated not to defeat the purposes of the Charter of the United Nations (UN Charter). Additionally, the World Bank must work to further the objectives of the UN Charter, and of course must not undermine those objectives.¹ This requirement is laid out in Article 59 of the Charter, which mandates that “the creation of any new specialized agencies require[s] accomplishment of the purposes set forth in Article 55.”² The purposes and objectives articulated in Article 55 include, *inter alia*, the promotion of “universal respect for, and observance of, human rights and fundamental freedoms for all.”³ Furthermore, Article 103 of the UN Charter makes clear that “in the

¹ See, e.g., Mac Darrow, *Between Light and Shadow: The World Bank, The International Monetary Fund and International Human Rights Law*, pp. 127-133, Oxford: Hart Publishing, 2003.

² *Id.*

³ Charter of the United Nations, Art. 55(c), *adopted* 26 June 1945, 59 Stat. 1031, T.S. 993, 3 Bevans 1153, *entered into force* 24 October 1945. Other human rights obligations are enshrined in Article 1 and Article 56 of the UN

event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.⁴ In other words, these UN Charter obligations would trump any contradictory clauses in donor project agreements.

Maastricht Principle 29 recognizes the requirement under international law that:

States must take deliberate, concrete and targeted steps, separately, and jointly through international cooperation, to create an international enabling environment conducive to the universal fulfilment of economic, social and cultural rights, including in matters relating to bilateral and multilateral trade, investment, taxation, finance, environmental protection, and development cooperation.

The compliance with this obligation is to be achieved through, *inter alia*:

- a) elaboration, interpretation, application and regular review of multilateral and bilateral agreements as well as international standards;
- b) measures and policies by each State in respect of its foreign relations, including actions within international organisations, and its domestic measures and policies that can contribute to the fulfilment of economic, social and cultural rights extraterritorially.

Furthermore, Principle 33 reaffirms elements of the human rights-based approach to development, and is highly relevant to decision-making within IFI governance bodies. Principle 33 requires that:

In fulfilling economic, social and cultural rights extraterritorially, States must:

- a) prioritize the realisation of the rights of disadvantaged, marginalized and vulnerable groups;
- b) prioritize core obligations to realize minimum essential levels of economic, social and cultural rights, and move as expeditiously and effectively as possible towards the full realization of economic, social and cultural rights;

Charter, and these too are binding upon all Member States of the United Nations. Article 1(3) states that the “purposes and principles” of the United Nations is “to achieve international co-operation in ... promoting and encouraging respect for human rights and for fundamental freedoms for all...” While Article 56 states that “all Members pledge themselves to take joint and separate action ... for the achievement of the purposes set forth in Article 55.”

⁴ Charter of the United Nations, Art. 103, *adopted* 26 June 1945, 59 Stat. 1031, T.S. 993, 3 Bevans 1153, *entered into force* 24 October 1945.

c) observe international human rights standards, including the right to self-determination and the right to participate in decision-making, as well as the principles of nondiscrimination and equality, including gender equality, transparency, and accountability; and

d) avoid any retrogressive measures or else discharge their burden to demonstrate that such measures are duly justified by reference to the full range of human rights obligations, and are only taken after a comprehensive examination of alternatives.

Consequently, the Maastricht Principles not only provide guidance on how IFIs should implement their development projects and their poverty alleviation missions, but this guidance is grounded in international human rights legal obligations to respect, to protect, and to fulfill human rights extra-territorially. The extra-territorial obligations to respect and protect human rights is applicable to human rights defenders, and the right of human rights defenders to actively, freely and meaningfully participate in all development-related decisions is applicable to the extra-territorial obligation to fulfill human rights.

When IFIs and their respective Member States fail to abide by their extra-territorial human rights obligations, accountability mechanisms must be available to human rights defender that apply relevant international law to Member States that are on IFI governing bodies and thus can exercise control and influence over IFI activities. The Maastricht Principles provide a useful resource to advocates seeking such accountability and it is hoped that the Special Rapporteur can make mention of the Maastricht Principles and their underlying international standards in her report.