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The duty to cooperate and non-State actors

Draft study by the Expert Mechanism on the Right to Development

Summary

The study looks to find best practices and to provide recommendations on how non-State actors can contribute to the duty to cooperate for the implementation of the right to development worldwide. Among the non-State actors, the study focusses on foreign private actors operating in a host State.

The study builds on inputs received during the consultation process; on a desk study of investor-State arbitration cases that revolve around the failure of the foreign investor to secure the support of local communities for its mining operations and on the results of a site visit at the invitation of the Kingdom of Lesotho that reviewed how engagement by non-State actors contributed and could contribute to the realization of the right to development of mountain communities affected by major economic investments in mining and water management.

Using these inputs as building blocks, the study then aims at operationalizing the general duty of non-State actors to cooperate for the realization of the right to development by breaking the duty to cooperate down into four more practical components: the duty to give notice, the duty to consult and agree, the duty to assist and the duty to repair harm.

I. Introduction

1. This study looks to find best practices and to provide recommendations on how non-State actors can contribute to the duty to cooperate for the implementation of the right to development worldwide.¹

A. The Duty to cooperate for the realization of the right to development

2. In Articles 55 and 56 of the United Charter, Member States pledge themselves to take joint action for the creation of conditions of stability and well-being that will enable development and universal respect of human rights. According to the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, adopted at the occasion of the 25th anniversary of the Charter, States have the duty to cooperate with one another in the various spheres of international relations to promote international economic stability and progress, and to that end “shall co-operate in the promotion of universal respect for, and observance of, human rights and fundamental freedoms for all, and in the elimination of all forms of racial discrimination and all forms of religious intolerance.”²

3. The duty to cooperate as an essential element for the realization of treaty objectives is reflected in various fields of international law including the international law of peace and security, international criminal and humanitarian law, international environmental law and in many international treaties such as those dealing with shared natural resources or the determination of territorial boundaries. An argument can be made that the duty to cooperate has developed into a general principle of international law, at least if one accepts the proposition by the International Law Commission Special Rapporteur on General Principles of Law that the concept of general principles includes general principles of law formed within the international legal system.³

4. In international human rights treaty law, the importance of international cooperation is explicitly recognized in the Convention on the Rights of the Child (Article 4) and in the Convention on the Rights of Persons with Disabilities (Article 32). Article 2(1) of the International Covenant on Economic, Social and Cultural Rights stipulates that “each State Party undertakes to take steps, individually and through international assistance and cooperation, especially economic and technical, to the maximum of its available resources, to achieving progressively the full realization of the rights recognized in the present Covenant”. In its General Comment No.3 on the nature of State Parties’ obligations, the CESCR Committee emphasized that “in accordance with Articles 55 and 56 of the Charter of the United Nations, with well-established principles of international law, and with the provisions of the Covenant itself, international cooperation for development and thus for the realization of economic, social, and cultural rights is an obligation of all States. It is particularly incumbent upon those States which are in a position to assist others in this regard.”⁴

5. The duty to cooperate is a key component of the human right to development. According to Article 3(3) of the Declaration on the right to development “States have the duty to cooperate with each other in ensuring development and eliminating obstacles to development. States should realize their rights and fulfil their duties in such a manner as to promote a new international economic order based on sovereign equality, interdependence, mutual interest and cooperation among all States, as well as to encourage the observance and

¹ For background materials to the current study, please consult <https://www.uantwerpen.be/en/research-groups/law-and-development/collaboration/right-to-development-and-the-duty-to-cooperate/>

² Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, General Assembly resolution 2625 (XXV), 24 October 1970, Annex.

³ See Third report on general principles of law by Marcelo Vázquez-Bermúdez, Special Rapporteur, A/CN.4/753, 18 April 2022, para. 18-33.

⁴ CESCR General Comment No. 3: The Nature of States Parties’ Obligations (Art. 2(1) of the Covenant), E/1991/23, 14 December 1990, par. 14.

realization of human rights.”⁵ According to Article 4 of the Declaration “States have the duty to take steps, individually and collectively, to formulate international development policies with a view to facilitating the full realization of the right to development” (paragraph 1); and “As a complement to the efforts of developing countries, effective international cooperation is essential in providing these countries with appropriate means and facilities to foster their comprehensive development” (paragraph 2). The African Charter on Human and Peoples’ Rights provides that “States shall have the duty, individually or collectively, to ensure the exercise of the right to development.” [Article 22(2)]

6. The legal instruments above refer to the duty of States to cooperate with each other. There is little doubt, however, that in practice the cooperation of non-State actors is equally required to achieve the realization of the right to development.⁶ Non-State actors are strongly involved in international cooperation for development, and in activities that impact locally and globally on the right to development. It is therefore essential to ensure that the actions of non-State actors contribute to the realization of the right to development as well. This approach is taken in the 2030 Agenda on sustainable development: the Agenda envisages a revitalized global partnership in support of its implementation “bringing together governments, the private sector, civil society, the United Nations system and other actors and mobilizing all available resources.”⁷ The full realization of the right to development can only be achieved if both States and non-State actors contribute.

7. The foundation of the all-encompassing understanding of the notion of a global partnership for development is in the Universal Declaration of Human Rights (UDHR) as “a common standard of achievement for every organ of society.”⁸ Article 28 UDHR further provides that everyone is entitled to “a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.” Clearly, non-State actors partake in the social and international order. The Declaration on the right to Development similarly recognizes that all human beings have a responsibility for development “individually and collectively” and equally calls for the creation of an “appropriate political, social and economic order for development.” [Article 2(2)]

B. Focus of the study

8. The aim of this study is to investigate what the necessary cooperation by non-State actors to the realization of the right to development entails. From a forward-looking perspective, the study may thus aid in adding detail to the general duty of non-State actors to cooperate for the realization of the right to development.

9. The study focuses on interventions by foreign non-State actors. The study is less concerned with the relationship between a State and domestic actors. In this sense the study relates primarily to the international dimension of the right to development.

10. A further limitation is that among the non-State actors, the study deals primarily with private actors, and particularly with private actors engaged in interventions that have a significant impact on the realization of the right to development in the host State. These actors include foreign direct investors and international operational NGOs designing and implementing development projects. Their impact tends to be particularly significant in peripheral areas and settlements.

⁵ Declaration on the Right to Development, General Assembly resolution A/RES/41/128, 4 December 1986.

⁶ Compare Elena Pribytkova, *What Global Human Rights Obligations Do We Have?* (2020) *Chicago Journal of International Law*: Vol. 20 (2), 410.

⁷ *Transforming our world: the 2030 Agenda for Sustainable Development*, General Assembly resolution 70/1, 25 September 2015, para. 39. The same approach is adopted in the United Nations Sustainable Development Cooperation Framework as endorsed by the General Assembly in General Assembly resolution 72/279, 31 May 2018. A similar approach is taken in the Global Compact on Refugees, see UN document A/73/ 12 (Part II), 13 September 2018, para 33-44 as adopted in General Assembly resolution 73/171, 17 December 2018.

⁸ Universal Declaration of Human Rights, General Assembly resolution 217A, 10 December 1948, final preambular paragraph.

11. The study does not focus on the duty of States to cooperate with each other. Nevertheless, inspiration has been drawn from treaties and standards in various fields of international law that offer detail on what is required from States when they are bound by a duty to cooperate with each other. Some of the features of cooperation that appear in treaties dealing with inter-State relations are pertinent from the perspective of exploring cooperation by non-State actors as well.

12. The duty of foreign non-State actors to cooperate extends to their relationship with States (as the main duty bearers) and to their relationship with the holders of the right to development. In the network of relationships that cooperation entails, the rights holders and duty bearers hold a specific position that is addressed in the final part of the study.

II. Consultation of stakeholders

13. During the consultation process States and other stakeholders raised issues that are helpful in framing the scope of the study.

14. A number of submissions received during the consultation process focus on the impact of the international financial institutions on the realization of the right to development. These submissions include IFIs and by implication other intergovernmental organizations as non-State actors.

15. The term non-State actors can indeed be understood as all actors that are not States. In public international law, intergovernmental organizations and private actors are however distinct categories. Intergovernmental organizations are primarily composed of States. They are thus an institutionalized form of cooperation between States, and as such may be perceived of as an emanation of the duty of States to cooperate with each other.

16. In addition, there is general agreement that intergovernmental organizations are autonomous subjects of international law as well, and thus capable of possessing rights and duties under international law dependent on their purposes and functions, as specified or implied in their constituent documents and developed in practice. As intergovernmental organizations derive their existence from international law, a persuasive argument can be made that general principles of international law apply to them.

17. Private actors have rights and duties in international law as well, but their conduct is still mainly regulated in the domestic law of both their host and home States.

18. The submissions dealing with international financial institutions point out that the intergovernmental development banks have a great influence on the holders of the right to development. Their influence is said to transcend State sovereignty in many cases.⁹ Hence, it is important to deepen the knowledge on the ability of the non-judicial accountability mechanisms created by the intergovernmental banks to act as instruments of cooperation for the realization of the right to development of affected communities, particularly in contexts where the State entrusts large-scale economic interventions to corporate actors.¹⁰

19. Another submission deplors that the Articles of Agreement of the International Monetary Fund lack any meaningful provision for genuine and equal cooperation with the relevant Member State. It is argued that the international financial institutions have a duty to cooperate with the State when taking actions that affect the right of local communities to participate in, contribute to and enjoy the full realization of their development.¹¹

20. A further submission commends the role of the IMF Catastrophe Containment and Relief Trust in enabling least developed countries to move to the beginning of a path towards realizing the right to development.¹²

⁹ Joint submission by the Legal Clinic of Torcuato Di Tella University School of Law and the Bank Information Center.

¹⁰ Some references to World Bank Inspection Panel investigation reports are included *infra*.

¹¹ Submission by the Institute for Justice & Democracy in Haiti.

¹² Submission by Maat for Peace, Development, and Human Rights.

21. A number of State submissions focus on their own role in cooperating with private actors, or in ensuring that private actors contribute to the realization of the right to development. Although this study does not focus on the State, the interaction between the State and non-State actors is obviously relevant, given that States have the primary responsibility for the creation of national and international conditions favorable to the realization of the right to development.¹³

22. It was pointed out that the States' duty to cooperate is not limited to the conduct of the State itself, but also to the conduct of actors within its jurisdiction, under its control or acting upon its instructions. States should ensure in each of these situations that legal or human persons do not commit acts that impede international cooperation or the realization of human rights in other countries.¹⁴

23. A number of States highlight their best practices in cooperating with civil society organizations or private actors more broadly, particularly in the context of addressing discrimination and poverty. The role of an Ombudsman Institution in acting as a instrument of cooperation between government and civil society was stressed. An Urban Community Economic Empowerment Program was set up as a cooperation between the Ministry of Housing and Local Government and 25 non-governmental organizations to improve entrepreneurial skills to relieve people living in urban areas from poverty.¹⁵ An Urban Community Economic Empowerment Program was set up as a cooperation between the Ministry of Housing and Local Government and 25 non-governmental organizations to improve entrepreneurial skills to relieve people living in urban areas from poverty.¹⁶ Ad-hoc consultations were regularly held with non-State actors when new legislation or policy was being prepared; a fishermen welfare fund had been set up to directly promote the development of local fishermen communities; a national social inclusion fund was created to play a key role in the promotion of social inclusion, equity and sustainable development, specifically, by leveraging strategic and sustainable partnerships with NGOs, public institutions and the private sector.¹⁷

III. Lessons from investor-State arbitration on foreign investment in mining

24. Mineral resource extraction by foreign investors supplies a good testing ground for examining the implications of the duty to cooperate. A sustainability lens is increasingly adopted to assess mining activities.¹⁸ As concerns are raised about the environmental and social consequences of mining, a multiplicity of actors beyond the mining companies have become involved in societal debates on the industry.

25. Foreign investment in mining is typically dependent on a state institution granting a license to operate, i.e., a permission to exploit the natural resources on part of the territory. Foreign investors are active particularly in sectors such as the extractive industry – bringing in capital, technology and knowledge. Customary international law provides a minimum standard of treatment that the host State must offer to the foreign investor. Applicable international and bilateral investment treaties supply additional protection to the foreign investor. Such treaties also tend to favor dispute settlement by international arbitral tribunals

¹³ Article 3(1), Declaration on the Right to Development.

¹⁴ Submission by Syria.

¹⁵ Submission by Azerbaijan.

¹⁶ Submission by Malaysia.

¹⁷ Submission by Mauritius.

¹⁸ E.g., see Stefanie Schacherer, *International Investment Law and Sustainable Development: Key cases from the 2010s*. International Institute for Sustainable Development, October 2018 available as: <https://www.iisd.org/publications/international-investment-law-and-sustainable-development-key-cases-2010s>; Taida Begić Šarkinović, *Human Rights issues in investment arbitration cases: a new perspective?* *Pravni Zapisi*, Vol. XI (2) (2020), 532-553.

(such as ICSID)¹⁹ rather than dispute settlement by domestic courts. Investment treaties have been widely ratified by States.

26. In the mining sector, there is now “widespread recognition” that mining companies not only require a legal license to operate granted by the host State, but also “a ‘social license to operate’ from local communities in order to avoid potentially costly conflict and exposure to social risks.”²⁰

27. The idea that there needs to be a necessary understanding between foreign investors and those living in affected communities resonates with human rights law and with the right to development. In the context of the Declaration on the Right to Development local communities qualify as rights holders either as a people or as a group of individual human beings depending on the factual circumstances.²¹

28. Article 2(3) of the Declaration on the Right to Development provides that States must ensure the active, free and meaningful participation in the formulation of national development of all individuals and the entire population” (which necessarily includes local communities). States also need to consult and cooperate in good faith with Indigenous peoples in order to obtain their free, prior and informed consent on matters affecting the enjoyment of their own development.²² To fulfill these requirements, the State may well need to ensure that the investor obtains the support of those affected by its activity.²³

29. It is of interest to review two investor-State arbitration cases that revolved around the failure of the foreign investor to secure the support of local communities for its mining operations. The social conflicts that appeared - on both sides of the Peruvian/Bolivian border - were broadly similar in both cases. The State authorized the operations of the foreign investor in a relatively remote area of the territory. At an early-stage local indigenous communities oppose the investor’s activities claiming adverse social, environmental, and human rights impact. The relationship between the investor and the communities gradually deteriorates. Protests increase and violent incidents ensue. In response the government reverses its decision to authorize the mining company’s activities. Subsequently, the foreign investor appeals to international arbitration to obtain fair compensation from the host State.

30. In *South American Silver v. Bolivia*²⁴

(a) “[T]he Indigenous communities’ opposition to the Project is established as well as significant shortcomings in the management of the community relations programs that were identified by the Claimant’s²⁵ own advisors (...) [I]t has been equally established that the conflict existed with the communities and the ayllus, and that it caused acts of violence, including death of people (...). In other words, the premises mentioned in the Reversion Decree as causes for Reversion have been proven and such premises include the

¹⁹ International Centre for the Settlement of Investment Disputes, one of the five World Bank group organizations.

²⁰ Jason Prno, D. Scott Slocombe, Exploring the origins of ‘social license to operate’ in the mining sector: Perspectives from governance and sustainability theories, *Resources Policy*, Vol. 37 (2012), 346.

²¹ The concept of peoples has not been defined in international law, but guidance may be taken from a UNESCO Expert study describing a people as a group of individual human beings who enjoy some or all of the following common features: a common historical tradition; racial or ethnic identity; cultural homogeneity; linguistic unity; religious or ideological affinity; territorial connection, common economic life. The will to be identified as a people or the consciousness of being a people is equally an important characteristic (UNESCO International Meeting of Experts on further study on the concept of the rights of peoples. Final report and Recommendations, SHS-89/CONF.602/7, 22 February 1990, 7-8).

²² See Articles 19 and 20, UN Declaration on the Rights of Indigenous Peoples, General Assembly resolution 61/295, 13 September 2007).

²³ For an argument that a broad range of local and non-local stakeholders should be involved with a view to creating long-term spaces for active and meaningful deliberation and co-production, see Marieke Meesters et al., *The Social Licence to Operate and the legitimacy of resource extraction*, *Current Opinion in Environmental Sustainability* Vol. 49 (2021), 7–11.

²⁴ PCA case No. 2013-15, *South American Silver Ltd. vs. the Plurinational State of Bolivia*, Award of 22 November 2018. Available as: <https://pcacases.com/web/sendAttach/2536>.

²⁵ The Claimant is the foreign investor.

protection of human rights – the right to life and the right to peace, both expressly mentioned in the Reversion Decree – and the protection of the communities and the ayllus against the difficulties resulting from the Project.”²⁶

31. The Permanent Court of Arbitration further acknowledged that the reversion had in part resulted from the investor’s mishandling of its relations with the local communities:

(a) “In this case, the Claimant knew, or should have known, that CMMK operated in an area inhabited by Indigenous communities, under specific political, social, cultural, and economic conditions. CMMK’s own advisors, as the Tribunal has already mentioned, warned of this situation, and recommended that certain measures be taken for the development of the Project. On the one hand, this implies that SAS, through CMMK, should develop the Project based on the special characteristics of the place where it operated. On the other hand, this supposes that Bolivia had a heightened duty of protection and oversight regarding the communities that inhabit the Project area.”²⁷

32. The Permanent Court awarded compensation to the investor for the cost of its investment, but not for future profits because it considered that “the Project’s state of progress cast serious doubt as to its economic viability.”²⁸

33. In *Bear Creek v. Peru*,²⁹ the State argued that when a community or important stakeholders did not accept a mining project on their land, it could not be imposed against the will of the people.³⁰ The Tribunal should deny compensation if it should find that the investor had failed to obtain a social licence to operate.³¹ Canada, the home State of the investor, intervening as a non-disputing State party,³² recognized that a State was not required to compensate an investment for any loss sustained by the imposition of non-discriminatory regulatory measures designed and applied to protect legitimate public welfare objectives.

34. The arbitrators held that there was no clear definition of a social licence to operate in international law, but all relevant international instruments required that consultations with indigenous communities were to be made with the purpose of obtaining consent from all the relevant communities.³³ The majority held that although the investor “could have gone further in its outreach activities,”³⁴ the State had been aware of the community discontent and of the investor’s outreach program for a significant period of time and had not raised objections; hence, the investor’s conduct could not be deemed insufficient.³⁵ The partially dissenting arbitrator held that the investor’s actions had contributed significantly to the social unrest. He argued that the investor was not as fully prepared to the making of an investment in the lands of the communities of Indigenous peoples as it should have been,³⁶ and had failed to engage the trust of all affected communities because it had not taken the appropriate steps.³⁷

35. Compensation was awarded to the investor for investments made, but not for future profits, as the future of the project was considered too uncertain. The dissenting arbitrator

²⁶ Para. 559, 561.

²⁷ Para. 665.

²⁸ As to the costs of the Arbitration, 65% were to be assumed by the investor, and 35% by Bolivia.

²⁹ ICSID Case No. ARB/14/21, *Bear Creek Mining Corporation v. Republic of Peru*, Award of 30 November 2017. Available as:

http://icsidfiles.worldbank.org/icsid/icsidblobs/onlineawards/c3745/ds10808_en.pdf. Also compare Victor Saco, Foreign investment in the mining sector in Southern Peru: The Case of the Tintaya Antapaccay mine project, available at: <https://www.uantwerpen.be/en/research-groups/law-and-development/collaboration/right-to-development-and-the-duty-to-cooperate/>

³⁰ Para. 263.

³¹ Para. 264.

³² DHUMA (Association for Human Rights and the Environment) and Dr Carlos Lopez (Senior Legal Advisor International Commission of Jurists, Geneva) were awarded permission to submit as non-disputing parties.

³³ Para. 406.

³⁴ Para. 408.

³⁵ Para. 412.

³⁶ Partial Dissenting Opinion of Professor Philippe Sands (English), para. 12.

³⁷ Para. 19.

felt that the compensation granted should have been cut in half due to the investor's contributory fault.

36. In its submission, Peru argued³⁸ that the State's role was to ensure that the affected communities were in fact consulted by private companies and to supervise those consultative processes to ensure they were implemented by the company in conformity with the law. "The State", so the government argued "has the neutral role of an independent facilitator."³⁹ States have the duty, however, to ensure that any actor that the State is in a position to regulate – such as a foreign investor that operates on its territory - does not impair the enjoyment of the right to development.⁴⁰ This duty requires action that goes beyond the role of neutral facilitation.

37. In *South American Silver v. Bolivia* and in *Bear Creek v. Peru* the joint efforts of the government and the investor did not achieve the acceptance by the Indigenous communities of the investor's operations. The result was social conflict and the collapse of the project by the foreign investor. The dispute was settled in an international arbitration procedure to which the Indigenous peoples as holders of the right to development had no access and that was entirely focused on the amount of compensation to be awarded by the government to the investor.

38. Mining operations in the region continue and the issues dealt with in the awards stay topical. Clearly, cooperation between the various stakeholders is necessary to design and implement mining operations by foreign investors in such a way that they benefit the right to development of affected indigenous communities. These stakeholders certainly include the actors most directly involved: the foreign investor, civil society organizations that are active in the area, and the host State and the Indigenous peoples. In addition, the home State of the investor and intergovernmental organizations that promote human rights or facilitate foreign investment can usefully contribute to ensure that the cooperative effort results in a human rights compliant investment. Taking into account the Permanent Court of Arbitration award in *South American Silver v. Bolivia* such a constructive cooperative effort should enable the foreign investor to develop its intervention in full cognizance of the special characteristics of the place where it operates and enable the host State to comply with its heightened duty of protection of the holders of the right to development.

IV. Study visit to the Kingdom of Lesotho

39. A study visit was conducted in Lesotho from 22 to 27 January 2023 at the kind invitation of the Government of Lesotho. The aim of the visit was to research how engagement by non-State actors contributed or could contribute to the realization of the right to development of mountain communities affected by major economic investments. Two large-scale investments in the Highlands of Lesotho were selected: first, mining activities by foreign investors with a focus on the Letseng Diamond Mine and second, the Lesotho Highlands Water Project (Phase II).

40. The Letseng Diamond Mine⁴¹ is a private company owned by UK-based Gem Diamonds with a minority participation by the Government of Lesotho. The Lesotho Highlands Water Project (LHWP),⁴² is a large bi-national infrastructure project between Lesotho and South Africa. It involves the construction of dams and tunnels to channel water from the mountains of Lesotho to South Africa (particularly with a view to supply drinking water to the Johannesburg area). The current construction phase focuses on the building of the Polihali Dam and transfer tunnel that will lead to 52 km² of land in Lesotho being covered

³⁸ Award, para. 262.

³⁹ Ibid.

⁴⁰ And arguably the foreign investor has a parallel "general duty under international law to refrain from participating in the violation of the right to development" as suggested in Article 7, Second revised text of the draft convention on the right to development, A/HRC/WG.2/24/2, 30 November 2022.

⁴¹ See <https://www.letsengdiamonds.co.ls>

⁴² See <https://www.lhda.org.ls/lhdaweb>

by water. On the Lesotho side, the Lesotho Highlands Development Authority, a parastatal owned by the Government of Lesotho manages the project.

41. *Lesotho Highlands Water Project: Network of Relationships*

- (a) Government of the Kingdom of Lesotho;
- (b) Government of the Republic of South Africa: party to the bilateral treaty with Lesotho on the Lesotho Highlands Water Project;
- (c) The Lesotho Highlands Water Commission (LHWC): a bi-national body representing the governments of the Kingdom of Lesotho and the Republic of South Africa. The Commission is responsible and accountable for the project;
- (d) The Lesotho Highlands Development Authority (LHDA): a Lesotho parastatal that manages the part of the project that falls within Lesotho's borders; construction contracts were awarded to companies from China, France, Lesotho and South Africa;
- (e) World Bank (Phase I) and African Development Bank (Phase II):⁴³ international development banks contributing to the project;
- (f) Numerous local development and civil society organizations are watching the impact of the water project and of mining activities on affected communities including the Transformation Resource;
- (g) Centre, the Seinoli Legal Centre and the Maluti Community Development Forum. Domestic legislation requires NGOs to register, but they can work relatively freely.

42. The visit was facilitated in exemplary fashion by OHCHR Geneva and the UN country team in Lesotho. Meetings were held with Government of Lesotho officials, at the South African High Commission, with the UN Resident Coordinator, with a World Bank Lesotho water management expert, with representatives of the Lesotho Highland Development Authority (LHDA) and of the Lesotho Highland Water Commission, with Letseng and Mothae mining company staff, civil society organizations and academia.⁴⁴ In addition two public meetings assembled various affected Maluti Mountain communities in the villages of Masakong (near Polihali) and Maloraneng (near the Letseng and Mothae mines). At the end of the visit, the Expert had the opportunity to make suggestions on how the UN Country Team could facilitate multi-stakeholder cooperation for the implementation of the right to development in the context of the draft UN Lesotho Cooperation Framework.

43. A genuinely free and earnest exchange of ideas took place with each of the stakeholders, including on issues that could be considered sensitive from a human rights and development perspective. Government officials generally took a keen interest in the mission and welcomed recommendations. Two lengthy meetings took place with mining company staff that engaged constructively with critical feedback received during the community visits. LHDA representatives were equally forthcoming both in the field and at headquarters to discuss the human rights impact of their activities. Civil society organizations welcomed the mission and offered maximum assistance. At the village meetings, both men and women, and youth spoke openly and without fear – arguably honoring the Basotho reputation of being known as a nation of peace.

44. Clearly the interventions of both LHDA and the mining companies have an impact beyond the directly affected communities. Their activities make a significant contribution to Lesotho's foreign income and to new infrastructure (particularly roads) that are open also for widespread use. In addition, the water management project, in the words of a South African interlocutor, is "fundamental for economic growth and of massive importance" to South Africa. Both the public and the private operators are nevertheless keenly aware of their impact on the people that have been present in the Maluti mountains for generations and that did not invite them to come. In response, both actors have set up compensation schemes, corporate social responsibility (CSR) and investment schemes, complaints and grievance

⁴³ See <https://projectsportal.afdb.org/dataportal/VProject/show/P-ZA-EA0-004>

⁴⁴ Note that yet no national human rights institution exists in Lesotho.

mechanisms⁴⁵ and other direct channels of communication including through area or village chiefs.⁴⁶ Those initiatives are valuable and not always available in similar circumstances elsewhere in the world.

45. In addition, most stakeholders show a degree of willingness to cooperate and to consider the viewpoint of the other. Relationships between LHDA and the mining companies on the one hand and civil society organizations on the other “fluctuate” and “are dependent on personalities” but there are examples of fruitful bilateral exchanges. The UN Country Team recently organized a well-attended Stakeholders Workshop on Business and Human Rights (Maseru, 22-23 November 2022) bringing a variety of actors together to discuss how to ensure that businesses respect human rights during their operations.

46. Both LHDA and the mining companies do not hold consultation processes with local communities based on free, prior and informed consent. They meetings are rather about giving advance warning of planned activities (which regularly include land acquisition and resettlement) and about dialogue on measures that can mitigate adverse consequences. Confronted with the scale of the existing and planned operations and with the economic interests that back them up, the communities have little or no opportunity to challenge the economic intervention itself. At the village meetings complaints thus focused on the communal and individual compensation offered, the need to maintain access to land (such as grazing fields) for the subsistence economy the communities pursue and the adequacy of CSR initiatives. Mitigating measures are based on largely voluntary, ad hoc arrangements that LHDA and the mining companies offer. Such ad hoc arrangements include the timing of an expropriation, the standard of valuation and the duration of compensation, the procedure for negotiation and reaching agreement with individuals and communities on compensation and the record keeping and accessibility of agreements reached. Inevitably this situation creates a high degree of uncertainty and of dependency among the communities.

47. Emotions run high, particularly in disputes on the adequacy of compensation. At the same time, the long-term challenge is to ensure that local communities can maintain a livelihood for current and future generations in the changed circumstances that the economic interventions create. Representatives of the Highlands Water Commission argued that one needed to “think big” around the Polihali dam project, i.e. to see the project as an opportunity for broader industrial development that would create employment, and for bringing in technological expertise, e.g. through providing energy by floating solar panels on the future artificial lake (water reservoir). This could be combined, so it was argued with bottom-up initiatives appearing from the communities themselves. Whether such a hybrid strategy, combining subsistence lives and industrial development could work still is to be seen. At a much more micro level, an LHDA official recognized that the hotels that are currently under construction near the future lake side would not help the communities “because they do not want to display their handicraft there.”

48. What may be ultimately at stake is a clash between two different visions of how to use nature for the benefit of man – one vision based on highly intrusive human activity, the other much less so. It may not be possible to ever create a social license through any compensation or CSR scheme for an industrial use of natural resources among the communities that inhabit the mountains. An even more fundamental critique would insist that the nonuse value of natural resources should be recognized, because “(w)hen we leave them alone, natural resources perform services and play roles essential to the earth’s vitality.”⁴⁷ Our LHWC interlocutors pointed to the Klamath River renewal project in the United States, a multi-stakeholder cooperative effort to “remove four hydroelectric dams to restore the health of the Klamath River and the communities that depend upon it.”⁴⁸

49. The relationship between the foreign mining companies and the State also came to the fore. When asked about complaints by Maloraneng villagers that a health facility at the village was only open once a month, Letseng officials explained that under their CSR

⁴⁵ LHDA officials did point to legal constraints in holding their contractors accountable.

⁴⁶ The chiefs are both state institutions as well as traditional rulers with lineage succession to office. Their role is thus somewhat ambivalent, as is the extent to which they stand for community views.

⁴⁷ Jan G. Laitos, *The Right of Nonuse* (2012), Oxford University Press, 5.

⁴⁸ For more information, see <https://klamathrenewal.org/the-project/>.

program the company's agreed role had been to supply the equipment, but that government was to supply medical staff. Setting up a real clinic as the village had asked - a hospital is 2 to 3 hours walking distance from the village - had not been possible within the financial limitations of the CSR program. Company officials pointed out that "there was no law that says you have to develop a social plan for the area" and that the government derived significant royalties from mining activities that could be used for development purposes.⁴⁹

50. A major concern of the communities and of civil society organizations is the pollution of the river by mine tailings.⁵⁰ The mining companies contest the scientific validity of civil society reports, arguing that the companies monitor the pollution and report to the government "applying the South African standard."⁵¹ A representative of the Department of the Environment recognized that the department's capacity to monitor pollution was limited and that the Department "sometimes relied on the results they got from the companies' analysis". A representative of the Department of Mines added that "we are lucky that the mines are built by people that are on the stock exchange. They apply standards way above country standards."

51. Clearly, the government would be well advised not to make the monitoring and provision of the well-being of affected communities dependent on foreign or domestic investors. Cooperation should build on a stronger regulatory framework and the enhancement of the capacity of government institutions to ensure that the benefits of the use of natural resources are shared fairly with affected communities.

52. To be successful, the effort of all actors should meaningfully integrate a gender perspective. Until recently, women could not inherit under customary law, leaving them without a voice on land issues, and without compensation when land is expropriated. The construction business is a male business, and employment opportunities for women are scarce (mainly cleaning jobs). This exposes girls to the risks of sexual abuse, early pregnancy, and early marriage. In the words of the South African High Commissioner in Lesotho: "Our development is mainly male."

53. If cooperative efforts fail, litigation is a costly and time-consuming alternative. Families from Patising village have filed an application requesting the Court to order the Letseng mine to resettle them to nearby Maloraneng village.⁵² The villagers fear the collapse of a tailings dam above the village; if the dam were to burst, the village would be flooded. The Letseng mine has equipped the village with alarms and walkie talkies to be used in case of an emergency, but it has not agreed to bear the cost of relocation. The company representatives preferred not to enter a discussion on this situation as the case is still pending in court.

54. While walking the mountain path between Patising and Maloraneng, a lady from the village said that she could be singing; she had been standing for her community for a long time but felt she had never been able to bring a result. She said she was happy that the study

⁴⁹ Article 2(3) of the Declaration on the Right to Development provides that "States have the right and the duty to formulate appropriate national development policies that aim at the constant improvement of the well-being of the entire population and of all individuals, on the basis of their active, free and meaningful participation in development and in the fair distribution of the benefits resulting therefrom".

⁵⁰ See Maluti Community Development Forum, *Large-scale Diamond Mining in Lesotho: Unpacking its Impact on Adjacent Communities*, December 2021 available at:

<https://www.kpcivilsociety.org/publication/coalition/lesotho/>; see also Pascalinah Kabi, *Lesotho's Dangerous Water Gamble* <https://lescij.org/2022/10/13/lesothos-dangerous-water-gamble/>

⁵¹ The quality of river water is of concern to South Africa: the Lesotho Highlands Water Project will supply the same water as drinking water to the Johannesburg area.

⁵² The collapse of a similar abandoned dam in Jagersfontein (in Freestate, South Africa) on 11 September 2022 heightened fears. After an earlier tailings dam collapse in Brazil, the International Council on Metals and Mining, the UN Environmental Programme and Principles for Responsible Investment adopted the Global Industry Standard on Tailings Management, August 2020. See <https://globaltailingsreview.org/global-industry-standard/>. The first principle of the Global Industry Standard calls for respect of the rights of project-affected people and meaningful engagement with them at all phases of the tailings facility lifecycle, including closure.

visit had happened. Her statement was echoed by the headman at Maloraneng. “You promised and you made good on your promise,” he said.

55. Nevertheless, a study visit by a UN Expert Mechanism cannot provide a solution or do justice to the many issues raised. In the end, the priority must be to find ways and means to enhance the capacity of the people of the Maluti Mountains, as holders of the right to development, to strengthen their own voice in development discussions, without having to rely on any other actor speaking in their place. This requires support from a public institution that is independent from LHDA or the mining companies. The type of support should be defined by the communities themselves: perhaps it is about facilitating meetings or funding a consultant from within the communities. Only then do the communities stand a chance to hold their ground and ensure that domestic and foreign stakeholders, public and private alike, cooperate to ensure the implementation of their right to development.

V. Towards effective implementation of the duty to cooperate for non-State actors

56. This section aims at operationalizing the general duty of non-State actors to cooperate for the realization of the right to development by breaking the duty down into four components to clarify what the duty could entail in practice.

57. In a network of relationships non-State actors may assume different roles. They may be the principal actor undertaking an intervention that is contested from a right to development perspective; or they may fund or otherwise ease such an intervention. When non-State actors assume this role, questions will typically be raised about their accountability and about how improved cooperation with other actors and with rights holders can lead to improvement.

58. Other non-State actors may not be engaged in operational activities but take up advocacy on specific issues (such as human rights or environmental protection) or they may claim to function as representatives of the rights holders. Although in the case the non-State actor is not the principal actor, its interventions will influence whether a human rights compatible agreed solution can be reached.

59. As an aside, it appears unlikely that any non-State actor would engage in a human rights compatible cooperative spirit if its internal processes on workplace culture and hiring practices (in terms of diversity of staff) are not human rights compliant.

60. The scope of the duty to cooperate for non-State actors is such as to include both cooperation by non-State actors with States (primarily, but not exclusively with the host State as the actor primarily responsible for the realization of the right to development at the domestic level); cooperation among non-State actors (e.g. between foreign investors and civil society organisations); and cooperation by non-State actors with the holders of the right to development (primarily, but not exclusively with the rights holders directly affected by a contested intervention).

61. The extent to which a non-State actor needs to engage in the different actions below is dependent on the nature of the involvement of the non-State actor and the factual circumstances surrounding the contested intervention. For interventions with a high social, environmental and/or human rights impact the standard of what constitutes proper cooperation will be higher.

62. Apart from the duty to cooperate, legal requirements regulating the conduct of non-State actors apply. These legal requirements may be found in domestic law (in host or home State legislation) and increasingly in international law.

A. Duty to give prior notice

63. The first step in a cooperative approach to development is to give notice of a planned activity to other stakeholders to enable them to assess the social, environmental and/or human rights impact and to avoid a dispute from arising at a later stage. To enable other actors to

meaningfully assess impact, the information given should be sufficiently precise, and may well require sharing the results of a scientifically valid assessment of the actual and potential risks and impacts the planned activity entails.

64. Prior notification signifies the start of a process of dialogue. It should therefore come sufficiently early in the planning process so that other stakeholders have an opportunity to study the notification and to respond to it.

65. When foreign investors intervene in sectors such as the extractive industry, the garment sector or large-scale agriculture it is particularly important to give prior notice of planned activities to obtain a social licence to operate in addition to the home State's consent. But prior notice may also be important in other sectors that at first sight appear less elevated risk. There is for instance some evidence that health services provided by foreign NGOs in rural areas may cause a displacement of government health services (with staff shifting from one to the other given differences in wage levels) and may ultimately lead to a reduction in the total services available. Early notification by the foreign NGO of the plan to roll out the service would enable coordination both with the government, and with other stakeholders.⁵³

B. Duty to consult and agree

66. In the context of the right to development, participation processes must be active, free and meaningful. When Indigenous peoples are involved, they are entitled to free, prior and informed consent before development measures that affect them are adopted.

67. The same standards are pertinent for consultation processes undertaken by non-State actors that engage in activities that impact on the right to development.

68. As a building block of the duty to cooperate, consultation processes should be "other-regarding."⁵⁴ The interaction between the parties should be meaningful. The interests of the other stakeholders should be duly respected, and the aim of the consultation process should be to seek an agreement that achieves the common objective of contributing to the realization of the right to development of affected rights holders to the fullest extent possible – a goal that can be reached only if all relevant actors work together, or at the very least refrain from obstruction.

69. As the South African Constitutional Court has held: meaningful engagement "has the potential to contribute towards the resolution of disputes and to increased understanding and sympathetic care if [the] sides are willing to participate in the process."⁵⁵ and the Court added – not superfluously – that such an engagement process "should preferably be managed by careful and sensitive people."⁵⁶ The effort to reach an agreement should be serious which implies that proposals are put forward and amended that take into account the positions of the other.⁵⁷ The OECD has thus for example suggested that in carrying out due diligence enterprises should consider entering "directly into agreements with trade unions in order to

⁵³ See Erika Deserranno, Aisha Nansamba, Nancy Qian, Aid crowd-out: The effect of NGOs on government-provided public services (2020), available as <https://www.nber.org/papers/w26928>.

⁵⁴ The term is borrowed from Neil Craik, The Duty to Cooperate in International Environmental Law: Constraining State Discretion through Due Respect, *Yearbook of International Environmental Law* (2019), Vol. 30 (1), 22-23.

⁵⁵ Constitutional Court of South Africa, Case CCT 24/07, *Occupiers of 51 Olivia Road et al. vs. City of Johannesburg et al.*, 19 February 2008, para. 15.

⁵⁶ *Ibid.*

⁵⁷ In parallel with the expectations of good faith negotiations between States; compare Olivier De Schutter, A Duty to Negotiate in Good Faith as Part of the Duty to Cooperate to Establish 'An International Legal Order in which Human Rights can be Fully Realized': The New Frontier of the Right to Development in: Nehal Bhuta (ed.), Florian Hoffmann (ed.), Sarah Knuckey (ed.), Frédéric Mégret (ed.), Margaret Satterthwaite (ed.), *The Struggle for Human Rights: Essays in honour of Philip Alston* (2021), 140.

facilitate worker involvement in the design and implementation of due diligence processes, the implementation of standards on workers' rights and the raising of grievances."⁵⁸

70. Given the inequalities in negotiating power, particular attention should be given to the design of consultation processes implementing participatory rights of affected communities. More is needed than ensuring that such processes are in a form and language that are understandable and accessible to the groups being consulted. Processes that are supposedly consultative often amount to the intervening actor supplying information on decisions already taken without consideration of local views. An example from the World Bank Inspection Panel's review of consultations organised in the context of a road construction project supported by the Bank may serve as an illustration. In its investigation report the Panel found that fears expressed by residents during public meetings about how a road construction project might lead to the flooding of low-lying land had not been taken seriously. Project technicians dismissed the concerns of the residents perceiving them as non-experts who were not competent to discuss complex hydrological issues, and thus disregarding, so the Panel noted, the people's many years of field-based experience.⁵⁹ Lived experiences are regularly discounted as knowledge during consultation processes.

71. The preferred outcome of a consultation process is a publicly available written agreement that is legally enforceable. The conclusion of an agreement is important because agreements create equality of arms between parties that may be otherwise unequal. They also create transparency about commitments made and serve as an incentive for all parties to cooperate, as non-compliance with commitments will be subject to reparation by the defecting party.

C. Duty to assist

72. The duty to assist the other parties in performing, i.e., in ensuring that the agreement contributes to the realization of the right to development also forms part of a cooperative relationship. The parties may well be unequal in their ability to contribute to the agreement or in their influence on determining the outcome. Parties may therefore wish to request or offer support to each other to build mutual trust and confidence while at the same time maintaining their own interest and position. Corporate social responsibility projects by foreign investors are an example of such forms of assistance. They typically do not relate to the essence of an investor's operation, but they may help in building constructive relationships with other rights holders and other stakeholders when they are designed in such a way that they respond to the addressees' priorities. It is also clear, however, that in themselves, CSR measures will not suffice to create a social licence for an investor operation that was not properly consulted.

73. Intergovernmental organizations may usefully facilitate a cooperative relationship between corporate actors and civil society actors enabling them to contribute to the realization of the right to development. They are also in a position to enhance the capacity of the rights holders or of stakeholders in need of assistance to defend their position in the context of a cooperative venture. The UN High Commissioner for Human Rights has long held a mandate to "promote and protect the realization of the right to development and to enhance support from relevant bodies of the United Nations system for this purpose."⁶⁰ The mandate can be put to good use in the context of multi-stakeholder cooperation.

D. Duty to repair harm

74. Ideally, harm because of an intervention affecting the right to development is prevented. But when harm is shown or reported during the performance of an operation, the

⁵⁸ OECD Due Diligence Guidance for Responsible Business Conduct (2018), 51, available at <https://www.oecd.org/investment/due-diligence-guidance-for-responsible-business-conduct.htm>.

⁵⁹ World Bank Inspection Panel Investigation Report No. 49110-AR, Argentina: Santa Fe Road Infrastructure Project, 2 July 2009, para. 129.

⁶⁰ UN General Assembly resolution 48/141, 7 January 1994, para. 4(c).

relevant actor should notify the other stakeholders. When the non-State actor's conduct impairs the right to development, those affected should have access to an effective remedy leading to reparation.

75. Reparation is different from assistance (e.g., provided in the context of a CSR policy) as discussed in the earlier section. Reparation efforts address only rights holders that have suffered loss because of an intervention. Reparation also differs from benefit-sharing as required by Article 2(3) of the UN Declaration on the Right to Development. As the African Commission on Human and Peoples' Rights has explained, benefit-sharing is about ensuring a reasonable share in the benefits of the intervention itself to the community that is affected by an intervention.⁶¹

76. In human rights law, States generally have a duty to protect the rights holders against non human rights compliant conduct by private actors that they are able to regulate.

77. In addition, in complex situations that cannot be solved by a single actor but require the cooperation of a variety of actors, these actors are well advised to set up an independent⁶² human rights compatible multi-stakeholder grievance mechanism.⁶³ Most existing multi-stakeholders grievance mechanisms tend to focus on the accountability of corporate actors, but in the context of the right to development, there is no reason why multi-level grievance accountability mechanisms should not address harm caused by other non-State actors or by the lack of cooperation between various actors.

78. Multi-stakeholder grievance mechanisms should provide access for affected rights holders to report harm. The composition of the mechanism should be such as to credibly reflect the voices and perspectives of all actors involved. Depending on the context, this may require representation by corporate and civil society actors, the host government, and by an ODA agency of a third State or an international financial institution. Studies on existing mechanisms found that access to report harm by affected people is not always ensured and that not all relevant stakeholders are always represented, and when they are, they are not necessarily represented equally.⁶⁴ In order to address distrust between affected communities and other stakeholders "critical success factors [included]: the levelling of unequal power dynamics; a need to focus on process as much as outcome; use of facilitated dialogue; and the necessity of mechanisms to be truly independent and credible."⁶⁵

79. Multi-stakeholder grievance mechanisms provide an interesting model for operationalizing the duty to cooperate for the benefit of the holders of the right to development, but they are complex institutions that require time and effort in order to ensure that they deliver cessation of harm and reparation.⁶⁶ A recent empirical study of six multi-stakeholder grievance mechanisms found that "limitations depended on a number of factors

⁶¹ African Commission on Human and Peoples' Rights, Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya, Communication No. 276/03, 25 November 2009, para. 295-296.

⁶² On independence, see Office of the High Commissioner for Human Rights, Discussion Paper on Non-State based grievance mechanisms (2019), 14- 15, available as https://www.ohchr.org/sites/default/files/Documents/Issues/Business/ARP/ARPIII_Discussion_Paper_Nov2019.pdf

⁶³ Compare Guiding Principles on Business and Human Rights, A/HRC/17/31, 21 March 2011, para. 30-31. Paragraph 31 includes criteria to assess the effectiveness of non-judicial grievance mechanisms.

⁶⁴ See MSI Integrity and the Duke Human Rights Center at the Kenan Institute for Ethics, The new regulators? Assessing the landscape of multi-stakeholder initiatives (2017), 9. On multi-stakeholder initiatives generally, see <https://msi-database.org>.

⁶⁵ Business and Human Rights Resource Centre, Global Business Initiative on Human Rights, Access to Remedy Through Multi-Stakeholder Engagement (2018), 11.

⁶⁶ For a fascinating account of the difficulties that may arise in ensuring that a multi-stakeholder grievance mechanism is effective, see World Bank Inspection Panel Investigation Report No. 124033-ZR Democratic Republic of Congo Second Additional Financing for the High-Priority Roads Reopening and Maintenance Project, 27 April 2018, para. 102-116.

including how well each of the mechanisms was publicized, which countries they were operating in, and the types of complaints they were handling.”⁶⁷

VI. Duty bearers and right holders

80. States have the right and the duty to formulate appropriate national development policies aimed at the realization of the right to development. States have the right to regulate within the confines of their obligations under international law, including human rights law. The right to regulate includes the right to legislate on the conduct of foreign non-State actors. The State obligation under human rights law to protect the rights holders against abuses by third parties implies the duty to supervise the conduct of non-State actors and to act when necessary, including through legislation or other forms of standard-setting.

81. States are well recommended to exercise national ownership and leadership in designing the duty to cooperate of non-State actors for the realization of the right to development at the domestic level through an inclusive participatory process reflecting the country’s reality. Practice shows that the implementation of this duty is not straightforward given the power imbalances between the stakeholders and their potentially conflicting interests. A regulatory framework at the domestic level can clearly defining what is expected from non-State actors in terms of their cooperation in the realization of the right to development and other human rights. In the absence of a regulatory framework, non-State actors may argue that they are following domestic law but in the absence of a detailed duty to cooperate, cooperation still is at their discretion, to be decided upon in the light of their own interests. In addition, as explained above, the duty to cooperate of non-State actors includes cooperation with the State, and so it is worth defining the role of the State itself in the context of cooperation with non-State actors. This will diminish the risk that the State neglects or abandons its own responsibility when non-State actors supply services that contribute to the realization of the right to development, particularly in peripheral areas or settlements.

82. A regulatory framework could endow an independent entity, such as a national human rights institution with a mandate to appraise and publicly report on the efforts at implementing the duty to cooperate of non-State actors. Non-State actors could be asked to declare their cooperative efforts to the independent institution at regular intervals. The existence of an institution taking up such a mandate will aid in providing mutual accountability of the stakeholders involved in the cooperative effort as well as their joint accountability to the rights holders.

83. The international community has a role to play in to enhancing the ability of States to ensure the implementation of the duty to cooperate of non-State actors for the realization of the right to development. The components of the duty to cooperate could be spelled out at the international normative level. Intergovernmental organizations and other States (including the home States of relevant non-State actors) can usefully enhance the capacity of host States, and particularly of least developed countries to ensure, through their own legislation, policies and practices, to obtain the full cooperation by non-State actors to the realization of the right to development. The support of intergovernmental organizations and third States will contribute to the creation of an enabling international environment for the realization of the right to development.

84. Finally, the rationale of the duty to cooperate is that the cooperation should help the holders of the right to development. Not all forms of cooperation will achieve this goal, and thus cooperative efforts among different stakeholders need to be critically assessed from the perspective of whether they benefit the rights holders.

85. In the context of the duty to cooperate, it may be expected that the rights holders too make a genuine effort to engage in dialogue and cooperation, without compromising their use of other avenues to defend their rights. As the Declaration on the Right to Development provides: “All human beings have a responsibility for development, individually and

⁶⁷ James Harrison, Mark Wielga, *Grievance Mechanisms in Multi-Stakeholder Initiatives: Providing Effective Remedy for Human Rights Violations?* *Business and Human Rights Journal* (2023), 23.

collectively, taking into account the need for full respect for their human rights and fundamental freedoms as well as their duties to the community.’⁶⁸

⁶⁸ Article 2(2), Declaration on the Right to Development.