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**Promotion and protection of all human rights, civil,
political, economic, social and cultural rights,
including the right to development**

Duty to cooperate and non-State actors

Thematic study by the Expert Mechanism on the Right to Development

Summary

In the present study, the Expert Mechanism on the Right to Development presents best practices and provides recommendations on how non-State actors can contribute to the duty to cooperate for the implementation of the right to development worldwide. The study is focused on foreign, private non-State actors operating in a host State.

The study is based on: (a) input received during the consultation process; (b) a desk study of investor-State arbitration cases revolving around the failure of foreign investors to secure the support of local communities for mining operations; and (c) a visit to Lesotho, at the invitation of the Government, to review how engagement by non-State actors has affected the realization of the right to development of mountain communities affected by major economic investments in mining and water management.

With the present study, the Expert Mechanism looks at the operationalization of the general duty of non-State actors to cooperate in the realization of the right to development by breaking the duty to cooperate down into four more practical components: (a) the duty to give notice; (b) the duty to consult and agree; (c) the duty to assist; and (d) the duty to repair harm.



I. Introduction

1. In the present study, the Expert Mechanism on the Right to Development presents best practices and provides recommendations on how non-State actors can contribute to the duty to cooperate for the implementation of the right to development worldwide.

A. Duty to cooperate in the realization of the right to development

2. In Articles 55 and 56 of the Charter of the United Nations, Member States pledge themselves to take joint action for the creation of conditions of stability and well-being to enable development and universal respect for 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, 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, to cooperate 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.

3. The duty to cooperate as an essential element of 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 and 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 the proposition by the Special Rapporteur of the International Law Commission for general principles of law that the concept of general principles of law includes general principles of law formed within the international legal system is accepted.¹

4. In international human rights treaty law, the importance of international cooperation is explicitly recognized in the Convention on the Rights of the Child (art. 4) and the Convention on the Rights of Persons with Disabilities (art. 32). Article 2 (1) of the International Covenant on Economic, Social and Cultural Rights stipulates that each State party must undertake to take steps, individually and through international assistance and cooperation, 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 Covenant. In accordance with Articles 55 and 56 of the Charter of the United Nations, well-established principles of international law and the provisions of the International Covenant on Economic, Social and Cultural Rights, international cooperation for development, and thus for the realization of economic, social, and cultural rights, is an obligation of all States, and one that is particularly incumbent upon those States that are in a position to assist others in this regard.²

5. The duty to cooperate is a key component of the human right to development. Under 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 realization of human rights. Article 4 of that Declaration specifies that 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 and, as a complement to the efforts of developing countries, effective international cooperation is essential in providing such countries with appropriate means and facilities to foster their comprehensive development. The African Charter on Human and Peoples' Rights provides, in its article 22 (2), that States

¹ [A/CN.4/753](#), paras. 18–33.

² Committee on Economic, Social and Cultural Rights, general comment No. 3 (1990) on the nature of States parties' obligations, para. 14.

have the duty, individually and collectively, to ensure the exercise of the right to development.

6. The legal instruments above refer to the duty of States to cooperate with each other. Non-State actors are obliged to ensure that their activities do not violate human rights, including the right to development, in host countries, or undermine the ability of host States to discharge their human rights obligations.³ These obligations arguably entail a duty to cooperate with the objective of ensuring the full exercise and progressive enhancement of the right to development (article 10 of the Declaration on the Right to Development). In any case, there is no doubt that, in practice, the cooperation of non-State actors is equally important in achieving the realization of the right to development.⁴ Non-State actors are strongly involved in international cooperation for development, and in activities that have local and global effects 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, in which Member States envisage a revitalized global partnership in support of the implementation of the Agenda, bringing together Governments, the private sector, civil society, the United Nations system and other actors and mobilizing all available resources (para. 39).⁵ 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, which was proclaimed by the General Assembly as a common standard of achievement for every organ of society. Article 28 of the Universal Declaration of Human Rights provides that everyone is entitled to a social and international order in which the rights and freedoms set forth in the Declaration can be fully realized. Clearly, non-State actors partake in the social and international order. Similarly, in the Declaration on the Right to Development, it is recognized that all human beings have a responsibility for development, individually and collectively, and the creation of an appropriate political, social and economic order for development is called for (art. 2 (2)).

B. Focus of the study

8. The aim of the present study is to investigate what necessary cooperation by non-State actors entails in terms of the realization of the right to development. The study may thus aid in improving understanding of the duties of non-State actors in that regard.

9. The study is focused on interventions by foreign non-State actors, rather than on the relationship between a State and domestic actors. In this sense, the study is related primarily to the international dimension of the right to development.

10. Furthermore, it is primarily private non-State foreign actors, in particular private actors engaged in interventions that have a significant impact on the realization of the right to development in the host State, that are the focus of the study. Such actors include foreign direct investors and international non-governmental organizations that design and implement development projects. The impact of such projects tends to be particularly significant in peripheral areas and settlements.

11. The study is not focused 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.

³ Universal Declaration of Human Rights, art. 30; International Covenant on Civil and Political Rights, art. 5; and International Covenant on Economic, Social and Cultural Rights, art. 5.

⁴ Elena Pribytkova, "What global human rights obligations do we have?", *Chicago Journal of International Law*, vol. 20, No. 2 (2020), p. 410.

⁵ The same approach is adopted in the United Nations Sustainable Development Cooperation Framework. A similar approach is taken in the Global Compact on Refugees (paras. 33–44).

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, 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 were focused on the impact that international financial institutions have on the realization of the right to development. In those submissions, international financial institutions and, by implication, other intergovernmental organizations were considered as non-State actors.

15. The term “non-State actors” can be understood as all actors that are not States. However, in public international law, intergovernmental organizations and private actors are 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 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 and thus capable of possessing rights and duties under international law, depending 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 regulated mainly in the domestic law of their host and home States.

18. In the submissions dealing with international financial institutions, it was pointed out that intergovernmental development banks had a great influence on the holders of the right to development. Their influence was described as transcending State sovereignty in many cases.⁶ Hence, it is important to deepen knowledge on the ability of the non-judicial accountability mechanisms created by intergovernmental development banks to act as instruments of cooperation in the realization of the right to development of affected communities, in particular in contexts where the State entrusts large-scale economic interventions to corporate actors.

19. In another submission, the lack of any meaningful provision for genuine and equal cooperation with the relevant member State in the Articles of Agreement of the International Monetary Fund was deplored. It was argued that the international financial institutions had a duty to cooperate with the State when taking actions that affected the right of local communities to participate in, contribute to and enjoy the full realization of their development.⁷

20. In a further submission, the role of the International Monetary Fund Catastrophe Containment and Relief Trust in enabling least developed countries to move towards realizing the right to development was commended.⁸

21. A number of State submissions were focused on the role of States themselves in cooperating with private actors, or in ensuring that private actors contribute to the realization of the right to development. Although the present study is not focused on States, the interaction between the State and non-State actors is obviously relevant, given that States

⁶ Joint submission by the Legal Clinic of the Torcuato Di Tella University School of Law and the Bank Information Center.

⁷ Submission by the Institute for Justice and Democracy in Haiti.

⁸ Submission by Maat for Peace, Development and Human Rights Association.

have the primary responsibility for the creation of national and international conditions favourable to the realization of the right to development.⁹

22. It was pointed out that the States' duty to cooperate was not limited to the conduct of the State itself, but that it extended to the conduct of actors within its jurisdiction, under its control or acting upon its instructions. States should ensure, in each of those situations, that legal or human persons do not commit acts that impede international cooperation or the realization of human rights in other countries.¹⁰

23. In their submissions, a number of States highlighted their best practices in cooperating with civil society organizations or private actors more broadly, in particular in the context of addressing discrimination and poverty. The role of an ombudsman institution as an instrument of cooperation between Government and civil society was stressed. For example, an urban community economic empowerment programme had been set up to allow for cooperation between the Ministry of Housing and Local Government and 25 non-governmental organizations to improve entrepreneurial skills and help lift people living in urban areas out of poverty.¹¹ Another submission contained details of ad hoc consultations that were held regularly with non-State actors when new legislation or policy was being prepared; a welfare fund that had been set up to directly promote the development of local fisher communities; and a national social inclusion fund that had been created to play a key role in the promotion of social inclusion, equity and sustainable development, specifically by leveraging strategic and sustainable partnerships with non-governmental organizations, public institutions and the private sector.¹²

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

24. Mineral-resource extraction by foreign investors is a good testing ground for examining the implications of the duty to cooperate. A sustainability lens is increasingly being adopted to assess mining activities.¹³ As concerns are raised about the environmental and social consequences of mining, 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 licence to operate, namely, permission to exploit the natural resources on part of the territory. Foreign investors are particularly active 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 favour dispute settlement by international arbitral tribunals, such as the International Centre for Settlement of Investment Disputes, which is one of the five World Bank Group organizations, rather than by domestic courts. States have widely ratified investment treaties.

26. In the mining sector, there is now widespread recognition that mining companies require not only a legal licence to operate, granted by the host State, but also a social licence to operate, granted by local communities, to avoid potentially costly conflict and exposure to social risks.¹⁴

⁹ Declaration on the Right to Development, art. 3 (1).

¹⁰ Submission by the Syrian Arab Republic.

¹¹ Submission by Malaysia.

¹² Submission by Mauritius.

¹³ See, for example, Stefanie Schacherer, *International Investment Law and Sustainable Development: Key Cases from the 2010s* (Winnipeg, Canada, International Institute for Sustainable Development, 2018); and Taida Begić Šarkinović, "Human rights issues in investment arbitration cases: a new perspective?", *Pravni Zapisi*, vol. XI, No. 2 (2020), pp. 532–553.

¹⁴ Jason Prno and 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, No. 3 (2012), p. 346.

27. The idea that there needs to be an 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 peoples or as a group of human beings, depending on the factual circumstances.¹⁵

28. Article 2 (3) of the Declaration on the Right to Development provides that States must ensure the active, free and meaningful participation of all individuals and the entire population (which necessarily includes local communities) in the formulation of national development policies. States also need to consult and cooperate in good faith with Indigenous Peoples to obtain their free, prior and informed consent on matters affecting the enjoyment of their own development.¹⁶ To fulfil these requirements, the State may well need to ensure that the investor obtains the support of those affected by its activity.¹⁷

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 border between Bolivia (Plurinational State of) and Peru – were broadly similar in both cases: the State authorized the operations of a foreign investor in a remote area of the territory; at an early stage, local Indigenous communities opposed the investor’s activities, claiming an adverse social, environmental and human rights impact; the relationship between the investor and the communities gradually deteriorated and protests increased; and violent incidents ensued. In response, the Government reversed its decision to authorize the mining company’s activities. Subsequently, the foreign investor appealed to international arbitration to obtain fair compensation from the host State.

30. In *South American Silver Limited v. the Plurinational State of Bolivia* the Permanent Court of Arbitration agreed with the Plurinational State of Bolivia that the reversing of the mining concessions granted to the foreign investor (the claimant) had been conducted for a social benefit, as required by the applicable bilateral investment treaty:

The 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’s own advisors ... It 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 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.¹⁸

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:

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

¹⁵ The concept of “peoples” has not been defined in international law, but guidance may be taken from the final report and recommendations of the United Nations Educational, Scientific and Cultural Organization International Meeting of Experts on further study of the concept of the rights of peoples, in which people are described as a group of individual human beings who enjoy some or all of the following features: a common historical tradition; a common racial or ethnic identity; cultural homogeneity; linguistic unity; a common religious or ideological affinity; a territorial connection; and a common economic life. The will to be identified as a people or the consciousness of being a people is an equally important characteristic (document SHS-89/CONF.602/7, pp. 7 and 8).

¹⁶ United Nations Declaration on the Rights of Indigenous Peoples, arts. 19 and 20.

¹⁷ 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 and others, “The social licence to operate and the legitimacy of resource extraction”, *Current Opinion in Environmental Sustainability*, vol. 49 (2021), pp. 7–11.

¹⁸ Permanent Court of Arbitration, Case No. 2013-15, Award, 22 November 2018, paras. 559 and 561.

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.¹⁹

32. The Permanent Court of Arbitration 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 on its economic viability.²⁰

33. In *Bear Creek Mining Corporation v. Republic of Peru*,²¹ the State argued that, if a community or important stakeholders did not accept a mining project on their land, it could not be imposed against their will (para. 263). The State also argued that the tribunal should deny compensation if it found that the investor had failed to obtain a social licence to operate (para. 264). Canada, the home State of the investor, intervening as a non-disputing State party, 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 (para. 338).

34. The arbitrators held that there was no clear definition of a social licence to operate in international law, but that 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 (para. 406). The majority held that, although the investor could have gone further in its outreach activities (para. 408), the State had been aware of the community discontent and of the investor's outreach programme for a significant period of time and had not raised objections; hence, the investor's conduct could not be deemed insufficient (412). In his partially dissenting opinion, one arbitrator held that the investor's actions had contributed significantly to the social unrest. He argued that the investor had not been as fully prepared for the making of an investment in the lands of the communities of Indigenous Peoples as it should have been, and had failed to engage the trust of all affected communities because it had not taken the appropriate steps.²²

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 felt that the compensation granted should have been halved, owing to the investor's contributory fault.

36. In its submission, the State argued that its role was to ensure that the affected communities were in fact consulted by private companies and to supervise those consultative processes to ensure that they were implemented by the company in conformity with the law. According to the Government, the State has the neutral role of an independent facilitator.²³ 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.²⁴ This duty requires action that goes beyond the role of neutral facilitation.

37. In both *South American Silver Limited v. the Plurinational State of Bolivia* and *Bear Creek Mining Corporation v. Republic of Peru*, the joint efforts of the Government and the investor did not result in acceptance by the Indigenous communities of the investors' operations. The result was social conflict and the collapse of the foreign investors' projects.

¹⁹ Ibid., para. 655.

²⁰ Ibid., para. 823. As to the costs of the arbitration, 65 per cent were to be assumed by the investor and 35 per cent by the Plurinational State of Bolivia (para. 936).

²¹ International Centre for Settlement of Investment Disputes, Case No. ARB/14/21, Award, 30 November 2017. See also Victor Saco, "Foreign investment in the mining sector in southern Peru: the case of the Tintaya Antapaccay mine project", May 2022.

²² International Centre for Settlement of Investment Disputes, Case No. ARB/14/21, Award, 30 November 2017, partial dissenting opinion, para. 19.

²³ International Centre for Settlement of Investment Disputes, Case No. ARB/14/21, Award, 30 November 2017, para. 262.

²⁴ 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 of the second revised text of the draft convention on the right to development ([A/HRC/WG.2/24/2](#)).

The disputes were settled in an international arbitration procedure to which the Indigenous Peoples, as holders of the right to development, had no access and that were entirely focused on the amount of compensation to be awarded by the Government to the investors.

38. Mining operations on both sides of the border between Bolivia (Plurinational State of) and Peru continue and the issues dealt with in the awards stay topical. Clearly, cooperation among 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. Those stakeholders certainly include the actors most directly involved: the foreign investor, civil society organizations that are active in the area, the host State and 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. In the light of the Permanent Court of Arbitration award in *South American Silver Limited v. the Plurinational State of Bolivia*, such a constructive cooperative effort should enable the foreign investor to develop its activity in full cognizance of the special characteristics of the place in which it is operating and enable the host State to comply with its heightened duty of protection towards the holders of the right to development.

IV. Study visit to Lesotho

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

40. The Letseng Diamond Mine²⁵ is owned by Gem Diamonds, based in the United Kingdom of Great Britain and Northern Ireland, with a minority participation by the Government of Lesotho. The Lesotho Highlands Water Project²⁶ is a large 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 (in particular with a view to supplying drinking water to the Johannesburg area). The current construction phase is focused on the building of the Polihali Dam and the transfer tunnel, which will lead to 52 km² of land in Lesotho being covered by water. The network of relationships involved in the Lesotho Highlands Water Project is shown in the box.

²⁵ See <https://www.letsengdiamonds.co.ls>.

²⁶ See <https://www.lhda.org.ls/lhdaweb>.

Lesotho Highlands Water Project: network of relationships

- (a) Government of Lesotho;
- (b) Government of South Africa;
- (c) Lesotho Highlands Water Commission, which is a binational body representing the Governments of Lesotho and South Africa. The Commission is responsible and accountable for the project;
- (d) Lesotho Highlands Development Authority: a Lesotho parastatal that manages the part of the project that falls within the borders of Lesotho;
- (e) Construction companies from China, France, Lesotho and South Africa to whom contracts were awarded by the Lesotho Highlands Development Authority;
- (f) World Bank (phase I) and African Development Bank (phase II),^a international development banks contributing to the project;
- (f) Numerous local development and civil society organizations, including the Transformation Resource Centre, that are watching the impact of the water project and of mining activities on affected communities;
- (g) Non-governmental organizations, including the Seinoli Legal Centre and the Maluti Community Development Forum. Domestic legislation requires non-governmental organizations to register, but they can work relatively freely.

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

41. The visit was facilitated by the Office of the United Nations High Commissioner for Human Rights (OHCHR) and the United Nations country team in Lesotho. Meetings were held with government officials, at the South African High Commission. Meetings were also held with the United Nations Resident Coordinator, a World Bank Lesotho water management expert, representatives of the Lesotho Highlands Development Authority and of the Lesotho Highlands Water Commission, Letseng and Mothae mining company staff and representatives of civil society organizations and academia.²⁷ In addition, two public meetings brought together various affected Maloti mountain communities in the villages of Masakong (near the Polihali Dam) and Maloraneng (near the Letseng and Mothae mines). At the end of the visit, the member of the Expert Mechanism had the opportunity to make suggestions on how the United Nations country team could facilitate multi-stakeholder cooperation for the implementation of the right to development in the context of the draft United Nations Sustainable Development Cooperation Framework.

42. A genuinely free and earnest exchange of ideas took place with all of the stakeholders, including on issues that could be considered sensitive from a human rights and development perspective. Government officials took a keen interest in the visit and welcomed recommendations from the Expert Mechanism. During two extensive meetings, mining company staff engaged constructively with critical feedback received during the community visits. Representatives of the Lesotho Highlands Development Authority were equally forthcoming, both in the field and at its headquarters, in discussions on the human rights impact of their activities. Civil society organizations welcomed the visit and offered maximum assistance. At the village meetings, men, women and young people spoke openly and without fear, exemplifying the reputation of Lesotho as a nation of peace.

43. Clearly, the activities of both the Lesotho Highlands Development Authority and the mining companies have an impact beyond the directly affected communities. The activities make a significant contribution to the foreign income of Lesotho and involve the creation of new infrastructure (in particular roads) that are available for widespread use. In addition, the water management project, in the words of a South African interlocutor, is fundamental for economic growth and is of massive importance to South Africa. Both the public and the

²⁷ No national human rights institution currently exists in Lesotho.

private operators are nevertheless keenly aware of their impact on the people who have been living in the Maluti mountains for generations and who did not invite them to come. In response, both actors have set up compensation schemes, corporate social responsibility and investment schemes, complaints and grievance mechanisms²⁸ and other direct channels of communication, including through area or village chiefs.²⁹ Those initiatives are valuable and not always available in similar circumstances elsewhere in the world.

44. In addition, most stakeholders show a degree of willingness to cooperate with each other and to consider the viewpoint of the other. Relationships between the Lesotho Highlands Development Authority 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 United Nations country team recently organized a well-attended stakeholder workshop on business and human rights (held in Maseru on 22 and 23 November 2022), which brought together a variety of actors to discuss how to ensure that businesses respected human rights during their operations.

45. Neither the Lesotho Highlands Development Authority nor the mining companies hold consultation processes with local communities based on free, prior and informed consent. The meetings are about giving advance warning of planned activities (which regularly include land acquisition and resettlement) and about measures that can mitigate adverse consequences. Given the scale of the existing and planned operations and the economic interests that are backing them, the communities have little or no opportunity to challenge the project itself. At the village meetings, complaints thus focus on the communal and individual compensation offered, the need to maintain access to land (such as grazing fields) for the subsistence economy that the communities pursue and the adequacy of corporate social responsibility initiatives. Mitigating measures are based on voluntary, ad hoc arrangements that the Lesotho Highlands Development Authority and the mining companies offer. Such ad hoc arrangements include the timing of an expropriation, the standard of valuation and the duration of compensation arrangements, the procedure for negotiation and reaching agreement with individuals and communities on compensation and the record-keeping and accessibility of agreements reached. Inevitably, the situation creates a high degree of uncertainty and among the communities, which are forced to rely on the goodwill of officials and the mining company.

46. Emotions run high, in particular 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 Lesotho Highlands Water Commission argued that the Polihali Dam project needed to be seen as an opportunity for broader industrial development that would create employment and allow for the enjoyment of benefits from technological advances, for example, generating energy by floating solar panels on the future artificial lake (water reservoir). This could be combined, it was argued, with bottom-up initiatives from the communities themselves. Whether such a hybrid strategy, combining subsistence lifestyles and industrial development, could work remains to be seen. At a much more micro level, an official from the Lesotho Highlands Development Authority recognized that the hotels that were under construction near the future lake would not help the communities, because the community members did not want to display their handicrafts in them.

47. What may be at stake is a clash between two different visions of how to use nature for the benefit of humans: one vision based on highly intrusive human activity; the other based on much less intervention by humans in the natural environment. It may not ever be possible for the communities that inhabit the mountains to grant a social licence, despite compensation or a corporate social responsibility scheme, for the industrial use of natural resources. An even more fundamental critique would insist that the non-use value of natural resources should be recognized, because “when we leave them alone, natural resources perform

²⁸ Officials from the Lesotho Highlands Development Authority did point to legal constraints in holding their contractors accountable.

²⁹ The chiefs are both State officials and traditional rulers with lineage succession to office. Their role is thus somewhat ambivalent, as is the extent to which they represent the views of the communities.

services and play roles essential to the earth's vitality."³⁰ Representatives from the Lesotho Highlands Water Commission pointed to the Klamath River renewal project in the United States of America, 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.³¹

48. 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 in the village was open only once a month, Letseng officials explained that, under their corporate social responsibility programme, the company's agreed role had been to supply the equipment, but that the Government was to supply medical staff. Setting up a real clinic, as the village had asked – a hospital is two to three hours away by foot from the village – had not been possible within the financial limitations of the corporate social responsibility programme. Company officials pointed out that there was no law requiring the development of a social plan for the area and that the Government derived significant royalties from mining activities that could be used for development purposes.³²

49. A major concern of the communities and of civil society organizations is the pollution of the river by mine tailings.³³ 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".³⁴ A representative of the Department of the Environment recognized that the Department's capacity to monitor pollution was limited and that it sometimes relied on the results received from the companies' analysis. A representative of the Department of Mines added that it was fortunate that the mines were built by companies listed on the stock exchange as they applied higher standards than the national ones.

50. 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 upon 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.

51. To be successful, the efforts 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 was expropriated. The construction business is considered 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."

52. 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 company behind the Letseng Diamond Mine to resettle them in nearby Maloraneng village. 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 Diamond 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

³⁰ Jan G. Laitos, *The Right of Nonuse* (New York, Oxford University Press, 2012), p. 5.

³¹ See <https://klamathrenewal.org/the-project/>.

³² 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.

³³ See Maluti Community Development Forum, "Large-scale diamond mining in Lesotho: unpacking its impact on adjacent communities" (Kimberley Process Civil Society Coalition, 2021); and Pascalinah Kabi, "Lesotho's dangerous water gamble", MNN Centre for Investigative Journalism, 13 October 2022.

³⁴ The quality of river water is of concern to South Africa: the Lesotho Highlands Water Project will supply drinking water to the Johannesburg area.

the cost of relocation. The company representatives preferred not to enter into a discussion on the situation as the case was still pending in court.³⁵

53. During the visit, on the mountain path between Patising and Maloraneng, the member of the Expert Mechanism encountered a woman from the village who expressed her happiness at the fact that the study visit had happened. She said that she “could be singing”: she had been standing up for her community for a long time but felt that she had never been able to bring a result. That sentiment was echoed by the headman at Maloraneng: “You promised and you made good on your promise”, he said.

54. Nevertheless, a study visit by an expert mechanism of the Human Rights Council cannot provide a solution or do justice to the many issues raised. In the end, the priority must be to find ways and means of enhancing 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 other actors speaking in their place. This requires support from a public institution that is independent from the Lesotho Highlands Development Authority or the mining companies. The communities should define the type of support themselves, perhaps by facilitating meetings or funding a consultant from within the communities. Only then will the communities stand a chance of holding their ground and ensuring that domestic and foreign stakeholders, public and private alike, cooperate to ensure the implementation of their right to development.

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

55. In the present section, the Expert Mechanism looks at the operationalization of the general duty of non-State actors to cooperate in the realization of the right to development by breaking that duty down into four components to clarify what it could entail in practice.

56. 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 the perspective of the right to development, or they may fund or otherwise facilitate 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 improvements.

57. Other non-State actors may not be engaged in operational activities but may 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 that case, the non-State actor is not the principal actor, its interventions will influence whether a human rights-compatible solution can be agreed upon.

58. On a related note, 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.

59. The scope of the duty to cooperate for non-State actors includes cooperation with States (primarily, but not exclusively, with the host State as the actor with the main responsibility for the realization of the right to development at the domestic level); cooperation with other non-State actors (e.g. foreign investors and civil society organizations); and cooperation with the holders of the right to development (primarily, but not exclusively, the rights holders directly affected by a contested activity).

60. The extent to which a non-State actor needs to engage in the different actions set out in subsection A below depends on the nature of the involvement of the non-State actor and

³⁵ The collapse of an abandoned dam in Jagersfontein (Free State, South Africa) on 11 September 2022 heightened fears. After an earlier tailings dam collapse in Brazil, the International Council on Mining and Metals, the United Nations Environment Programme and the Principles for Responsible Investment adopted the Global Industry Standard on Tailings Management (August 2020). The first principle of the Global Industry Standard covers respect for the rights of project-affected people and meaningful engagement with them at all phases of the tailings facility life cycle, including closure.

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.

61. 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

62. 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 arising at a later stage. To enable other actors to meaningfully assess impact, the information given should be sufficiently precise. It may also be necessary to share the results of a scientifically valid assessment of the actual and potential risks and impact of the planned activity.

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

64. When foreign investors become involved 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 in order to obtain a social licence to operate in addition to the home State's consent. However, prior notice may also be important in other sectors that, at first sight, appear to involve a less-elevated risk. There is, for instance, some evidence that health services provided by foreign non-governmental organizations 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 lead to a reduction in the services available overall. Early notification by foreign non-governmental organizations of the plan to roll out such services would enable coordination with both the Government and other stakeholders.³⁶

B. Duty to consult and agree

65. 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.

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

67. As a building block of the duty to cooperate, consultation processes should be "other-regarding".³⁷ 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.

68. As the Constitutional Court of South Africa has held, meaningful engagement has the potential to contribute towards the resolution of disputes and to increase understanding and sympathetic care if both sides are willing to participate in the process.³⁸ The Court has also

³⁶ See Erika Deserranno, Aisha Nansamba and Nancy Qian, "Aid crowd-out: the effect of NGOs on government-provided public services", Working Paper, No. 26928 (Cambridge, Massachusetts, United States, National Bureau of Economic Research, 2020).

³⁷ 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*, vol. 30, No. 1 (2019), pp. 22 and 23.

³⁸ *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street, Johannesburg vs. City of Johannesburg and Others*, Case No. CCT 24/07, Judgment, 19 February 2008, para. 15.

stated – not superfluously – that the process for such engagement “should preferably be managed by careful and sensitive people”.³⁹ The effort to reach an agreement should be serious, which implies that the proposals put forward and amended take into account the positions of the other.⁴⁰ The Organisation for Economic Co-operation and Development has, for example, suggested that, in carrying out due diligence, enterprises should consider entering directly into agreements with trade unions in order to facilitate worker involvement in the design and implementation of due diligence processes, the implementation of standards on workers’ rights and the raising of grievances.⁴¹

69. Given the inequalities in negotiating power, particular attention should be paid to the design of consultation processes that implement the 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 review by the World Bank Inspection Panel of consultations organized in the context of a road construction project 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 residents’ many years of field-based experience.⁴² Lived experiences are regularly dismissed during consultation processes.

70. 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

71. The duty to assist the other parties in performing, namely, 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 to determine 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 interests and positions. 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 the rights holders and other stakeholders when they are designed in a way that responds to the priorities of those groups. It is also clear, however, that in themselves, corporate social responsibility measures will not suffice to create a social licence for an investor operation on which proper consultations were not held.

72. Intergovernmental organizations may 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 rights holders or stakeholders in need of assistance to defend their position in the context of a cooperative

³⁹ Ibid.

⁴⁰ This can be seen as similar to the expectations of good faith negotiations between States. See, in this regard, 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 *The Struggle for Human Rights: Essays in Honour of Philip Alston*, Nehal Bhuta and others, eds., (Oxford, Oxford University Press, 2021), p. 140.

⁴¹ *OECD Due Diligence Guidance for Responsible Business Conduct* (2018), p. 51.

⁴² *Investigation Report No. 49110-AR, Argentina: Santa Fe Road Infrastructure Project*, 2 July 2009, para. 129.

venture. The mandate of the United Nations High Commissioner for Human Rights includes promoting and protecting the realization of the right to development and enhancing support from relevant bodies of the United Nations system for that purpose.⁴³ The mandate can be put to good use in the context of multi-stakeholder cooperation.

D. Duty to repair harm

73. Ideally, harm because of an intervention affecting the right to development is prevented. However, when harm is demonstrated or reported during the performance of an operation, the 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.

74. Reparation is different from assistance (e.g. that provided in the context of a corporate social responsibility policy), as discussed in subsection C above. Reparation efforts address only rights holders who have suffered loss because of an intervention. Reparation also differs from benefit-sharing as required by article 2 (3) of the 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 for the community that is affected by an intervention.⁴⁴

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

76. 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 independent⁴⁵ human rights-compatible multi-stakeholder grievance mechanism.⁴⁶ Most existing multi-stakeholder 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 among various actors.

77. Multi-stakeholder grievance mechanisms should provide a way 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 the representation of corporate and civil society actors, the host Government, an official development assistance agency of a third State or an international financial institution. Studies on existing mechanisms have found that access to mechanisms to report harm by affected people is not always ensured, that not all relevant stakeholders are always represented and that, when they are, they are not necessarily represented equally.⁴⁷ In order to address distrust between affected communities and other stakeholders, critical success factors include the levelling of unequal power dynamics, a need to focus on process as much as outcome, the use of facilitated dialogue and the necessity of mechanisms to be truly independent and credible.⁴⁸

78. 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

⁴³ General Assembly resolution 48/141, para. 4 (c).

⁴⁴ *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya*, Decision No. 276/2003, 4 February 2010, paras. 295 and 296.

⁴⁵ On independence, see OHCHR, "Non-State-based grievance mechanisms", discussion paper, 19 November 2019, pp. 14 and 15.

⁴⁶ Guiding Principles on Business and Human Rights, principles 30 and 31 and commentary. Principle 31 includes criteria to assess the effectiveness of non-judicial grievance mechanisms.

⁴⁷ Institute for Multi-Stakeholder Initiative Integrity and Duke Human Rights Center at the Kenan Institute for Ethics, "The new regulators? Assessing the landscape of multi-stakeholder initiatives" (2017), p. 9.

⁴⁸ Business and Human Rights Resource Centre and Global Business Initiative on Human Rights, "Access to remedy through multi-stakeholder engagement: insights from cases in Myanmar and South Africa" (2018), p. 11.

that they deliver cessation of harm and reparation.⁴⁹ A recent empirical study of six multi-stakeholder grievance mechanisms found that limitations depended on a number of factors, including how well each of the mechanisms was publicized, which countries they were operating in and the types of complaints they were handling.⁵⁰

VI. Implications for States and rights holders

79. States have the right and the duty to formulate appropriate national development policies aimed at the realization of the right to development. States also 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 obligation under human rights law for States to protect rights holders from 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.

80. It is highly recommended that States 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 define 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 is still 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, in particular in peripheral areas or settlements.

81. 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 to implement 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.

82. The international community has a role to play in 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, in particular least developed countries, to ensure, through their own legislation, policies and practices, that they obtain the full cooperation of non-State actors in terms of 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.

⁴⁹ For an 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, paras. 102–116. Available at <https://www.inspectionpanel.org/sites/default/files/cases/documents/120-Inspection%20Panel%20Investigation%20Report%28English%29-27%20April%202018.pdf>.

⁵⁰ James Harrison and Mark Wielga, "Grievance mechanisms in multi-stakeholder initiatives: providing effective remedy for human rights violations?", *Business and Human Rights Journal*, vol. 8, No. 1 (2023), p. 65.

83. 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 cooperative efforts among different stakeholders need to be critically assessed from the perspective of whether they benefit the rights holders.

84. In the context of the duty to cooperate, it may be expected that the rights holders also 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, in its article 2 (2), all human beings have a responsibility for development, individually and collectively, taking into account the need for full respect for their human rights and fundamental freedoms as well as their duties to the community.

VII. Final observations

85. The mandate of the Expert Mechanism on the Right to Development, as set out in Human Rights Council resolution 42/23, is to provide the Council with thematic expertise on the right to development in searching for, identifying and sharing best practices with Member States and to promote the implementation of the right to development worldwide. During the first year of its first three-year cycle, the Expert Mechanism identified two overarching objectives: (a) to mainstream, reinvigorate and operationalize the right to development; and (b) to enhance the ability of grass-roots organizations to use the right to development. There was general agreement within the Expert Mechanism that it was important to go beyond rhetoric, to identify obstacles to the realization of the right to development and to make concrete policy recommendations on how to overcome them.⁵¹

86. Moving beyond the rhetoric implies moving beyond the law and official policy. It implies giving a voice to rights holders on the obstacles that they face in realizing the right to development. It also requires engaging with all stakeholders that can make a meaningful contribution, including through cooperation, to the removal of those obstacles. From a research perspective, going into the field, interacting directly with relevant actors and collecting new data – even on the modest scale feasible within the context of the present study – are all crucial to get a better sense of the problems that occur in practice when attempting to operationalize cooperation in the realization of the right to development. The Expert Mechanism reiterates its appreciation to Lesotho for providing it with the opportunity to engage in the field study and expresses the hope that more Member States will facilitate similar study visits in the future.

⁵¹ [A/HRC/45/29](#), para. 19.