

Application of the International Covenant on Economic, Social and Cultural Rights in the Framework of International Organisations

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¹ This contribution is a revised and expanded version of F. Coomans, "Some Remarks on the Extraterritorial Application of the International Covenant on Economic, Social and Cultural Rights", in: F. Coomans/ M. Kamminga (eds), *Extraterritorial Application of Human Rights Treaties*, 2004, 183 et seq.

I. Introduction

Realisation of economic, social and cultural rights (hereafter: esc rights) essentially has a territorial scope: it normally takes place on the territory of states. On 19 April 2007, 156 states ratified or acceded to the International Covenant on Economic, Social and Cultural Rights (ICESCR)² which is the main universal treaty protecting these rights.

A State Party is under an obligation to take all appropriate measures to progressively realise the esc rights listed in the treaty (article 2 (1)). However, states do not exist in isolation. As members of the community of states they are dependent on international cooperation to cope with problems that go beyond national borders. The need for international cooperation as a key principle of present-day life comes very much to the fore in the era of globalisation in which we live. The process of globalisation is crucial for a proper understanding of the international dimensions of the realisation of esc rights.

Globalisation as an economic and social phenomenon is characterised by an increase in international transactions between a growing number of actors, such as companies, individuals (patterns of worldwide migration), international governmental organisations, non-governmental organisations and states. Also the nature of involvement of actors in this process is changing: we witness an increase in the role and responsibilities of private actors in economic life, a diminishing role of the state (trends towards privatisation), and a stronger involvement of international governmental organisations and international market forces in the economic and financial policy of states (financial and economic austerity and adjustment programmes propagated by the IMF and the World Bank).³ The process of economic globalisation has also led to an unequal distribution of the positive effects of globalisation between people living in the North and those in the South.⁴ In other words, the realisation of esc rights increasingly has international dimensions. In addition, trends towards deregulation and pruning of welfare services have put the realisation of esc rights at risk.⁵

² UNTS Vol. 993 No. 14531.

³ See the Report *A Fair Globalization*, prepared by the (ILO) World Commission on the Social Dimension of Globalization, 2004, available at <www.ilo.org>.

⁴ A. Sen, "Ten Theses on Globalization", *New Perspectives Quarterly* 18 (2001), 62 et seq.

⁵ See D. Beetham, *Democracy and Human Rights*, 1999, 117.

Furthermore, since the end of World War II the nature of international law has changed dramatically. Not only did a law of cooperation between states develop side by side a law of co-existence.⁶ Also the more recent process of globalisation led to a trend towards a wider interpretation of traditionally territorial related concepts, such as jurisdiction and national sovereignty in matters of human rights.⁷

What then is the relationship between developments towards globalisation and the universal protection of esc rights? The UN Committee on Economic, Social and Cultural Rights (CESCR) has noted that in itself globalisation as a social phenomenon is not incompatible with the idea of social, economic and cultural rights. However,

“taken together, ... and if not complemented by appropriate additional policies, globalisation risks downgrading the central place accorded to human rights by the Charter of the United Nations and the International Bill of Human Rights in particular”.⁸

In other words, the changed (and changing) nature and pattern of economic and financial transactions worldwide may jeopardise the enjoyment of esc rights in many countries. The challenge then is to make the ICESCR fit the era of globalisation, to reach beyond traditional concepts of state sovereignty in order to provide for international solidarity and achieve global justice.

When the treaty was drafted only states were the principal actors on the international plane. The role of the state as the principal actor responsible and accountable for the realisation of these rights is still paramount, but other actors (international organisations, companies) may also have an impact on the actual enjoyment or lack of enjoyment of these rights. The question then is how the state, as a State Party to the ICESCR, can be held responsible for the conduct of these non-state actors who often act extraterritorially, or whose conduct has extraterritorial effects. For example, if the World Bank intends to financially support the construction of a dam in a developing country, and if as a consequence of this project indigenous people face eviction from their land and homes, has a Western donor state an obligation under human rights

⁶ For a description of this development see, W. Friedmann, *The Changing Structure of International Law*, 1964.

⁷ Coomans/ Kamminga, see note 1; S. Skogly, *Beyond National Borders: States' Human Rights Obligations in International Cooperation*, 2006.

⁸ Statement by the Committee on Economic, Social and Cultural Rights on Globalisation and its Impact on the Enjoyment of Economic, Social and Cultural Rights, Doc. E/1999/22, 92.

law to oppose approval of this project by the competent body of the World Bank? Also, the state itself is an actor that increasingly acts outside its own territory. Such conduct may have human rights effects in another country. Does the state have human rights obligations due to an extraterritorial application of the ICESCR? What does international human rights law have to say about this?

The present contribution will deal with the development and application of international human rights law on *esc* rights in an extraterritorial context. It will focus on the conduct of states within the framework of international organisations and the activities of international organisations themselves.

II. The ICESCR and Its International Dimension

Article 2 (1) ICESCR refers to the obligation of every State Party,

“to take steps, individually *and through international assistance and co-operation*, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means ...”⁹

The ICESCR does not mention territory or jurisdiction as delimiting criteria for the scope and application of the treaty.¹⁰ Instead, it refers to the international or transnational dimensions of the realisation of *esc* rights. Therefore it is suggested that a certain extraterritorial (in the sense of international) scope was intended by the drafters and is part of the treaty.¹¹ There was consequently no need to limit explicitly the pro-

⁹ Emphasis added.

¹⁰ Compare article 2 (1) ICCPR which provides that, “Each State Party to the present Covenant undertakes to respect and to ensure to all individuals *within its territory and subject to its jurisdiction* the rights recognized in the present Covenant, (...)”, Emphasis added. See on the scope of this provision, D. McGoldrick, “Extraterritorial Application of the International Covenant on Civil and Political Rights”, in: Coomans/ Kamminga, see note 1, 41-72.

¹¹ See M.C.R. Craven, *The International Covenant on Economic, Social and Cultural Rights – A Perspective on its Development*, 1995, 144. Craven quotes R. Cassin, who, at the time of drafting the Covenant, argued that, “by providing for recourse to international cooperation instead of allowing the enjoyment of rights to be put off, [the reference to international coop-

tection of esc rights to those people resident in the territory of a State Party only. It has been argued by one commentator that,

“it is beyond doubt that States Parties are required to apply the Covenant within their territories and within the territory over which they have effective control”.¹²

For example, with respect to the occupation of the Palestinian Territories by Israel, the CESCR has said that,

“the Covenant applies to all areas where Israel maintains geographical, functional or personal jurisdiction”, and that “the State’s obligations under the Covenant apply to all territories and populations under its effective control”.¹³

Israel, however, was of the opinion that “the Covenant does not apply to areas that are not subject to its sovereign territory and jurisdiction”.¹⁴ The Committee did not agree with Israel and urged the government of that country,

“to implement without delay its obligations under the Covenant and to desist from decisions and measures resulting in violations of the economic, social and cultural rights of the population living in the occupied territories”.¹⁵

In its Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, the ICJ observed that although the ICESCR guarantees rights that are essentially territorial, it is not to be excluded that the treaty applies both to territories over which a State Party has sovereignty (Israel) and to those over which that state exercises territorial jurisdiction (the West Bank). The Court was of the view that as an occupying power, Israel exercises territorial jurisdiction over these territories and therefore it is bound by the

eration] filled the gap between what States could in fact do and the steps they would have to take to meet their obligations under the Covenant”, Doc. E/CN.4/SR.216, 6 (1951).

¹² M. Sepúlveda, *The Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights*, 2003, 274.

¹³ Concluding Observations on Israel, 4 December 1998, Doc. E/C.12/1/Add.27, para. 8.

¹⁴ Additional information by the government of Israel, Doc. E/1989/5/Add.14, para. 1.

¹⁵ Concluding Observations on Israel, 31 August 2001, Doc. E/C.12/1/Add.69, para. 15.

provisions of the ICESCR.¹⁶ It concluded that the construction of the wall and the associated restrictive measures impede the liberty of movement of the inhabitants of the occupied territory and also their right to work, to health, to education and to an adequate standard of living as laid down in the ICESCR.¹⁷

A few other articles of the Covenant also have an explicit international dimension. For example, article 11 (2) provides that State Parties shall take measures through international cooperation that are necessary to improve methods of food production, conservation and distribution of food. In addition, State Parties shall take measures in order to ensure an equitable distribution of world food supplies in relation to need, thereby taking into account the problems of food-importing and food-exporting countries. Articles 22 and 23 emphasise the important role of various forms of international action and cooperation for the achievement of esc rights.

However, there is no clear understanding yet of the extraterritorial reach of the ICESCR. There is no case law that could shed light on this question, because of the non-existence of a complaints procedure under the Covenant. The Committee has referred repeatedly to so-called “international obligations” of State Parties towards other states in its General Comments.¹⁸ For example, in the General Comment on the Right to Water, the Committee stated that,

“steps should be taken by States parties to prevent their own citizens and companies from violating the right to water of individuals and communities in other countries”.¹⁹

The Committee has also identified the need to take into account esc rights as part of structural adjustment programmes and measures to deal with the debt crisis designed and adopted by states and UN agencies.²⁰ Occasionally the Committee has emphasised in its Concluding Obser-

¹⁶ Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, ICJ Reports 2004, 136 et seq. (180, para. 112).

¹⁷ ICJ *ibid.*, 191/192, para. 134.

¹⁸ See, for example, General Comment No. 12 on the Right to Food, Doc. E/C.12/1999/5, paras 36-41; General Comment No. 14 on the Right to Health, Doc. E/C.12/2000/4, paras 38-42 and General Comment No. 15 on the Right to Water, Doc. E/C.12/2002/11, paras 30-36.

¹⁹ Doc. E/C.12/2002/11, para. 33.

²⁰ General Comment No. 2 on International Technical and Assistance Measures, Doc. E/1990/23. See in particular para. 9 of this General Comment.

vations that states from the North should make sure that projects for international (development) cooperation carried out in countries from the South contribute to the realisation of the rights listed in the ICESCR.²¹ However, so far an overall discussion of the subject by the Committee from a legal perspective has not taken place.

III. The General Legal Basis for International Obligations of States in the Field of Economic, Social and Cultural Rights

A key issue to be discussed is the general legal basis for international obligations of states in the field of esc rights. Under general international law states have a duty to cooperate.²² Also the idea of international cooperation for the promotion of human rights has a solid basis in international law.²³ As a minimum, the duty to cooperate would include the obligation not to undertake activities that will result in substantial harm to the rights of other states and their citizens. This idea has been codified, *inter alia*, in the Charter of Economic Rights and Duties of States. Article 24 of the Charter provides that,

“All States have the duty to conduct their mutual economic relations in a manner which takes into account the interests of other countries. In particular, all States should avoid prejudicing the interests of developing countries”.²⁴

This would include a negative obligation to refrain from activities that might influence negatively the enjoyment of human rights in other countries. In addition, a positive obligation for states to contribute to the realisation of human rights in other countries may be derived from

²¹ Concluding Observations on Spain, 7 June 2004, Doc. E/C.12/1/Add.99, para. 27; Concluding Observations on Italy, 14 December 2004, Doc. E/C.12/1/Add.103, para. 33.

²² See article 1 (3) UN Charter and Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, A/RES/2625 (XXV) of 24 October 1970.

²³ See Arts 55 and 56 UN Charter.

²⁴ Charter of Economic Rights and Duties of States, A/RES/3281 (XXIX) of 12 December 1974.

the Declaration on the Right to Development.²⁵ This Declaration has as its main feature the joint responsibility of all states to contribute to the realisation of the right to development and the obligation of all states to cooperate to achieve that goal.²⁶

More specifically, with respect to international human rights law, 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 this Declaration can be fully realized”.²⁷

Clearly this means an international order which is based on the idea that all states have a shared responsibility and obligation for realising such an order. With respect to esc rights the idea of international cooperation and a fair international order has been elaborated in arts 2 (1) and 23 ICESCR and the General Comments of the Committee. Mention should also be made of the preamble of the ICESCR which refers to,

“the obligation of States under the Charter of the United Nations to promote universal respect for, and observance of, human rights and freedoms”.

Reference may also be given to trends towards the formation of customary international law in the field of esc rights. Against the background of globalisation, states are more willing than before to adopt a shared responsibility for fighting global poverty. Official declarations by state representatives underscore such responsibilities and contribute to the development of customary international law in this field. For example, in the Millennium Declaration, UN Member States,

“recognise that, in addition to our separate responsibilities to our individual societies, we have a collective responsibility to uphold the principles of human dignity, equality and equity at the global level.

²⁵ Declaration on the Right to Development, A/RES/41/128 of 4 December 1986.

²⁶ This may be concluded from arts 3-6 of the Declaration. See, for example, article 4 (1) which provides that, “States have the duty to take steps, individually and collectively, to formulate international development policies with a view to facilitating the full realisation of the right to development”.

²⁷ Emphasis added.

As leaders, we have a duty to all the world's people, especially the most vulnerable ..."²⁸

Overall, one might say that international human rights should be qualified as overarching international norms to be respected by all states because of their membership in the UN. These norms may give rise to international (positive and negative) obligations for states on the basis of general international law and on the basis of being a party to the ICESCR and other relevant instruments. However, it should also be recognised that the notion of international obligations is in need of further clarification and specification.

IV. Decisions and Policies of International Organisations that May Effect Economic, Social and Cultural Rights

1. International Financial Institutions

Only states can become parties to the ICESCR. The treaty is not open to international organisations.²⁹ However, it is obvious that the availability of resources of a country to realise esc rights may be influenced by the strength or weakness of its international financial position and the agreements it may have concluded with the International Financial Institutions (IFI's). The impact of the IMF and the World Bank decisions, policies and programmes on governmental programmes and expenditure in developing countries is considerable in the sense that they often do affect negatively the enjoyment of esc rights.³⁰ Representatives of the IMF and the World Bank have stated many times that their organisations do not have obligations under the Covenant. To support

²⁸ UN Millennium Declaration, adopted unanimously by the UN General Assembly, A/RES/55/2 of 8 September 2000, para. 2.

²⁹ See, however, article 18 ICESCR, according to which ECOSOC may make arrangements with the UN specialised agencies in respect of their reporting to ECOSOC on the progress made in achieving the observance of the Covenant provisions falling within the scope of their activities. In the past, the ILO, UNESCO, FAO and WHO have informed the CESCR about ICESCR-related matters, but not the World Bank and the IMF.

³⁰ See M. Darrow, *Between Light and Shadow: The World Bank, the International Monetary Fund and International Human Rights Law*, 2003, Chapter III.

this view, they emphasise that article 24 ICESCR explicitly guarantees the independent position of the constitutions of the specialised agencies and their respective responsibilities, separate from the Covenant.³¹ For example, the General Counsel of the IMF, Mr. Gianviti, has argued,

“For its part, the Covenant is a treaty among States which contains obligations addressed to States. Neither by its terms nor by the terms of the Fund’s relationship agreement with the United Nations is it possible to conclude that the Covenant is applicable to the Fund. Moreover, the norms contained in the Covenant have not attained a status under general international law that would make them applicable to the Fund independently of the Covenant”.³²

Neither the IMF nor the World Bank is a human rights agency. For example, the mandate of the IMF as laid down in its Articles of Agreement is limited to adopt and implement policies on the use of its resources that will assist Member States to solve their balance of payments problems.³³ The Articles of Agreement also restrict the ability of the Fund to deal with issues of social policy in its activities in Member States, because it is under an obligation to respect the domestic social and political policies of members.³⁴

From a strictly legal point of view this seems to be the correct interpretation. However, it has been suggested by human rights scholars that the IMF and the World Bank have international legal obligations to take full responsibility to respect human rights in situations where the institutions’ own projects, policies or programmes have a negative impact on the enjoyment of human rights.³⁵ The legal ground for this position

³¹ Article 24 ICESCR reads, “Nothing in the present Covenant shall be interpreted as impairing the provisions of the Charter of the United Nations and of the constitutions of the specialized agencies which define the respective responsibilities of the various organs of the United Nations and of the specialized agencies in regard to the matters dealt with in the present Covenant”.

³² E. Gianviti, *Economic, Social and Cultural Human Rights and the International Monetary Fund*, Doc. E/C.12/2001/WP.5, para. 56. See also para. 23.

³³ IMF Articles of Agreement, article V, Section 3 (a). The Articles can be found under <<http://www.imf.org/external/pubs/ft/aa/index.htm>>.

³⁴ IMF Articles of Agreement, see above, article IV, Section 3 (b).

³⁵ See the Tilburg Guiding Principles on World Bank, IMF and Human Rights (paras 5 and 25), drafted by a group of experts, meeting at Tilburg University, the Netherlands, in October 2001 and April 2002, in: W. van Genugten/ P. Hunt/ S. Mathews (eds), *World Bank, IMF and Human Rights*, 2003, 247-255. See also, S. Skogly, *The Human Rights Obligations*

may be found in the fact that the IFT's are subjects of international law and consequently are bound by general rules of international law. These rules include the human rights provisions of the UN Charter (Arts 55, 56 and 1). The ICESCR should be seen as an authoritative interpretation of these provisions.³⁶ In this respect the Legal Counsel of the IMF admits that there may be an indirect link between IMF approved programmes in Member States and the Covenant in case a programme is so strict and harsh that it would lead to violations of social and economic rights and consequently to popular unrest or a lack of foreign financing. In such a case the programme may not be implemented.³⁷ In addition, the IMF and the World Bank are specialised agencies of the UN and thus obliged to contribute to furthering the purposes of the organisation, including the observance of human rights.

The World Bank is an intergovernmental organisation to promote economic growth and development. Its policy and activities are directed towards, *inter alia*, poverty reduction and better standards of living. It is not a human rights organisation, although achieving the purposes of the organisation may relate to the realisation of economic, social and cultural rights in particular. Although, in light of the World Bank's official mandate,³⁸ only economic considerations shall be relevant for its policy and decisions, one may notice a gradual shift towards an approach which reflects more attention to human rights concerns recently. On the occasion of the 50th anniversary of the Universal Declaration of Human Rights in 1998, the Bank published a booklet on the relationship between development and human rights and the role of the World Bank.³⁹ According to the Bank it contributes directly to the realisation of many rights that are part of the Universal Declaration by supporting access to primary education, health care, nutrition, sanitation and housing. The World Bank also believes that the realisation of civil and political rights and economic, social and cultural rights is impossible without development. Consequently,

of the World Bank and the International Monetary Fund, 2001; A. Clapham, *Human Rights Obligations of Non-State Actors*, 2006, 137-159.

³⁶ Darrow, see note 30, 126-129, 136-137. See also Ph. Sands/ P. Klein, *Bowett's Law of International Institutions*, 2001, 459.

³⁷ Gianviti, see note 32, para. 51.

³⁸ See World Bank's Articles of Agreement, article IV, Section 10. The Articles of Agreement can be found under <<http://siteresources.worldbank.org/EXTABOUTUS/Resources/ibrd-articlesofagreement.pdf>>.

³⁹ World Bank, *Development and Human Rights: The Role of the World Bank*, 1998.

“creating the conditions for the attainment of human rights is a central and irreducible goal of development. By placing the dignity of every human being – especially the poorest – at the very foundation of its approach to development, the Bank helps people in every part of the world build lives of purpose and hope”.⁴⁰

Development is thus seen as a process of realising social and economic goals and providing specific goods that benefit the poor. These goals and goods are not recognised as rights, which would mean a rights-based approach giving rise to obligations for duty-holders. On the basis of extensive research and a number of interviews with World Bank (former) staff members, M. Darrow has concluded that in practice international human rights standards arise only selectively and usually only marginally in the framework of the Bank’s programmes. Human rights norms have been of little practical relevance in the discharge of the Bank’s social safeguard functions and assessment procedures. Also, human rights have been of little relevance for the research activities of the Bank and policy development on substantive themes.⁴¹

In 2003, the then General Counsel of the Bank established a Work Group of World Bank lawyers to study the legal framework applicable to the Bank’s work in connection with human rights.⁴² This internal process of analysis led to some changes in the traditional approach of the Bank towards human rights. Already in 2004 General Counsel Danino gave as his personal opinion that developments in the field of international human rights protection should be considered by the Bank as part of its decision-making process. He said,

“in so far as human rights constitute a valid consideration for the investment process, they are properly within the scope of issues which the World Bank must consider when it makes its economic decisions”.⁴³

In January 2006, a Legal Opinion on Human Rights and the Work of the World Bank was adopted.⁴⁴ Its main feature is that it reflects a

⁴⁰ World Bank, see above, 2.

⁴¹ Darrow, see note 30, 25.

⁴² See the contribution by General Counsel R. Danino, “The Legal Aspects of the World Bank’s Work on Human Rights: Some Preliminary Thoughts”, in: Ph. Alston/ M. Robinson (eds), *Human Rights and Development – Towards Mutual Reinforcement*, 2005, 509-524.

⁴³ Danino, see above, 524.

⁴⁴ See the paper by the present General Counsel, A. Palacio, “The Way Forward: Human Rights at the World Bank” (October 2006), available at

willingness of the Bank to consider explicitly the human rights dimensions of its activities. The Legal Opinion stated, *inter alia*,

“The Articles of Agreement permit, and in some cases require, the Bank to recognize the human rights dimensions of its development policies and activities, since it is now evident that human rights are an intrinsic part of the Bank’s mission”.⁴⁵

The present General Counsel Palacio added that,

“there is a need for the recognition of the role of human rights as *legal principles*, which may inform a broad range of activities, and which may enrich the quality and rationale of development interventions, and provide a normative baseline against which to assess development policies and programmes”.⁴⁶

It remains to be seen, however, whether this new approach of the Bank also means that human rights standards, such as *esc* rights, actually impose restrictions on the decisions and programmes of the Bank.

Other UN officials and bodies have taken a much more outspoken position on the human rights obligations of international organisations. For example, the UN Special Rapporteur on the Right to Food has said that organisations, such as the World Bank and the IMF “are bound by international law with regard to the right to food”.⁴⁷ Also the UN General Assembly, in a recent resolution on the right to food, called upon

<<http://web.worldbank.org/WBSITE/EXTERNAL/NEWS/0,,contentMDK:21106614~menuPK:51062077~pagePK:34370~piPK:34424~theSitePK:4607,00.html>>.

⁴⁵ Palacio, see above.

⁴⁶ Palacio, see note 44 (*italics in original*). The World Bank Inspection Panel may deal with human rights issues in an indirect way. It has the power to examine complaints by third parties who claim to be negatively affected by the programmes the Bank carries out in Member States. The Panel may present recommendations to the Board of Directors on whether the Bank has complied with its own Operational Policies, Procedures and Directives. These parts of the Bank’s internal law, *inter alia*, relate to indigenous people, the environment and resettlement activities. They clearly have a link with human rights issues, but the Panel cannot apply human rights law, see K. De Feyter, *World Development Law*, 2001, 233-237.

⁴⁷ Report of the UN Special Rapporteur on the Right to Food, Doc. E/CN.4/2006/44, para. 41. In the recommendations part of the report he adds that, “international organizations, such as the World Bank, IMF and WTO, with the power to shape the national policies of Governments must respect human rights and refrain from encouraging any policy, programme or project that will violate the right to food or water” (para. 52(*b*)).

international organisations to promote policies and projects that have a positive impact on the right to food and to avoid actions that could negatively affect the realisation of the right to food.⁴⁸

2. The World Trade Organisation

The World Trade Organisation (WTO) was established in 1994 by states with the objective of entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international trade relations. However, states also recognised that relations in the field of trade should be conducted with a view to, *inter alia*, raising standards of living and ensuring full employment in a manner consistent with the respective needs and concerns of countries at different levels of economic development.⁴⁹ The WTO is not a specialised agency of the UN. Consequently it is not bound by the human rights provisions of the UN Charter.

WTO law on the one hand and international human rights law on the other have a different focus. WTO law primarily aims at facilitating and promoting international trade, while the objective of human rights law is to protect the human rights of individuals on the basis of obligations taken up by states. They are thus separate bodies of law and the interests of players in both fields of law often diverge. However, the WTO does recognise that the process of trade liberalisation should take into account non-trade issues, for instance in the field of agriculture.⁵⁰ These non-trade issues include the protection of human rights, such as the freedom from hunger, the right to adequate food and the continuous improvement of living conditions laid down in article 11 ICESCR. A relevant question in this respect is how obligations of states under WTO Agreements relate to their obligations under human rights treaties.⁵¹ This question was raised by Mauritius, a WTO Member State, which argued that the text of the Agreement establishing the WTO,

⁴⁸ A/RES/60/165 of 16 December 2005, para. 16.

⁴⁹ Agreement Establishing the World Trade Organisation, 15 April 1994, Doc. LT/UR/A/2, Preamble.

⁵⁰ Article 20 WTO Agreement on Agriculture.

⁵¹ See extensively on this subject, K. Mechlem, "Harmonizing Trade in Agriculture and Human Rights: Options for the Integration of the Right to

“appears to have been carefully drafted so as to avoid countries having to make commitments which would contradict their obligations under other multilateral frameworks”.⁵²

In other words, WTO commitments may not conflict with pre-existing human rights obligations. However, the reference to human rights obligations in a WTO forum is the exception rather than the rule. Usually developing countries are rather eager to accept trade rules and preferences as part of WTO law, because it is beneficial to the country and in particular to imports and exports oriented companies. There is also very little talk in WTO circles about human rights obligations of Member States. This has also to do with the fact that observance of WTO law is subject to a strict regime of sanctions, while human rights law has to do without strong enforcement measures.

This difference in focus between WTO law and human rights law came very much to the fore when WTO bodies took decisions under its Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) on the subject of patents on essential medicines. These patents, usually in the hands of Western-based pharmaceutical companies, are protected according to strict rules laid down in the TRIPS Agreement. However, in November 2001, WTO Member States recognised the gravity of the public health problems affecting many developing countries, especially those resulting from HIV/AIDS, tuberculosis and malaria. Member States agreed,

“that the TRIPS Agreement does not and should not prevent Members from taking measures to protect public health. Accordingly, (...) we affirm that the Agreement can and should be interpreted and implemented in a manner supportive of WTO Members’ right to protect public health and, in particular, to promote access to medicines for all”.⁵³

Next, in August 2003 WTO member governments decided to implement this Declaration by making it easier for poor and needy coun-

Food into the Agreement on Agriculture”, in: A von Bogdandy/ R. Wolfrum (eds), *Max Planck UNYB* 10 (2006), 127 et seq.

⁵² WTO Doc. G/AG/NG/W/36/Rev.1, 9 November 2000, 45, para. 17 (document presented by Mauritius).

⁵³ WTO Ministerial Conference in Doha, 9-14 November 2001, Declaration on the TRIPS Agreement and Public Health, 14 November 2001, Doc. WT/MIN(01)/DEC/2, para. 4. See further F.M. Abbott, “The WTO Medicines Decision: World Pharmaceutical Trade and the Protection of Public Health”, *AJIL* 99 (2005), 317 et seq.

tries to import cheaper generic drugs made under compulsory licensing if these countries are unable to manufacture these medicines themselves.⁵⁴ This decision should make it easier for those countries to cope with the HIV/AIDS pandemic that constitutes a threat to public health. The decision waived a provision of the WTO-TRIPS agreement that stipulated that production under compulsory licensing must be predominantly for the domestic market. This hampered the ability of poorer countries that cannot produce medicines themselves to import cheaper products from other countries where medicines are patented.⁵⁵ It must be noted, however, that in the WTO decision itself there was no mention of the right to health; it was dealt with as a technical trade issue only, and certainly not as an international human rights obligation of Western Member States to promote access to essential medicines in poor countries.

There is clearly a tension between international human rights obligations of States Parties to the ICESCR on the one hand and rules on the protection of intellectual property rights under the TRIPS Agreement on the other.⁵⁶ Already in 2000 the UN Sub-Commission on the Promotion and Protection of Human Rights referred to “apparent conflicts” between the two legal regimes and reminded “all Governments

⁵⁴ WTO General Council Decision WT/L/540, 30 August 2003. See on the implementation of this Decision, C.M. Correa, *Implementation of the WTO General Council Decision on Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health*, 2004, available at <<http://www.who.int/medicines/>>. This waiver decision got a permanent character by the Decision of the WTO General Council to make it an amendment of the TRIPS Agreement. See General Council Decision WT/L/641, (6 December 2005), and WTO Press Release 2005/426. See also on this topic the article by H.P. Hestermeyer, “Access to Medication as a Human Right”, in: A. von Bogdandy/ R. Wolfrum (eds), *Max Planck UNYB* 8 (2004), 101 et seq.

⁵⁵ WTO Press Release Press/350/Rev.1, Decision Removes Final Patent Obstacle to Cheap Drug Imports (30 August 2003), available at <<http://www.wto.org>>.

⁵⁶ See Ph. Cullet, “Patents and Medicines: the Relationship Between TRIPS and the Human Right to Health”, *Int'l Aff.* 79 (2003), 139 et seq. and L.R. Helfer, “Human Rights and Intellectual Property: Conflict or Co-Existence?”, *NQHR* 22 (2004), 167 et seq.

of the primacy of human rights obligations over economic policies and agreements".⁵⁷ In the view of the CESCR,

"it is incumbent upon developed States, and other actors in a position to assist, to develop international intellectual property regimes that enable developing States to fulfil at least their core obligations (in the field of economic, social and cultural rights) to individuals and groups within their jurisdictions".⁵⁸

The former UN Commission on Human Rights also called upon states,

"to conduct an impact assessment of the effects of international trade agreements with regard to public health and to the progressive realization of the right of everyone to the highest attainable standard of health".⁵⁹

There is a need to find a flexible way that would contribute to striking a fair balance between the interests protected by both international intellectual property law and international human rights law. In this respect the WTO should do more to take into account human rights inspired arguments in its deliberations and decisions.⁶⁰

3. The European Communities

If we take the European Communities as another example, the first thing that can be observed is that the Community has included respect for human rights as a condition for aid and cooperation in many agreements with third states, while little attention has been given to the observance of human rights in its external actions by the Community itself. Is the European Community under a legal obligation to comply with esc rights in its external activities? The question may be raised, for example, whether the policies adopted within the framework of the

⁵⁷ UN Sub-Commission, Resolution on Intellectual Property Rights and Human Rights, Doc. E/CN.4/SUB.2/RES/2000/7, para. 3.

⁵⁸ Statement by the Committee on Economic, Social and Cultural Rights on Human Rights and Intellectual Property, Doc. E/C.12/2001/15, para. 13.

⁵⁹ UN Commission on Human Rights, *Access to Medication in the Context of Pandemics such as HIV/AIDS, Tuberculosis and Malaria*, 11 April 2005, Doc. E/CN.4/RES/2005/23, para. 14.

⁶⁰ See for example, L.R. Helfer, "Towards a Human Rights Framework for Intellectual Property", 2006, available at <<http://ssrn.com/abstract=891303>>.

common agricultural policy and common commercial policy undermine the sustainability of local food production in developing countries by allowing subsidies to farmers from the North and impeding income generation by local farmers in the South by means of imposing high tariff barriers for agricultural products. Although the relationship with the obligations of State Parties under the ICESCR may be more indirect, there clearly is a concern about the human rights effects of these measures agreed upon by Member States and implemented by the EU institutions. In the area of agriculture and trade, the Community is competent with the exclusion of the Member States.⁶¹ On the basis of article 281, Treaty Establishing the European Community (TEC), the Community has international legal personality. It is thus a subject of international law. Although neither the European Community, nor the European Union is a party to human rights treaties such as the ICESCR.⁶² It can be argued that article 6 of the Treaty on the European Union may act as the legal basis for the Community to respect human rights in all its internal and external activities, including its agricultural and trade policy towards third states.⁶³ According to one author,

“there will only be a breach of Article 6(2) EU if the Union’s action has as a direct consequence the human rights violation in a third country”.⁶⁴

From the perspective of the indivisibility and equality of civil and political rights and esc rights, this conclusion may also be applicable in case of a violation of an esc right.

In the area of the EU common trade policy a Regulation was adopted which was meant to implement the WTO General Council

⁶¹ See article 34 and 132 TEC respectively. See also article III-228, III-230 and III-314 of the Treaty Establishing a Constitution for Europe, 29 October 2004.

⁶² However, all EU Member States have ratified or acceded to the ICESCR.

⁶³ Article 6 Treaty on the European Union provides, “1. The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States. 2. The Union shall respect fundamental human rights, as guaranteed by the European Convention on Human Rights and Fundamental Freedoms”. See also article I-9 and III-292 Treaty Establishing a Constitution for Europe. The European Union has no legal personality. However, pursuant to article I-7 of the Treaty Establishing a Constitution for Europe the Union will have legal personality.

⁶⁴ M.K. Bulterman, *Human Rights in the Treaty Relations of the European Community*, 2001, 73-74.

Waiver Decision of August 2003 on trade in essential medicines in the legal order of the European Communities. It allows manufacturers of generic pharmaceuticals, using a compulsory license, to produce patented medicines for export to countries that lack sufficient capacity to produce them.⁶⁵ Human rights considerations did not play a role when the draft Regulation was introduced by the European Commission and discussed in the European Parliament. However, EU Commissioner Bolkestein said that,

“the WTO decision and our proposed Regulation can help save lives by helping countries in need to acquire affordable medicines, without undermining the patent system, which is one of the main incentives for the research and development of new medicines”.⁶⁶

In the European Parliament it was noted that the idea of solidarity with the have-nots in the developing countries was the basis for the Regulation.⁶⁷ As a consequence of this Regulation, Commissioner for Trade Mandelson expected a decrease in prices for medicines produced on the basis of a compulsory license for export to developing countries.⁶⁸ This might have a positive effect on the affordability of essential medicines for people with low incomes in developing countries.

In the area of development cooperation, the European Community and its Member States share legal powers. Community policy is complementary to the policy of the Member States.⁶⁹ According to article 177 (2) TEC, Community policy in the field of development cooperation shall contribute to the development and consolidation of the rule of law and respect for human rights. This is a clear indication that the Community has international human rights obligations in a particular area beyond the territorial scope of the Community itself. Such obligations are not limited to negative obligations to abstain from violations, but extend to positive obligations to actively contribute to the achievement of these goals.⁷⁰ Article 178 adds that the Community shall take into account the objectives of its development policy in the (other) policies that it implements and that are likely to affect developing coun-

⁶⁵ Regulation (EC) 816/2006, 17 May 2006, on Compulsory Licensing of Patents on Pharmaceutical Products, *OJ L* 157/1, 9 June 2006.

⁶⁶ EU Press Release IP/04/1332, 29 October 2004.

⁶⁷ Doc. A6-0242/2005, 19 July 2005, page 76.

⁶⁸ EU Press Release IP/05/1523, 1 December 2005.

⁶⁹ Article 177(1) TEC.

⁷⁰ Bulterman, see note 64, 92.

tries.⁷¹ In addition, the important Cotonou Agreement between the Members of the African, Caribbean and Pacific Group of States, and the European Community and its Member States on trade and aid issues, contains a human rights clause, including an undertaking to respect human rights which shall underpin, on the basis of reciprocity, the domestic and international policies of the parties, and which constitutes the essential element of the agreement.⁷² This agreement not only imposes obligations on ACP countries to observe human rights, but also on the European Community and its Member States to observe human rights standards in its cooperation with these countries. It thus has a reciprocal scope. This commitment to the promotion and advancement of human rights and the eradication of poverty as goals of the external action and policy of the Union is reaffirmed in the Treaty establishing a Constitution for Europe.⁷³

4. United Nations Sanctions

Multilateral sanctions, adopted by the UN Security Council under Chapter VII of the UN Charter, give rise to special types of international coercive measures that may have serious human rights effects in the target state. Usually the purpose of such sanctions is to force the government of the target state to change its conduct, or to punish the government of the target state for its conduct that is in contravention of international law. Often UN sanctions are a countermeasure against human rights abuses by a regime, while at the same time sanctions may have a negative effect on the human rights of the population, but these effects are intended or taken for granted. The fact that sanctions may have a negative effect is part of the concept; however, it is important to look at the acceptability of the effects from a human rights perspective. In a way sanctions are indiscriminate, because the sanctioning states or body have no control over the target state. In a study for the UN Sub-Commission on the Promotion and Protection of Human Rights, Mr. Bossuyt has pointed out, for example, that the UN sanctions against

⁷¹ Compare article III-218 Treaty Establishing a Constitution for Europe.

⁷² Partnership Agreement between the Members of the African, Caribbean and Pacific Group of States of the one part, and the European Community and its Member States, of the other part, signed in Cotonou (Benin), 23 June 2000, [2000] OJ L 317/3 (Cotonou Agreement), article 9.

⁷³ Article III-292 Treaty Establishing a Constitution for Europe.

Iraq have had deleterious effects on the living conditions of the Iraqi people. He was of the view that,

“the sanctions regime against Iraq has as its clear purpose the deliberate infliction on the Iraqi people of conditions of life (...) calculated to bring about its physical destruction in whole or in part”.⁷⁴

This very critical study concludes that,

“sanctions regimes that clearly violate international law, especially human rights and humanitarian law, need not be respected. This is especially true when the imposers are clearly on notice of those violations and have undertaken no effective modification”.⁷⁵

On the other hand, one could say that the initial violation of human rights by a regime is worse than the abuse through sanctions, and that consequently sanctions as a response are legitimate? Furthermore, one should bear in mind that sanctions can be used for propaganda purposes by the target state; the regime may overemphasise the negative human rights effects of the sanctions. The question therefore is whether it is possible to include in the sanction measures adopted by the Security Council safeguards and exemptions for the protection of minimum levels of those esc rights directly relating to the livelihood of people, such as the right to food, health and work, so-called ‘smart’ sanctions.⁷⁶ In 1997 the CESCR adopted a General Comment on the relationship between economic sanctions and respect for esc rights.⁷⁷ It recommends, *inter alia*, that esc rights must be taken fully into account when designing a sanctions regime. In addition, the body imposing the sanctions has an obligation to take steps in order to respond to any disproportionate suffering experienced by vulnerable groups within the targeted country.⁷⁸ The Committee therefore indicated that economic, so-

⁷⁴ “The adverse consequences of economic sanctions on the enjoyment of human rights”, Working Paper prepared by Mr. M. Bossuyt, Doc. E/CN.4/Sub.2/2000/33, para. 72. One has to notice though that ironically the Oil for Food Programme was originally established in order to provide for the humanitarian needs of the Iraqi people according to S/RES/986 (1995) of 14 April 1995.

⁷⁵ Bossuyt, see above, para. 109.

⁷⁶ See A. Tostensen, “Are Smart Sanctions Feasible?”, *World Politics* 54 (2002), 373 et seq.

⁷⁷ General Comment No. 8 on the Relationship between Economic Sanctions and the Respect for Economic, Social and Cultural Rights, Doc. E/C.12/1997/8.

⁷⁸ General Comment No. 8, see above, paras 12-14.

cial and cultural rights could give rise to international obligations for the international community, represented by the UN Security Council.

V. Human Rights Obligations of States as Members of International Organisations

This section will focus on the relationship between the conduct of states as members of international organisations and their obligations under the ICESCR. It is crucial to look at the nature and scope of international human rights obligations of states in more detail, notably from the perspective of (a) the nature of the right at stake and (b) the actual context and circumstances of the conduct, in particular whether the state acted in terms of its opportunity to influence the conduct of international organisations. It goes beyond the aim and scope of the present contribution to explore this in detail; however, a few ideas will be presented.

It has been suggested by some commentators to apply the typology of obligations (to respect, to protect, to fulfil), developed in the academic debate on human rights, to qualify and assess the international conduct of states in the area of esc rights.⁷⁹ The obligation *to respect* means a duty for the state to restrain from any action that might impede the realisation of esc rights in other countries. The obligation *to protect* implies an obligation for the state to ensure that non-state actors (such as international organisations) in which it exercises some degree of influence or control observe the enjoyment of esc rights in other countries. The obligation *to fulfil* means that (rich) states have a duty to provide some form of bilateral or multilateral assistance to needy people living in poor countries in order to realise their esc rights.

1. Obligations to Protect

A key issue is the alleged obligation of a state *to protect* the esc rights of people in another state from those decisions, programmes and policies of international organisations of which the former state is a member. Do (rich) states, as members of specialised agencies (IMF, IBRD, IDA), have an obligation as States Parties to the ICESCR, to uphold these

⁷⁹ Craven, see note 11, 147-150; Sepúlveda, see note 12, 373-375.

treaty norms, when they take part in decision-making about lending and aid conditions for poor countries? One may think of the human rights effects of conditional lending policies of these agencies as part of Structural Adjustment Programmes or Poverty Reduction Strategy Papers. Such loans may be dependent on the reorganisation and reallocation of government expenditure and the budget of developing states, such as spending more resources on restructuring foreign debt. If such a reorganisation leads to cuts in spending for social services, the enjoyment of the right to health, housing and education of vulnerable groups in society may be at risk. For example, the then UN Special Rapporteur on the Right to Education, Ms. K. Tomaševski, has pointed out that the price of debt servicing in Uganda, in terms of domestic budgetary reallocations and export-promotion, was impoverishment of the population. She also referred to the conflicting types of international obligations the government of Uganda faced: debt repayment and human rights obligations.⁸⁰

The view of the IMF in this respect is that the members of the Fund in their actions in the governing organs of the IMF,

“are not free to give access to its resources for uses not permitted by the Fund’s Articles of Agreement, or to divert resources entrusted to the Fund by some of its members to uses other than those stipulated by donors”.⁸¹

However, in its General Comment on the Right to Health, the CESCR observed that,

“States parties have an obligation to ensure that their actions as members of international organisations take due account of the right to health. (...) States parties which are members of international financial institutions, notably the IMF, the World Bank, and regional development banks, should pay greater attention to the protection of the right to health in influencing lending policies, credit agreements and international measures of these institutions”.⁸²

⁸⁰ Report on a Mission to Uganda, Doc. E/CN.4/2000/6/Add.1, paras 24-29.

⁸¹ Gianviti, see note 32, para. 27.

⁸² General Comment No. 14, see note 18, para. 39. Compare also the Concluding Observations of the CESCR on this point. In its Observations on the United Kingdom, the Committee said that it, “encourages the State Party, as a member of international financial institutions, in particular the IMF and World Bank, to do all it can to ensure that the policies and decisions of those organisations are in conformity with the obligations of States parties under the Covenant (...)”, see Doc. E/C.12/1/Add. 79, para. 26. See

It may be argued, however, that there is a lack of legal authority for the proposition that states that voted in favour of so-called “destructive acts” (in the sense of violating esc rights) may be held responsible for their voting behaviour. The arguments in support of this view are that the ICESCR does not have a jurisdiction clause and that states which voted in favour of a decision do not exercise control over the recipient state, nor over the international organisation. Actually, international organisations yield control to the states that contribute financially to the organisation, while at the same time states yield control to the organisation to execute its mandate. Therefore, in a way, there is a vacuum in the sphere of controlling the execution of the decisions of these organisations and a vacuum also in the sphere of accountability and responsibility. It is suggested, however, that states, as members of international organisations, which have also ratified the ICESCR, are bound to comply with their obligations under the Covenant in their capacity as State Parties, also when they act as members of the decision-making group in an international organisation.

For example, when Member States of the IMF and the World Bank decide upon policies, programmes and projects that impact upon the level of basic services in a developing state, they must take into account and respect the relevant national and international human rights instruments that apply to that state and to themselves. They may be held accountable for their acts or failure to act under article 2 (1) ICESCR as State Parties.⁸³ In this respect it is quite interesting to note that Congress in the United States, which is not a State Party to the ICESCR, passed a bill in 2000 opposing “user fees” on basic health care and edu-

also General Comment No. 15 on the Right to Water, Doc. E/C.12/2002/11, paras 35-36; General Comment No. 18 on the Right to Work, Doc. E/C.12/GC/18, para. 30.

⁸³ The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, para. 19, *NQHR* 15 (1997), 244 et seq. and Tilburg Guiding Principles, see note 35, para. 7 and para. 27. In 2001, the CESCR encouraged Germany, “as a member of international financial institutions, in particular the International Monetary Fund and the World Bank, to do all it can to ensure that the policies and decisions of those organizations are in conformity with the obligations of States parties to the Covenant, in particular the obligations contained in articles 2(1), 11, 15, 22 and 23 concerning international assistance and cooperation”, Concluding Observations on Germany, Doc. E/C.12/1/Add.68, para. 33.

cation as part of lending programmes adopted by the IMF and the World Bank.⁸⁴

International human rights obligations of Germany as a member of the World Bank were raised by *FoodFirst International Action Network (FIAN)*, an NGO that aims to promote the right to feed oneself, in the context of a World Bank supported project for a pipeline in Chad and Cameroon. This project was approved by the World Bank in 2000. Communities of people living in areas of the section of the pipeline experienced negative effects of the project. People lost land and physical access to forest resources (plants and animals) and were affected by dust-related air pollution. The German Executive Director, as a member of the Board of Directors of the Bank, voted in favour of approving the pipeline project. In FIAN's view, the primary responsibility for the negative human rights effects of the project lie with the government of Chad (a State Party to the ICESCR) and the World Bank. However, Germany is co-responsible, because it approved the project in the framework of the World Bank.⁸⁵ Another example of Germany's international human rights obligations relates to a project approved by the IFC in January 2006. It concerned an IFC loan to the US mining company Newmont for a gold mining project in the Ahafo South region in Ghana. FIAN informed the German authorities prior to the approval of the loan about violations of the right to food, housing, health and water that resulted from the activities undertaken by Newmont.⁸⁶ Thousands of people in the affected region lost access to land and their homes, they were not offered replacement land and some of them were resettled involuntarily. In addition, the mining company dammed a river which led

⁸⁴ The "user fees" provision, (Sec. 596), is a part of the Fiscal Year 2001 Foreign Operations Appropriations Bill. It states that, "The Secretary of the Treasury shall instruct the United States Executive Director at each international financial institution (as defined in section 1701(2) of the International Financial Institutions Act) and the International Monetary Fund to oppose any loan of these institutions that would require user fees or service charges on poor people for primary education or primary health care, including prevention and treatment efforts for HIV/AIDS, malaria, tuberculosis, and infant, child, and maternal well-being, in connection with the institutions' lending programs", see <<http://www.twinside.org.sg/title/user.htm>>.

⁸⁵ See U. Hausmann, *Germany's Extraterritorial Human Rights Obligations in Multilateral Development Banks*, 2006, 15-18, available at <www.fian.org>.

⁸⁶ Hausmann, see above, 18-19.

to a loss of access to safe drinking water for local communities. Furthermore, stagnant water in certain areas caused an increase in the number of mosquitoes and raised the risk of malaria. The German Minister for Development Cooperation, who is the responsible minister for the IFC, decided to vote against the approval of the loan. In a letter to FIAN she mentioned, *inter alia*, involuntary resettlement as a reason for not approving the loan. The German Executive Director in the IFC was the only one who gave a negative vote; three other Executive Directors abstained (United States, Belgium, the Netherlands). It is not clear whether the German authorities explicitly used human rights standards as a touchstone for not approving the loan. It is also doubtful whether the German government did recognise its international human rights obligations under the ICESCR as a legal framework that is also applicable in decision-making in international financial organisations. However, detailed information provided by FIAN helped in informing the German government about the negative consequences of the project from a human rights perspective. It was willing to take up its responsibilities in this case, though most likely not its human rights obligations.

2. Obligations to Respect

It may be argued that states also have an obligation *to respect*. This obligation prohibits a state from directly interfering with the enjoyment of esc rights of persons in other countries. For example, on the basis of the obligation to respect a state should refrain from food embargoes or other coercive measures towards other states.⁸⁷ In addition, states should refrain from promoting trade and producer's subsidies (such as EU agricultural export subsidies) benefiting their own nationals which at the same time may be to the detriment of local traders and producers in developing countries.⁸⁸ With respect to sanctions it has been put forward by the CESCRC that states and the international community must do everything that is possible to protect at least the core content of esc rights of the affected people in a target state, with special attention for the situation of vulnerable groups in that country. When the af-

⁸⁷ See, for example, Doc. CHR/RES/2002/22 of 22 April 2002 on Human Rights and Unilateral Coercive Measures.

⁸⁸ See the Preliminary Report of the UN Special Rapporteur of the Commission on Human Rights on the Right to Food, Mr. J. Ziegler, Doc. A/56/210, paras 72-87.

affected state is also a State Party to the ICESCR, it is doubly incumbent upon other states to respect and take into account the obligations arising from the Covenant.⁸⁹ De Wet argues that limitations to esc rights as part of UN sanctions are acceptable, provided that they are in accordance with the principle of proportionality and protect the core of the rights involved, while at the same time giving the Security Council flexibility in order to respond to breaches of and threats to international peace and security.⁹⁰ A parallel may be drawn with article 4 ICESCR, the limitations clause.⁹¹ The nature of a right, mentioned in article 4 as a standard for the permissibility of limitations, should be understood as the essence or the very core of a right, that is that element without which a right loses its significance as a human right.⁹² Article 4 clearly has a function to protect the rights of people, not to permit the state to impose all kinds of limitations. This provision was not meant to introduce limitations on rights affecting the subsistence, survival or integrity of people.⁹³ It is submitted that this interpretation should be applied in the same manner to encroachments upon esc rights which may result from a sanctions regime adopted by the Security Council.

3. Obligations to Fulfil

The most controversial issue is whether states have positive obligations to contribute to the realisation of esc rights in other countries, for instance by providing development aid or other forms of financial support. Stated differently, do states have international obligations *to fulfil*

⁸⁹ General Comment No. 8, see note 77, paras 7, 8, 14.

⁹⁰ E. de Wet, "Human Rights Limitations to Economic Enforcement Measures under Article 41 of the United Nations Charter and the Iraqi Sanctions Regime", *LJIL* 14 (2001), 277 et seq.

⁹¹ Article 4 reads, "The States Parties to the present Covenant recognize that, in the enjoyment of those rights provided by the State in conformity with the present Covenant, the State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the *nature* of these rights and solely for the purpose of promoting the general welfare in a democratic society", (Emphasis added.) Compare also article 5 (1) ICESCR.

⁹² See the Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, para. 56, *HRQ* 9 (1987), 122 et seq.

⁹³ Limburg Principles, see above, paras 46-47.

the rights in other countries? It has been argued that there exists a wider duty to aid those in need in other countries for governments and international organisations with the resources to do so. The ground of such a duty would be the general moral duty to help fulfil human needs.⁹⁴ Recently, it has been put forward by the International Council on Human Rights Policy that all states have transnational obligations, supplementary to their national obligations, in order to help poor people in other countries whose esc rights are unmet when this is due to the misconduct or inability of their own government. In the case of esc rights it is not always possible to identify a violator, because the state may be unable to fulfil its obligations due to a lack of sufficient resources. In such cases, violations of esc rights may trigger obligations of other states and international organisations to intervene and aid with the sole purpose of protecting the victims from further suffering. The “gravity of need” or the seriousness of the violation should determine the nature of assistance by the international community.⁹⁵ The legal basis for such an obligation may be found in the case law of the ICJ, according to which states owe certain obligations to the international community as a whole. These obligations *erga omnes* relate, *inter alia*, to the protection of the basic rights of the human person,

“By their very nature, (...) they are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection”.⁹⁶

In its General Comment on article 2 (1), the CESCR stated that states have a duty to cooperate with other states for development and thus for esc rights. It adds that,

“it is particularly incumbent upon those states which are in a position to assist others in this regard”.⁹⁷

General Comments, however, although authoritative interpretations of a treaty, do not bind State Parties. They have a soft law character. It might indeed be questioned whether the duty to cooperate also implies

⁹⁴ See, for example, Beetham, see note 5, 129. Compare also J. Rawls, *The Law of Peoples*, 2000.

⁹⁵ International Council on Human Rights Policy, *Duties Sans Frontières – Human Rights and Social Justice*, 2003, 19-21, 24-25, 39-40, available at <www.ichrp.org>.

⁹⁶ Case Concerning the Barcelona Traction, Light and Power Company Ltd., ICJ Reports 1970, 3 et seq. (32, para. 33).

⁹⁷ General Comment No. 3, para. 14 on the Nature of States Parties Obligations, Doc. E/1991/23.

an obligation to provide aid to assist in the realisation of esc rights in other countries. De Feyter argues that the already mentioned Declaration on the Right to Development does not imply an obligation for developed states to commit part of their resources to realise esc rights in other countries. The Declaration only embodies a progressive obligation for states to formulate international development policies.⁹⁸ Alston and Quinn, however, who did an in-depth analysis of the drafting history of article 2 (1), concluded that,

“On the basis of the preparatory work it is difficult, if not impossible, to sustain the argument that the commitment to international cooperation contained in the Covenant can accurately be characterized as a legally binding obligation upon any particular state to provide any particular form of assistance. It would, however, be unjustified to go further and suggest that the relevant commitment is meaningless. In the context of a given right it may, according to the circumstances, be possible to identify obligations to cooperate internationally that would appear to be mandatory on the basis of the undertaking contained in Article 2(1) of the Covenant. Moreover, policy trends and events in the general area of international development cooperation subsequent to the adoption of the Covenant in 1966 may be such as to necessitate a reinterpretation of the meaning to be attributed today to Article 2(1).”⁹⁹

Such (international) obligations may be applicable if a developed state enters into a bilateral or multilateral agreement with a developing state to financially assist the construction of hospitals or schools or to support a literacy project or a micro credit programme for rural women. Then there is a clear link with the implementation of a specific right (health, education, work), framed as part of a legally binding agreement between states or in the framework of an international organisation. An example of changing policy trends in the area of international (UN) development cooperation is the so-called 20/20 formula: the idea that,

⁹⁸ De Feyter, see note 46, 23-24. See in particular article 4 (1) of the Declaration on the Right to Development.

⁹⁹ Ph. Alston/ G. Quinn, “The Nature and Scope of States Parties’ Obligations under the International Covenant on Economic, Social and Cultural Rights”, *HRQ* 9 (1987), 156 et seq. (191).

“interested developed and developing country partners could agree on mutual commitments to allocate, on average 20 per cent of their national budget, respectively, to basic social programmes”.¹⁰⁰

Whenever a state, on the basis of free consent, concludes such an agreement, it is justified to say that both states have an obligation to comply with such a commitment. That would mean that a donor state is under an obligation to allocate 20 per cent of its development aid to expenses for social programmes, providing the recipient state itself is also allocating 20 per cent of its own budget for social expenses. A similar proposal has been made by the then Independent Expert of the UN on the Right to Development, Mr. A. Sengupta. He suggested,

“a compact between the donor countries of the OECD, the financial institutions and the concerned developing countries, to realise three basic rights – the right to food, the right to primary health care and the right to education – within a specific time period”.¹⁰¹

Such an international agreement would give rise to obligations for the states that take part to provide assistance for the realisation of these rights in other states. It is important to note that international obligations of donor states are complementary to those of the developing states themselves to guarantee an adequate standard of living for their population.

From a more general perspective, the Committee has said that, as poverty is a global phenomenon, there are some core obligations resulting from *esc* rights that have a crucial role to play in national and international development policies. These core obligations establish an international minimum threshold. It is incumbent on all those actors who can assist to help developing countries respect this threshold,

“if a national or international anti-poverty strategy does not reflect this minimum threshold, it is inconsistent with the legally binding obligations of a state party”.¹⁰²

In addition, the Maastricht Guidelines state that the failure of a state to take into account its international legal obligations in the field of *esc* rights when entering into bilateral or multilateral agreements with other

¹⁰⁰ Agenda for Development, para. 93, approved by the UN General Assembly, A/RES/51/240 of 20 June 1997. This 20/20 formula was also part of the outcome of the World Summit for Social Development, held in Copenhagen in 1995.

¹⁰¹ Doc. E/CN.4/1999/WG.18/2, discussed by De Feyter, see note 46, 28-30.

¹⁰² Statement on Poverty and the ICESCR, Doc. E/C.12/2001/10, para. 17.

states, international organisations or multinational corporations is a violation of esc rights.¹⁰³

Are there other forms of positive international obligations “to fulfil” the enjoyment of esc rights in other countries? Perhaps a good example are the efforts undertaken by some governments of developed states to promote access to cheap anti-HIV/AIDS medicines for developing countries in Africa and Asia. Canada was the first country that actively promoted such access. In May 2004, the Canadian legislature adopted an emergency law which makes it possible for Canadian producers of generic anti-AIDS medicines to provide such medicines at a cheap rate to countries with a serious AIDS problem, even if these medicines are protected by patents. This law is meant to implement the WTO-TRIPS waiver decision in the Canadian legal order.¹⁰⁴ When the Bill was considered in Parliament there was no reference to international human rights obligations of Canada emanating from the ICESCR. However, this may still be seen as a good example of a state, recognising the public health dangers of contagious diseases in developing countries, feeling a shared responsibility for contributing to the promotion of the health conditions of poor people in poor countries.

VI. Concluding Remarks

Overall, it may be concluded that the subject of international obligations of states as parties to the ICESCR is still in a stage of development. The legal framework is still “under construction”: it is rudimentary and partly of a soft law nature. However, there are good reasons to subscribe to the conclusion that negative international obligations to re-

¹⁰³ Maastricht Guidelines, see note 83, para. 15(j).

¹⁰⁴ Bill C09, *An Act to Amend the Patent Act and the Food and Drugs Act (The Jean Chrétien Pledge to Africa)*, House of Commons, 3rd Sess., 37th Parliament, 52-53 Elizabeth II, 2004, entered into force on 14 May 2004. See also R. Elliot, “Step Forward, Backward, and Sideward: Canada’s Bill on Exporting Generic Pharmaceuticals”, *HIV/AIDS Policy and Law Review* 9-3 (December 2004), available at <<http://www.aidslaw.ca/publications/interfaces/downloadFile.php?ref=844>>; “UN Rights Expert Welcomes Canadian Initiative on Access to Low-Cost Drugs in Developing Countries”, UN Press Release, 7 November 2003, available at <<http://www.unhchr.ch/html/menu2/7/b/mhealth.htm>>.

spect the enjoyment of esc rights are more tangible and probably stronger than positive obligations to protect and to fulfil.

It may be concluded that international obligations to respect are part of existing human rights law (*de lege lata*), while obligations to protect and to fulfil are still part of the law as it ought to be (*de lege ferenda*). There is clearly a need for further legal confirmation and progressive legal development of the moral idea that the ICESCR ought to be read as also implying international obligations of states to people in other countries who are in need of assistance in order to enjoy their basic esc rights.

The relevant bodies of international institutions and their Member States should become much more aware of and sensitive to the impact their policies and decisions may have on the enjoyment of esc rights in both Member States and in third countries. Therefore, the concept of international obligations should be further clarified and supported by state practice on a national level, in bilateral relations and in the framework of multilateral institutions. As international human rights obligations are often a political issue, it requires political will to accept them, because they limit the freedom of states to act abroad and in many cases other interests (economic, military, financial) are also involved. Finally there is a need for elaboration and application of international human rights obligations in the case law of courts and the quasi-jurisprudence of the UN human rights treaty bodies. In an era of globalisation and interdependence, there is a particular need for this.