TRANSNATIONAL OBLIGATIONS IN THE FIELD OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS

OBLIGACIONES TRANSNACIONALES EN EL CAMPO DE LOS DERECHOS ECONÓMICOS, SOCIALES Y CULTURALES

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Summary: I. INTRODUCTION. II. INTERNATIONAL COOPERATION UNDER INTERNATIONAL LAW. III. INTERNATIONAL OBLIGATIONS IN THE FIELD OF ESC RIGHTS. IV. SOME TENTATIVE CONCLUSIONS.

ABSTRACT**:** Given that States, particularly developing States, are more exposed than ever before to actions taken by other States, International Organizations, and Transnational Corporations, there is a pressing need to carefully reflect on the obligations States may have with regard to the effects that their international activities have on the economic, social and cultural rights (ESC rights) of people living in another country. Unlike extraterritorial obligations in the field of civil and political rights and International Humanitarian Law, the discussion on the transnational obligations in the area of ESC rights has not received much attention so far.

RESUMEN: Dado que los Estados, especialmente los Estados en vías de desarrollo, están más expuestos que nunca a las actuaciones desplegadas por otros Estados, por Organizaciones Internacionales y por actores privados como las empresas transnacionales, existe una necesidad acuciante de reflexionar sobre las obligaciones de los Estados en relación con los efectos que sus actividades internacionales pueden tener en los derechos económicos, sociales y culturales (DESC) de personas que viven en otros países. A diferencia de las obligaciones de carácter extraterritorial en el terreno de los derechos civiles y políticos o en el ámbito del Derecho Internacional Humanitario, la discusión acerca de las obligaciones transnacionales en el campo de los DESC no ha recibido demasiada atención hasta la fecha

KEY WORDS: international cooperation, human rights, extraterritorial obligations, transnational obligations, international obligations, globalisation.

PALABRAS CLAVE: cooperación internacional, derechos humanos, obligaciones extraterritoriales, obligaciones transnacionales, obligaciones internacionales, globalización.

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I. INTRODUCTION

Globalisation has become one of the main driving forces of our time. While it offers great opportunities in terms of new technologies, communication, and economic growth in some parts of the world, there are increasing concerns about its impacts on the protection and promotion of human rights. According to the *UN Millenium Summit Declaration*,

> "the central challenge we face today is to ensure that globalization becomes a positive force for all the world's people. For while globalization offers great opportunities, at present its benefits are very unevenly shared, while its costs are unevenly distributed. We recognize that developing countries and countries with economies in transition face special difficulties in responding to this central challenge. Thus, only through broad and sustained efforts to create a shared future, based upon our common humanity in all its diversity, can globalization be made fully inclusive and equitable"[1].

As we can see, the General Assembly of United Nations is clamouring for a globalization[2] that is "fully *inclusive* and *equitable*," a statement which clearly shows that globalization is not currently headed in that direction. Very much to the contrary, in fact, the current process of globalization is characterized as one that generates exclusion and extreme inequality, which brings about very serious consequences for the protection of human rights, both in terms of civil and political rights and, above all, economic, social and cultural rights.

The process of globalisation is also having a strong impact in the actors that are relevant both in the national and in the international arena. The dynamics of globalisation, characterized by increasing financial and trade liberalization, deregulation, reduction of barriers to foreign investment and privatization (the so-called *Washington Consensus*), is reducing dramatically the role of the State. As a result, sectors previously covered by the public sector are left in the hands of the market. Consequently, this process has steadily weakened human rights protection in a number of countries, primarily affecting economic, social and cultural rights (ESC rights). As we well know, protection of these rights essentially depends on the capacity of the domestic State to cope with them. These rights hinge on the services provided by the State: rights such as healthcare, education, food and clothing, basic social services, a public social security system, etc. On par with cutbacks in certain sectors made by the State—which in so doing has relinquished its duties—economic, social and cultural rights have also suffered. This trend towards progressive and gradual "privatization of human rights" in many countries has had disastrous consequences in terms of the protection of many of those same rights[3]. The reduction in the role of the State has been particularly severe in many developing countries as a result of the Structural Adjustment Programs imposed by the

[1] *United Nations Millennium Declaration*, Resolution adopted by the General Assembly, UN Doc. 55/2, 18 September 2000, para. 5.

[2] *Mondialisation* is the term generally used in French-speaking countries for globalization.

[3] A much deeper analysis on the impact of privatisation on the enjoyment of human rights can be found in DE FEYTER, K. And GOMEZ ISA, F. (Eds.): *Privatisation and Human Rights in the Age of Globalisation*, Intersentia, Antwerp-Oxford, 2005.

World Bank and the International Monetary Fund (IMF) to face the debt crisis during the 80s and the 90s, which have helped to further aggravate the situation of economic, social and cultural rights in those countries[4], in addition to affecting the fulfillment of civil and political rights. The indivisibility and interdependence of all human rights are such that when a certain category of rights suffers, others feel the effects as well. The fact is that these economic programmes backed by the Bretton Woods Institutions have brought about serious repercussions in terms of the fulfillment of human rights[5].

In connection with the gradual reduction of the role of the State, we have witnessed a more and more relevant role played by International Financial and Trade Institutions (basically the World Bank, the IMF and the more recently created World Trade Organisation, WTO) and large and powerful Transnational Corporations. Economies and national decision-making in many relevant sectors are increasingly exposed to the influence of these non-State actors.

Along the same lines, States are also very active at international level. As Skogly and Gibney have rightly pointed out, "States are involved in more international activities than ever before"[6]. States, particularly developed States, do exert a growing influence beyond their borders, and this trend may have an impact in the realisation of human rights in other countries, especially in the South. External activities of States such as trade and trade policies, agricultural policies, development cooperation, participation in International Organisations... may influence the ability of other States, especially developing States, to realise the basic ESC rights of their population.

This progressive reduction of the role of the State and of the capacity to determine its domestic policies has led to the urgent need to pay attention to the so-called "Transnational Human Rights Obligations"[7]. Given that States, particularly developing States, are more exposed than ever before to actions taken by other States, International Organisations, Transnational Corporations and, even, non-governmental organisations (NGOs), there is a pressing need to carefully reflect on the obligations States may have with regard to the effects that their international activities have on the ESC rights of

[4] As early as in 1990, the ComESCR expressed its concern about the "adverse impact" of the adjustment measures on the enjoyment of ESC rights in many countries, in General Comment 2, *International Technical Assistance Measures (article 22 of the Covenant*), UN Doc. E/1990/23, para. 9.

[5] PIGRAU I SOLE, A.: "Las políticas del FMI y del Banco Mundial y los Derechos de los Pueblos", *Afers Internacionals*, 1995, nº 29-30, pp. 139-175.

[6] SKOGLY, S.I. and GIBNEY, M.: "Transnational Human Rights Obligations", *Human Rights Quarterly*, Vol. 24, 2002, p. 784.

[7] There are different terms used to refer to this type of human rights obligations: transnational human rights obligations, extra-territorial obligations, international obligations, external obligations... See the interesting reflections on the terminological debate by COOMANS, F.: "Some remarks on the extraterritorial application of the International Covenant on Economic, Social and Cultural Rights", in COOMANS, F. and KAMMINGA, M.T. (Eds.): *Extraterritorial Application of Human Rights Treaties*, Intersentia, Antwerp-Oxford, 2004, pp. 186 and 187. Since there is no consensus on the use of one single term to refer to this specific type of human rights obligations, I will use these terms in this paper interchangeably, although, following the qualified opinion of the ComESCR, the term "international obligation" is the most adequate term to refer to the application of these obligations in the field of ESC rights, a field in which international cooperation is essential for the realization of the latter rights.

people living in another country. We have to recognize that, unlike extraterritorial obligations in the field of civil and political rights[8] and International Humanitarian Law[9], the discussion on the extraterritorial obligations in the area of ESC rights has not received much attention so far[10]. It is much more complicated and much more problematic and contested to derive specific and detailed international obligations concerning ESC rights. Given the nature of ESC rights, their realization is progressive and in need of economic resources; the identification of perpetrators and victims is not as easy as in the realm of civil and political rights, especially when countries face situations of mass poverty and deprivation.

In spite of these obstacles, it is beyond all doubt the necessity of *international cooperation* in the broadest sense of the term[11] for the enjoyment of ESC rights in most countries of our world. There are many developing countries that are not in a position to fulfil the basic ESC rights of their citizens; they often lack the financial resources and the technical capacities to effectively meet their ESC rights obligations. But, on the other hand, developing States cannot use the argument of the insufficiency of economic means and the poor technical capacities to absolve themselves for the violation of ESC rights and to justify inaction. One of the basic principles governing International Human Rights Law is that domestic States are the primary responsible of the satisfaction of the rights of their populations. But, at the same time, the relevance of international cooperation as far as ESC rights are concerned has been explicitly recognised by the most important human rights treaties in the area of ESC rights, namely the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention on the Rights of the Child (CRC) and the recently adopted Convention on the Rights of Persons with Disabilities (known as the Disability Convention, DC), as we will see. Moreover, both the ComESCR and the Committee on the Rights of the Child have repeteadly advised developing States to seek for international assistance as a

[8] MERON, T.: "Extraterritoriality of Human Rights Treaties", *American Journal of International Law*, Vol. 89, 1995, pp. 78-82.

[9] GILLARD, E-CH.: "International Humanitarian Law and Extraterritorial State Conduct", in COOMANS, F. and KAMMINGA, M.T. (Eds.): *Extraterritorial Application of Human Rights Treaties…*, *op. cit.*, pp. 25-39.

[10] VANDENHOLE, W.: "EU and Development: Extraterritorial Obligations under the International Covenant on Economic, Social and Cultural Rights", in SALOMON, M.E.; TOSTENSEN, A. and VANDENHOLE, W. (Eds.): *Casting the Net Wider: Human Rights, Development and New Duty-Bearers*, Intersentia, Antwerp-Oxford, 2007, p. 85.

[11] International cooperation should not be read exclusively as "international development cooperation", as it is usually the case. International cooperation refers to all activities undertaken by States inter-acting with other States, including the provision of Official Development Aid (ODA) . All policies of States and International Organisations, ranging from trade to agricultural policies, should be guided by an spirit of international cooperation and solidarity. This understanding of international cooperation as a framework that should determine all policies of States and International Organisations is known as the principle of *coherence*. Unfortunately, the debates on the role of international cooperation for the realisation of ESC rights have mainly focused on development cooperation, a very both politically and legally contentious and disputed issue against the background of the North-South divide.

complementary mean for the protection of ESC rights[12]. As the ComESCR has rightly underlined,

> "in the absence of an active programme of international assistance and cooperation on the part of all those States that are in a position to undertake one, the full realisation of ESC rights will remain an unfulfilled aspiration in many countries"[13].

The aim of this paper is basically to shed some light on the legal basis and status of transnational human rights obligations in the area of ESC rights. First, I will try to explore the legal foundations and status of the principle of international cooperation and international cooperation for the promotion of human rights under general International Law. At a second stage, I will apply the trypartite typology of obligations as regards ESC rights (obligation to *respect*, to *protect*, and to *fulfil*) to transnational human rights obligations in the area of ESC rights.

II. INTERNATIONAL COOPERATION UNDER INTERNATIONAL LAW

1. The emergence of the principle of international cooperation

It is widely accepted that the duty of States to cooperate is one of the core principles of contemporary Public International Law that has gradually consolidated throughout the XXth Century. International cooperation is the essence of the emerging phenomenon of International Organisations, one of its principal aims; the increasing need of international cooperation provokes a certain process of institutionalization[14] and, on the other hand, an International Organisation becomes the most adequate mean to canalize cooperation between different actors at international level.

The Covenant of the League of Nations (1919), the constitutive document of the first International Organisation in the modern sense of the term, stipulated in its Preamble the two basic objectives of the new institution: "to promote *international co-operation* and to achieve international peace and security" (emphasis added). In the substantive part of the Covenant, from article 23 to 25, we find explicit specifications of the areas in which Member States of the League of Nations should cooperate: fair and humane conditions of labour for men, women, and children[15]; just treatment of the native inhabitants of territories under their control; traffic in women and children; prevention

[12] The Committee on the Rights of the Child has recently pointed out that "… countries with severe resource constraints have the responsibility to seek international co-operation and assistance", *Day of General Discussion on "Resources for the Rights of the Child-Responsibility of States"*, 21 September 2007, para. 51.

[13] General Comment nº 3, *The nature of States parties Obligations (article 2.1 of the Covenant*), UN Doc. E/1991/23, para. 14.

[14] TOUSCOZ, J.: "Souveraineté et coopération internationale culturelle, scientifique et technique", in DUPUY, R-J. (Ed.) : *La Souveraineté au Xxe. Siécle*, Paris, 1971, pp. 202 and ff.

[15] This reference found in Article 23 of the Covenant was the legal basis for the creation of the International Labour Organisation (ILO), which has promoted significantly international cooperation and legal recognition of labour rights, social rights, and the rights of indigenous peoples at global level.

and control of disease… In my view, the role played by the League of Nations in the field of promotion of international cooperation and in the creation of a number of international institutions can be considered as one of its major legacies, and was continued, to a great extent, by the successor of the League.

2. International cooperation in the UN Charter and beyond

The United Nations Charter (1945) incorporates very far-reaching references to international cooperation as one of the main purposes of the new organization. In the Preamble, the peoples of the United Nations declared themselves "determined… to promote social progress and better standards of life *in larger freedom*" (emphasis added)[16]. Also in the Preamble of the UN Charter we find a relevant provision from an institutional perspective, since an "international machinery for the promotion of the economic and social advancement of all peoples" is foreseen. As we can clearly see, from the very beginning it was evident that social progress and development should go hand in hand with the protection and promotion of human rights, and the concept of human rights was a comprehensive one, including both the traditional freedoms and socioeconomic rights. The principle of the *indivisibility of all human rights* was somewhat inherent in the spirit and in the underlying ideology of the UN Charter. Unfortunately, the Cold War exerted a very negative influence in this principle, and human rights became one of the main issues of controversy between the East and the West. Besides, it was also clear for the drafters of the Charter that some kind of "international machinery" was needed for the promotion of economic and social development; international cooperation usually leads to the creation of institutions aimed at a better articulation of international efforts.

Article 1 of the UN Charter is a provision of utmost importance, since it establishes the purposes of the new world organization. According to paragraph 3 of this provision, it is a purpose of the UN

> "to achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and fundamental freedoms for all…".

Finally, under Chapter IX of the UN Charter, devoted to *International Economic and Social Co-operation*, two articles are worth mentioning. Article 55 states that

> "with a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations…, the UN shall promote:
>
> (a) higher standards of living, full employment and conditions of economic and social progress and development;

[16] It is very illustrative that the Secretary-General launched his report in 2005 under the symbolic title "In larger freedom: towards development, security and human rights for all", underlining that security, development and human rights are the three central pillars of the UN's work. As stated by the Secretary-General, "we will not enjoy development without security, we will not enjoy security without development, and we will not enjoy either without respect for human rights", A/59/2005, para. 17.

> (b) solutions of international economic, social, health, and related problems; and international cultural and educational co-operation; and
> (c) universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion".

Along the same lines, Article 56 establishes that "all Members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55". As we can very clearly see, both the UN as such and all its Members assume the general legal obligation of cooperating internationally in several areas and, specifically, in the area of respect and promotion of human rights, thus situating human rights as a vital objective to be achieved through international cooperation.

One of the problems arising out from these relevant provisions of the UN Charter is that we do not find neither a detailed definition of what constitutes international cooperation nor of human rights. There is no a catalogue of those rights. As a consequence, we have to recognize that the references of the UN Charter to international cooperation and human rights are general, and somehow vague and imprecise. Immediately after the adoption of the UN Charter there was an academic dispute as to whether or not the provisions of the Charter we have just seen implied legal obligations for States in the field of human rights[17]. This issue has to be dealt with from a dynamic perspective, taking into account the considerable development of International Human Rights Law after the adoption of the Charter. These developments have contributed to the increasing legal relevance of the principle of international cooperation enshrined in the Charter[18]. In my view, it may be argued that the relevant provisions of the Charter impose legal duties both on the UN and on its Member States to cooperate internationally for the promotion and protection of human rights[19]; they constitute the legal and conceptual foundation for the development of International Law of Cooperation and International Human Rights Law after 1945, and have marked a significant change in the structure of International Law, that has progressively passed from a law of coexistence to a law of cooperation. In the view of Wolfgang Friedmann, the move of international society, "from an essentially negative code of rule of abstention to positive rules of co-operation, however fragmentary in the present state of world politics, is an evolution of immense significance for the principles and structure of international law"[20].

Another relevant landmark for the progressive affirmation of the principle of international cooperation under General International Law was the adoption on 24

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[17] Compare the interesting old debate between Lauterpacht and Schwelb, LAUTERPACHT, H.: *International Law and Human Rights*, Frederick A. Praeger, New York, 1950; SCHWELB, E.: "The influence of the Universal Declaration of Human Rights on International and National Law", *American Society of International Law Proceedings*, 1959.

[18] SKOGLY, S.I. and GIBNEY, M.: "Transnational Human Rights Obligations"…, *op. cit*., p. 786.

[19] I have analysed this issue in detail in GOMEZ ISA, F.: "International Protection of Human Rights", in GOMEZ ISA, F. and DE FEYTER, K. (Eds.): *International Protection of Human Rights: Achievements and Challenges*, HumanitarianNet-University of Deusto, Bilbao, 2006, pp. 28-30.

[20] FRIEDMANN, W.: *The Changing Structure of International Law*, Stevens&Sons, London, 1964, p. 62.

October 1970 of the *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (*Friendly Relations Declaration)[21]. This Declaration includes once again the duty of States to cooperate as one of the fundamental principles of International Law in accordance with the Charter[22], but, unfortunately, "does not seem to elucidate much further… the nature or the scale of cooperation envisaged"[23]. The Friendly Relations Declaration has to be seen as a mere reiteration of the principle of international cooperation as contained in the UN Charter, without much more precision and clarification on its nature, content and scope[24]. This lack of precision and clarification must be explained mainly by "the absence of any consensus among States as to the precise meaning of the duty to cooperate"[25].

Some scholars have defended that, as a minimum, the duty to cooperate would include a *negative obligation* "not to undertake activities that will result in substantial harm to the rights of other States and their citizens"[26]. This negative obligation has been codified in the *Charter of Economic Rights and Duties of States*[27]. According to Article 24 of this Charter, "All States have the duty to conduct its 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". Although the legal value of this Declaration is doubtful, in my view there is legal ground to defend the customary nature of this negative obligation. States must abstain from activities that might have adverse effects on the enjoyment of human rights in other countries. As we will see, this is the essence of the obligation to respect. The international *obligation to respect* requires

[21] General Assembly resolution 2625 (XXV), 24 October 1970. This Declaration was adopted in a very symbolic moment, when the United Nations commemorated its 25th anniversary, and was passed by consensus, something that is of utmost importance both from a legal and from a political point of view.

[22] According to Edward McWhinney, the Friendly Relations Declaration contains "the most detailed definition of the international law duty of cooperation" and is "the product of a clear inter-systemic consensus…", McWHINNEY, E.: "The concept of Co-operation", in BEDJAOUI, M. (General Editor): *International Law: Achievements and Prospects*, UNESCO-Martinus Nijhoff Publishers, Dordrecht, 1991, p. 426.

[23] CRAVEN, M.: *The International Covenant on Economic, Social and Cultural Rights. A Perspective on its Development*, Clarendon Press, Oxford, 1998 (with corrections), p. 145.

[24] TURK, D.: "Participation of developing countries in decision-making processes", in DE WAART, et al (Eds.): *International Law and Development*, Martinus Nijhoff Publishers, Dordrecht, 1988, p. 342. There is only a very weak reference in the Preamble of the Declaration to the "*increased importance* of the principles" in light of the "great political, economic and social changes and scientific progress which have taken place in the world since the adoption of the Charter" (emphasis added). This reference adds little to the efforts to clarify the nature, precise content and scope of the principle of international cooperation.

[25] ALSTON, P. and QUINN, G.: "The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights", *Human Rights Quarterly*, Vol. 9, 1987, p. 188. It is interesting to see how this lack of consensus was also present during the discussions on the Draft Declaration in the framework of an Special Committee of the General Assembly that was created to elaborate it, in HOUBEN, P-H.: "Principles of International Law concerning Friendly Relations and Cooperation among States", *American Journal of International Law*, 1967, p. 703.

[26] COOMANS, F.: "Some remarks on the extraterritorial application of the International Covenant on Economic…", *op. cit*., p. 190.

[27] General Assembly resolution 3281 (XXIX), 12 December 1974, adopted by a vote of 120 in favour, 10 abstentions and 6 against (Belgium, Denmark, German Federal Republic, Luxembourg, United Kingdom, and United States).

States to refrain from interfering directly or indirectly with the enjoyment of economic, social and cultural rights in other countries.

A *positive obligation* arising from the duty to cooperate is much more difficult to find and, above all, to precise, since States, especially developed States, are very reluctant to be legally obliged to cooperate internationally for the fulfilment of ESC rights and for the promotion of development, two aspects that are inextricably linked. One of the most audacious attempts to affirm a positive obligation to cooperate was the *Declaration on the Establishment of a New International Economic Order*, adopted by the General Assembly of the UN in 1974. This Declaration emphasizes the "reality of interdependence of all the members of the world community", since "… the interests of the developed countries and those of the developing countries can no longer be isolated from each other…". As a consequence, "international co-operation for development is the *shared goal* and *common duty* of all countries"[28] (emphasis added).

Along the same lines, the ComESCR has identified international cooperation for development and for the realization of ESCR as an "obligation of all States". According to the views expressed by the monitoring body of the ICESCR in its famous General Comment nº 3, "in accordance with Articles 55 and 56 of the Charter of the UN, with well-established principles of International Law, and with the provisions of the Covenant itself, international cooperation for development is an *obligation of all States*" (emphasis added)[29]. Besides, the Committee establishes a differentiation of responsibilities in the field of international cooperation aimed at the realization of ESC rights, since "it is particularly incumbent upon those States which are in a position to assist others in this regard"[30]. As we can see, the obligation to cooperate lies essentially with the developed States, those that obviously are in a much better situation to cooperate. Finally, the Committee notes the "importance of the Declaration on the right to development"[31], one of the most serious attempts to create positive legal obligations for States to cooperate internationally for development and for the protection of human rights worldwide. After a lengthy and difficult process of discussion and negotiation in the framework of a working group created by the UN Commission on Human Rights in 1981, the *Declaration on the right to development* was adopted by an overwhelming majority[32] by the UN General Assembly on 4 December 1986[33]. The most interesting feature of this pioneer Declaration is the clear link between development and human rights. The protection and promotion of all human rights, both civil and political and economic, social and cultural rights, is an essential ingredient of every process of

[28] Resolution 3201 (S-VI), 1 May 1974, para. 3.
[29] General Comment nº 3, *The nature of States parties Obligations…*, *op. cit*., para. 14.
[30] *Ibidem*, para. 14.
[31] *Ibidem*, para. 14.
[32] The final vote on the Declaration on the right to development is very illustrative of the positions of the different countries of the international community. 146 States voted in favour, 8 abstained (the Federal Republic of Germany, the United Kingdom, Sweden, Finland, Japan, Denmark, Iceland and Israel) and only the US voted against the Declaration. A detailed study on the right to development can be found in GOMEZ ISA, F.: *El derecho al desarrollo como derecho humano en el ámbito jurídico internacional*, Universidad de Deusto, Bilbao, 1999.
[33] Resolution 41/128, 4 December 1986.

development. Development is no possible without a scrupulous respect of all human rights[34]. One of the underlying principles of the Declaration is the joint responsibility of all States of the international community to contribute to the realization of the right to development through international cooperation. It is very illustrative that the very first paragraph of the Preamble of the Declaration opens up with a reference to the "the purposes and principles of the Charter of the United Nations relating to the achievement of international co-operation". The need of international cooperation to contribute to the realization of the right to development and universal respect of all human rights is stressed from Article 3 to Article 6 of the Declaration. According to Article 3.3, "States have the duty to co-operate with each other in ensuring development and eliminating obstacles to development". Along the same lines, Article 4.1 establishes 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". Aimed at further detailing of the commitments assumed by States, paragraph 2 of Article 4 refers to the *complementary* nature of the international cooperation that has to be provided by the international community; in this sense, "as a complement to the efforts of developing countries, effective international co-operation is essential in providing these countries with appropriate means and facilities to foster their comprehensive development". As we can clearly see, the Declaration on the right to development tries to detail the obligations arising from the principle of international cooperation, an attempt that faced the fierce opposition of some developed States that did not want to give raise to any "legal" obligation to provide assistance to developing countries to promote their development[35]. The Vienna Declaration and Programme of Action adopted by the World Conference on Human Rights, while reaffirming the right to development as a universal and inalienable right, proclaimed that "States should cooperate with each other in ensuring development and eliminating obstacles to development. The international community should promote an effective international cooperation for the realization of the right to development and the elimination of obstacles to development"[36].

The most recent reference to the principle of international cooperation can be found in the *Millenium Declaration*, where the Heads of State and Government solemnly proclaimed that

[34] In the substantive part of the Declaration there is an essential proclamation as far as the conceptual evolution of development is concerned. According to Article 2.1 of the Declaration on the right to development, "the human person is the central subject of development and should be the active participant and beneficiary of the right to development". This relevant provision paved the way for the emergence of the concept of *Human Development* in the late 80s under the auspices of scholars such as Amartya Sen and the institutional umbrella of the United Nations Development Program (UNDP). For a multidimensional and comprehensive concept of development, human rights have become an essential and unavoidable element. Compare ALSTON, P. and ROBINSON, M. (Eds.): *Human Rights and Development. Towards Mutual Reinforcement*, Oxford University Press, Oxford, 2006.

[35] This is one of the main reasons given by some States to justify abstention or vote against on the Declaration on the right to development.

[36] A/CONF.157/23, 12 July 1993, para. 10.

> "… 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. As leaders *we have a duty therefore to all the world's people*, especially the most vulnerable and, in particular, the children of the world, to whom the future belongs"[37] (emphasis added).

3. International cooperation in the Universal Declaration of Human Rights

The elaboration of the provisions of the UN Charter as far as human rights are concerned came with the adoption of the Universal Declaration of Human Rights (UDHR) the 10th December 1948, an instrument that proclaims both civil and political rights and economic, social and cultural rights. The UDHR has been defined as an "authorized interpretation" of the human rights provisions of the UN Charter[38] and, therefore, the UN Charter and the UDHR must be read jointly when trying to identify and to define the specific human rights obligations of the UN and its Member States.

The role of international cooperation in the enjoyment of human rights has also been emphasized by the UDHR, especially in the field of ESC rights. Article 22 refers to "national efforts and international co-operation" as necessary for the realization of the right to social security, and economic, social and cultural rights.

A crucial provision from the point of view of the role of international cooperation in the promotion of human rights and transnational human rights obligations is Article 28 of the UDHR, a provision that has not received much subsequent attention[39]. This article is said to encompass the so-called *Structural Approach to Human Rights*, since it points to the removal of the structural obstacles, both internal and international, that impede the full realization of all human rights[40]. According to this provision, "everyone is entitled to a social and international order in which the rights and freedoms set forth in this

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[37] *United Nations Millennium Declaration*, Resolution adopted by the General Assembly, UN Doc. 55/2, 18 September 2000, para. 2.

[38] See ORAA, J.: "The Universal Declaration of Human Rights", in GOMEZ ISA, F. and DE FEYTER, K. (Eds.): *International Protection…*, *op. cit*., pp. 121 and ff.

[39] It is very significant that, in the International Covenants of 1966, there is no mention of Article 28, the provision which relates the enjoyment of human rights to the establishment of a particular social and international order. Not surprisingly, this Article is in the origin of the emergence of the third generation of human rights in the 70s, in particular with regard to the right to development. In this sense, the Preamble of the Declaration on the right to development includes an explicit reference to the wording of Article 28 of the UDHR. Article 28 has been defined as the "embryo" of the right to development, EIDE, A.: "Economic, Social and Cultural Rights as Human Rights", in EIDE, A; KRAUSE, C. and ROSAS, A. (Eds.): *Economic, Social and Cultural Rights. A Textbook*, Martinus Nijhoff Publishers, Dordrecht, 1995, p. 39.

[40] Concerning the *Structural Approach to Human Rights* and the importance of both an internal and an international order for an effective realisation of human rights, see VAN BOVEN, T.: "Human Rights and Development. Rhetorics and Realities", in *Festschrift für Felix Ermacora*, E. Verlag, Strasbourg, 1988, pp. 575-587; GALTUNG, J.: *Human Rights in another key*, Polity Press, Cambridge, 1994, p. 134. The ComESCR has declared that it is "conscious of the *formidable structural and other obstacles* impeding the full implementation" of the right to education in many States parties (emphasis added), General Comment nº 13, *The right to education (Article 13 of the Covenant*), UN Doc. E/C.12/1999/10, 8 December 1999, para. 2.

Declaration can be fully realized". It is interesting to note that the *Limburg Principles on the Implementation of the ICESCR*[41] made an explicit reference to the article under analysis. As stated in paragraph 30 of the Limburg Principles, "international co-operation and assistance must be directed towards the establishment of a social and international order in which the rights and freedoms set forth in the Covenant can be fully realized".

In sum, the UDHR also recognizes the essential role to be played by international cooperation as far as the realization of ESC rights is concerned, although we have to admit that adds little to the elucidation of the specific meaning and of the concrete practical implications of the term.

Most of the scholars advocate that at least a significant part of the rights enshrined in the UDHR, especially in the realm of civil and political rights, have become international customary law[42]. This means that all States of the international community would be bound by those norms, both territorially and extraterritorially. Along the same lines, the International Court of Justice (ICJ) has found that some of the most basic human rights norms have acquired the character of *obligations erga omnes* and, therefore, they can be considered as *ius cogens norms*, the highest category of norms at international level[43]. Among these norms that have become *ius cogens* the ICJ has included the norms that prohibit genocide, slavery and slave trade, racial discrimination, torture[44], and, more recently, the right to self-determination[45]… But, as we can clearly

[41] This relevant Principles were adopted in the framework of a meeting of experts convened by the Faculty of Law of the University of Limburg (Maastricht, the Netherlands), the International Commission of Jurists and the Urban Morgan Institute for Human Rights, University of Cincinnati (Ohio, US), 2-6 June 1986, UN Doc. E/CN.4/1987/17, Annex. The Principles can also be found in *Human Rights Quarterly*, Vol. 9, 1987, pp. 122-135. On the occasion of the 10th Anniversary of the Limburg Principles, another group of experts met in Maastricht (22-26 January 1997) to elaborate on the Limburg Principles as regards the nature and scope of violations of ESC rights and appropriate responses and remedies. They adopted formally the *Maastricht Guidelines on Violation of ESC rights*.

[42] INTERNATIONAL LAW ASSOCIATION: "Final Report on the Status of the Universal Declaration of Human Rights in National and International Law", *ILA Report of the Sixty-Sixth Conference*, Buenos Aires (Argentina), 1994, pp. 527 and ff. In this final report there is a fairly complete study of the incorporation of the UDHR into national laws and constitutions, as well as jurisprudential references to it.

[43] According to Article 53 of the Vienna Convention on the Law of Treaties, "a treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character". At the same time, given the crucial importance of these norms, they have a retroactive effect, since, as stated in Article 64 of the Vienna Convention, "if a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates".

[44] Barcelona Traction Case, *CIJ Recueil*, 1970.

[45] The opinion of the ICJ in the East Timor Case (*ICJ Recueil*, 1995) is worth mentioning. It reads as follows: "in the Court's view, Portugal's assertion that the right of peoples to self-determination, as it evolved from the Charter and from United Nations practice, has an *erga omnes* character, is irreproachable. The principle of self-determination of peoples has been recognized by the United Nations Charter and in the jurisprudence of the Court…; it is one of the essential principles of contemporary international law". An analysis of the scope of the right to self-determination of peoples in contemporary

observe, the category of *ius cogens* norms is basically applied to the most fundamental civil and political rights, being much more doubtful that this category might be applicable to ESC rights.

4. Article 103 of the UN Charter

An interesting and far-reaching reflection on the hierarchy and legal status of the principle of international cooperation and of International Human Rights Law can be made in connection with Article 103 of the UN Charter, that establishes the prevalence of legal obligations arising from the Charter over any other international agreement. According to this provision,

> "in the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, *their obligations under the present Charter shall prevail*" (emphasis added).

Although the Committee has not referred explicitly to Article 103 of the UN Charter, on several occasions the ComESCR has reminded States negotiating international agreements that they should take steps to ensure that these instruments do not adversely impact upon economic, social and cultural rights[46]. In the context of the right to education, the Committee has proclaimed that "States parties have an obligation to ensure that their actions as members of international organizations, including international financial institutions, take due account of the right to education"[47]. On the other hand, the IFIs themselves and the States participating in the decision-making of these institutions should also take into consideration in its programmes and policies its consequences in terms of the enjoyment of basic rights. In this sense, the UN Committee on the Rights of the Child "encourages states parties and the IMF, the World Bank and regional financial institutions or banks to take carefully into account the rights of children… when negotiating loans or programmes"[48].

The main problem with the interpretation of Article 103 and its legal and practical consequences is, once again, the scope of the human rights obligations that emanate from the UN Charter and its subsequent developments. While there is an emerging consensus on its applicability to the most basic civil and political rights, many doubts arise when trying to apply this norm to economic, social and cultural rights. Despite the

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International Law in GOMEZ ISA, F.: "El derecho de autodeterminación en el Derecho Internacional contemporáneo", in *Derecho de autodeterminación y realidad vasca*, Servicio Central de Publicaciones del Gobierno Vasco, Vitoria-Gasteiz, 2002, pp. 267-318.

[46] See General Comment 12, *The right to adequate food (Article 11 of the Covenant*), UN Doc. E/C.12/1999/5, 12 May 1999, para. 41; General Comment 14, *The right to the highest attainable standard of health (Article 12 of the Covenant*), UN Doc. E/C.12/2000/4, 11 August 2000, para. 39 and General Comment 15, *The right to water (Articles 11 and 12 of the ICESCR*), UN Doc. E/C.12/2002/11, 20 January 2003, para. 60.

[47] General Comment 13, *The right to education.…*, para. 56.

[48] *Day of General Discussion, The Private Sector as Service Provider and its Role in Implementing Child Rights*, UN Doc. CRC/C/121, 20 September 2002, p. 21.

reiteration of the proclamation of the principle of indivisibility of all human rights[49], we are obliged to recognize that the legal status and the development of second generation human rights are quite different in comparison to civil and political rights. Economic, social and cultural rights are less developed conceptually, institutionally and jurisprudentially, being doubtful that they have become customary international law. This is one of the main problems when trying to apply ESC rights extraterritorially. Much more efforts and work need to be done for clarifying the nature, content and scope, and for specifying the practical implications, of international obligations in the field of economic, social and cultural rights.

Taking into account this restrictive approach to the customary nature of ESC rights, Skogly and Gibney have defended that these norms "carry mainly negative obligations"[50]. This would mean that while all States of the international community have the obligation not to interfere, not to violate ESC rights in other countries, that is not the case with the positive elements of these rights. This reasoning has been applied by the mentioned authors to two of the core ESC rights. Therefore, "the right to food and the right to life may have customary international law elements…, States are under an obligation not to deliberately starve people by removing their food supply. However, the more positive elements of these rights, such as the obligation to ensure that people have access to food… may not be of a customary nature"[51].

In conclusion, there seems to be an emerging consensus about the customary nature of a negative obligation of all States of the international community to respect ESC rights even when they take actions that have an impact outside their territory, while it is much more difficult to affirm the customary character of the international obligation to protect and, above all, the obligation to fulfil ESC rights.

5. Human Rights treaties

The principal treaties in the domain of ESC rights (ICESCR, CRC, and DC) include a considerable number of references to international assistance and cooperation for their realization, thus opening the door to transnational obligations in the field of ESC rights.

A) The International Covenant on Economic, Social and Cultural Rights.

Unlike treaties dealing with civil and political rights, the ICESCR does not contain a jurisdiction clause[52]. Therefore, the realization of ESC rights is not restricted to persons

[49] This principle has been incorporated in many international instruments, from the UN Charter and the UDHR to the most recent Vienna Declaration and Plan of Action. According to the Vienna Declaration, "all human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis", *Vienna Declaration and Programme of Action*, World Conference on Human Rights, Vienna, from 14th to 25th June 1993, A/CONF.157/23, 12 July 1993, Part I, para. 5.

[50] SKOGLY, S.I. and GIBNEY, M.: "Transnational Human Rights Obligations"…, *op. cit*., p. 788.

[51] *Ibidem*, p. 788.

[52] Article 2.1 of the ICCPR establishes 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

within the territory and under the jurisdiction of a State party. Moreover, several provisions of the ICESCR envisage international obligations for the realization of ESC rights. First of all, the Preamble makes a proclamation of the principle of *universality* of all human rights when it recalls "the obligation of States under the Charter of the United Nations to promote universal respect for, and observance of, human rights and freedoms". This is an important statement, since States have to promote the universality of not only civil and political rights (as it is usually the case), but also of economic, social and cultural rights.

However, the key provision in terms of international human rights obligations is Article 2.1, in which international assistance and cooperation are explicitly mentioned. According to it,

> "each State party to the present Covenant undertakes to take steps, individually and through *international assistance and co-operation*, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant…" (emphasis added).

Although Article 2.1 makes an important explicit recognition of international obligations in the field of ESC rights[53], we are forced to share critical Craven´s view in the sense that this provision is "fairly unsatisfactory…, making it virtually impossible to determine the precise nature of the obligations"[54]. The reference to international assistance and cooperation for the realization of ESC rights remain general, vague and imprecise, adding little to specify the general references to international cooperation of the UN Charter and related instruments.

Much more precise and, somewhat, stronger is Article 11 in the context of the right to an adequate standard of living, including adequate food, clothing and housing. Paragraph 1 of this provision mentions "the *essential importance* of international co-operation based on free consent" (emphasis added) for the realization of these rights. As we can see, this article makes a qualification of the role of international cooperation, a role that is "essential". A much higher degree of specification can be found in paragraph

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recognized in the present Covenant…" (emphasis added). Compare also respective Articles 1 of the European Convention on Human Rights and of the American Convention on Human Rights.

[53] Article 1.2, in the context of the recognition of the right to self-determination of peoples, also refers explicitly to international cooperation, but in this case qualifying the kind of cooperation with the adjective "economic". As stated in this provision, "all peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of *international economic co-operation*… In no case may a people be deprived of its own means of subsistence" (emphasis added). There seems to be an apparent contradiction between this Article 1.2 and other references in the Covenant to the need of international cooperation with Article 25. This latter provision reads as follows: "Nothing in the present Covenant shall be interpreted as impairing the inherent right of all peoples to enjoy and utilize freely their natural wealth and resources". This article has to be interpreted in light of the post-colonial context in which the Covenant was adopted. Countries from the South wanted to firmly affirm their right to permanent sovereignty over their natural resources (compare the GA resolution 1803 (XVII) on Permanent Sovereignty over Natural Resources). This provision "should not be read to detract from an obligation to provide assistance inferable from other provisions in the Covenant, CRAVEN, M.: *The International Covenant on Economic…, op. cit.*, p. 147.

[54] CRAVEN, M.: *The International Covenant on Economic…, op. cit.*, p. 151.

2, in the framework of the right to be free from hunger. Apart from a general reference to international co-operation, it emphasises the need of "specific programmes" for the realization of the right to food. These programmes must be aimed at improving "methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems…", and at ensuring "an equitable distribution of food supplies in relation to need". If we carefully observe this provision, we come to the conclusion that it elaborates specific guidelines that should be followed when entering into international cooperation for the realization of the right to food.

Article 23 of the Covenant makes an indicative enumeration of the types of international action that may help to achieve ESC rights[55], but it does not intend to elaborate an exhaustive list. The international action foreseen in Article 23 "includes such methods as the conclusion of conventions, the adoption of recommendations, the furnishing of technical assistance and the holding of regional meetings and technical meetings for the purpose of consultation and study…"[56].

We have already seen that the ComESCR, based on the UN Charter, well-established principles of International Law and on the relevant provisions of the Covenant, has identified international cooperation for development and thus for the realization of ESC rights as "an obligation of all States"[57]. Although relevant, this statement by the Committee does not help much to clarify the nature, content and scope of this international obligation.

In conclusion, it can be sustained that the ICESCR provides a solid legal basis for transnational obligations in the field of ESC rights. The problem, once again, is that the proclamations remain vague and imprecise, in need of much more specification and further clarification.

B) The Convention on the Rights of the Child and its Optional Protocols

A significant number of provisions of the CRC and its Optional Protocols contain explicit references to the importance of international cooperation for the realization of the rights of the child and to the specific needs of developing countries in this regard.

[55] Article 22 of the ICESCR gives the ECOSOC the opportunity of bringing "to the attention of other organs of the United Nations, their subsidiary organs and specialized agencies concerned with the furnishing of technical assistance any matters… which may assist such bodies in deciding… on the advisability of international measures likely to contribute to the effective progressive implementation of the present Covenant". This is an important provision, since it offers the ECOSOC the capacity to bringing to the attention of, for example, the Bretton Woods Institutions any international measure that might be taken for an adequate implementation of ESC rights, something that is much needed.

[56] For a comprehensive understanding of this provision, see General Comment nº 2 on International Technical Assistance Measures (article 22 of the Covenant), UN Doc. E/1990/23. See also ALFREDSSON, G.: "Technical Assistance and Advisory Services", in EIDE, A; KRAUSE, C. and ROSAS, A. (Eds.): *Economic, Social and Cultural Rights…*, *op. cit.*, pp. 415-419.

[57] General Comment nº 3, The nature of States parties Obligations…, *op. cit.*, para. 14.

The inclusion of repeated references to international cooperation in the CRC "was never the subject of huge controversy as a matter of principle" [58]. All States were aware of the need of international cooperation for an adequate implementation of the Convention, in particular in the South.

The first mention to international cooperation appears in the final preambular paragraph, in which the States parties recognize "the importance of international co-operation for improving the living conditions of children in every country, in particular in the developing countries". As we can see, not only the importance of international cooperation is recognized, but also the special needs of developing countries, something that created some discomfort to the US delegation negotiating the Convention.

Something that marks a significant difference with Article 2.1 of the ICESCR is that the CRC contains a jurisdiction clause. According to Article 2.1 of the CRC, "States parties shall respect and ensure the rights set forth in the present Convention to each child *within their jurisdiction*…" (emphasis added). This may be explained because the CRC also recognizes civil and political rights, not only ESC rights. That is why Article 4 of the CRC establishes that "with regard to economic, social and cultural rights, States parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation", without any mention to jurisdictional issues. As we can easily observe, this provision is very similar to Article 2.1 of the ICESCR.

Other provisions of the CRC also make explicit references of the need to encourage international cooperation for an adequate implementation of the relevant rights. In this sense, I would like to underline the utmost importance of, among others, Articles 17.b (access to information and material)[59]; 22.2 (children seeking for refugee status or children who are considered a refugee already)[60]; 23.4 (mentally or physically disabled children)[61]; 24.4 (the right of children to the enjoyment of the highest attainable standard of health)[62]; 28.3 (right to education)[63]; 34 (protection of children from all forms of sexual exploitation or sexual abuse)[64]; and procedural Article 45.

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[58] VANDENHOLE, W.: "Economic, Social and Cultural Rights in the CRC: Is There a Legal Obligation to Cooperate Internationally for Development?", *International Journal of Children's Rights*, Vol. 17, 2009.

[59] States parties shall "encourage international co-operation in the production, exchange and dissemination of such information and material…".

[60] In order to guarantee that these children receive "appropriate protection and humanitarian assistance in the enjoyment of applicable rights" (Article 22.1), States parties "shall provide, as they consider appropriate, co-operation in any efforts by the United Nations and other competent intergovernmental organizations or non-governmental organizations… to protect and assist such a child and to trace the parents or other members of the family…".

[61] "States parties shall promote, *in the spirit of international co-operation*, the exchange of information in the field of preventive health care and of medical, psychological and functional treatment of disabled children… In this regard, particular account shall be taken of *the needs of developing countries*" (emphasis added).

[62] According to Article 24.4, "States parties undertake to promote and encourage international co-operation with a view to achieving progressively the full realisation of the right recognised in the present article. In this regard, particular account shall be taken of the needs of developing countries".

The Optional Protocol to the CRC on the involvement of children in armed conflicts[65] also recognizes the importance of international cooperation for an adequate implementation of the provisions of the Protocol[66]. In the Preamble, the States parties to the Protocol declared themselves "*convinced* of the need to strengthen international cooperation in the implementation of this Protocol, as well as the physical and psychological rehabilitation and social reintegration of children who are victims of armed conflict". In the operative part of the Protocol, the key provision is Article 7, which establishes in paragraph 1 that "States parties shall cooperate in the implementation of the present Protocol…, including through technical cooperation and *financial assistance*" (emphasis added). According to paragraph 2, "States parties in a position to do so shall provide such assistance through existing multilateral, bilateral or other programmes, or, *inter alia*, through a voluntary fund…". As we can observe, this Optional Protocol is much more explicit in the requirement of financial assistance and, at the same time, determines a very clear *differentiation of responsibilities*, since the obligation to provide financial assistance is specifically addressed to those States that are "in a position to do so"[67]. Unfortunately, the level of vagueness of this provision is still high, and, therefore, it is difficult to deduce precise and concrete legal obligations of assistance on the part of those States that are "in a position to do so".

The Optional Protocol to the CRC on the sale of children, child prostitution and child pornography[68] follows the basic lines established by the other Protocol just analysed with regard to international cooperation, although there is a provision that may open a window of opportunity for addressing the root causes of the violations of the rights of the child. While recognizing in the Preamble "the importance of strengthening global partnership among all actors", Article 10[69] contains a far-reaching provision that needs to be carefully explored. In light of Article 10.3, "States parties shall promote the

[63] "States parties shall promote and encourage international co-operation in matters relating to education... In this regard, particular account shall be taken of the needs of developing countries".

[64] "... States parties shall in particular take all appropriate national, bilateral and multilateral measures to prevent: a) the inducement or coercion of a child in any unlawful sexual activity; b) the exploitative use of children in prostitution...; c) the exploitative use of children in pornographic performances and materials".

[65] Adopted by General Assembly resolution 54/263, adopted without a vote on 25 May 2000. The Protocol entered into force on 12 February 2002.

[66] I have studied in more detail the role of international cooperation under this Optional Protocol in GOMEZ ISA, F.: "La participación de los niños en los conflictos armados. El Protocolo Facultativo a la Convención sobre los Derechos del Niño", *Cuadernos Deusto de Derechos Humanos*, nº 10, 2000, p. 71.

[67] Something that has to be emphasised is that no State party to the Protocol has made either a reservation or a declaration on the provisions dealing with international cooperation.

[68] Adopted by the General Assembly resolution 54/263, adopted without a vote on 25 May 2000. It entered into force on 18 January 2002.

[69] Article 10.1 reads as follows: "States parties shall take the necessary steps to strengthen international cooperation by multilateral, regional and bilateral arrangements for the prevention, detection, investigation, prosecution and punishment of those responsible for acts involving the sale of children, child prostitution, child pornography and child sex tourism…". Paragraph 4 of Article 10 also establishes a differentiation of responsibility. According to this provision, "*States parties in a position to do* so shall provide *financial*, technical or other assistance through existing multilateral, regional, bilateral or other programmes" (emphasis added). Again, we find a reference to financial assistance, but the reference to a voluntary fund is missing in this Protocol.

strengthening of international cooperation in order to address the root causes, such as poverty and underdevelopment, contributing to the vulnerability of children to the sale of children, child prostitution, child pornography and child sex tourism". Although a much stronger language would have been desirable (to "promote the strengthening" is a very light wording), "the fact that Northern States eventually accepted this obligation to be included, and in the operative part of the Protocol, is highly significant"[70]. Besides, no reservations and declarations have been made with regard to the provisions on international cooperation.

After the analysis of the relevant provisions of the CRC and its Optional Protocols, we can conclude that there is a wide recognition of the necessity of international cooperation for an effective implementation of the rights of the child, the principle of differentiation of responsibility is also recognized, and also the explicit inclusion of financial assistance as one of the principal means to promote international cooperation. The problem, once again, is when it comes to specify the international legal obligations arising out from these instruments and to clarify its scope, especially the international obligation with regard to the provision of financial assistance for the realization of the rights of the child.

The Committee on the Rights of the Child has tried to shed some light on these issues through its General Comments, Days of General Discussion and Concluding Observations on the reports submitted by States parties to the Convention. The Committee has very recently devoted a Day of General Discussion to the issue of "Resources for the Rights of the Child-Responsibility of States" (2007). In the report on this Day of General Discussion, the Committee has affirmed that it

> "believes that children's rights are a *shared responsibility* between the developed and the developing countries. States parties must *respect* and *protect* economic, social and cultural rights of children in all countries with no exceptions, and take all possible measures to *fulfil* these rights –whenever they are in a position to do so- through development cooperation" (emphasis added)[71].

In my view, this statement by the Committee is a very far-reaching one, since it firmly proclaims that all States have international obligations to respect and to protect the ESC rights of the child everywhere, and, at the same time, it also defends the existence of an obligation on the part on those States that are in a position to do so to take all possible measures to fulfil these rights through development cooperation. In this sense, the Committee has urged States "to meet internationally agreed targets, including the United Nations target for international development assistance of 0,7 per cent of gross domestic product"[72]. But the Committee not only addresses its comments and recommendations with regard to international obligations to developed States; recipient States also have to assume certain obligations as parties to the CRC. The Committee

[70] VANDENHOLE, W.: "Economic, Social and Cultural Rights in the CRC…", *op. cit.*

[71] *Day of General Discussion on "Resources for the Rights of the Child-Responsibility of States"*, 21 September 2007, para. 51.

[72] General Comment nº 5, *General measures of implementation of the Convention on the Rights of the Child (arts. 4, 42, and 44, para. 6*), CRC/GC/2003/5, 27 November 2003, para. 61.

"encourages States parties that receive international aid and assistance to allocate a substantive part of that aid specifically to children"[73].

C) The Convention on the Rights of Persons with Disabilities (the Disability Convention, DC)

The issue of the role of international cooperation in the realization of the rights of persons with disabilities was also present throughout the whole process of discussion and negotiation of the DC. In spite of the traditional divergent views between developed and developing countries, in the end we can affirm that the DC goes beyond the provisions of the CRC and the ICESCR with regard to international cooperation.

Unlike the CRC, the DC does not contain a jurisdiction clause. This clause is included in the Optional Protocol to the DC that was adopted to allow for an individual complaint mechanism[74].

Similarly to the CRC, Article 4 of the DC, the provision that deals with the general obligations under the Convention, makes an specification concerning the ESC rights of persons with disabilities. According with paragraph 2 of Article 4, "with regard to economic, social and cultural rights, each State party undertakes to take measures to the maximum of its available resources and, where needed, within the framework of international cooperation, with a view to achieving progressively the full realization of these rights...". As we can see, this provision clearly resembles Article 4 of the CRC.

The main innovation of the DC can be found in Article 32, a single provision devoted exclusively to the issue of international cooperation. First of all, States parties "recognize the importance of international cooperation and its promotion, in support of national efforts for the realization of the purpose and objectives of the present Convention, and will undertake appropriate and effective measures in this regard…". The relevant measures that States can take include, *inter alia*, the following: a) "ensuring that international cooperation, including international development programmes, is inclusive and accessible to persons with disabilities; b) facilitating and supporting capacity-building…, training programmes…; c) facilitating cooperation in research and access to scientific and technical knowledge; d) providing, as appropriate, technical and economic assistance… and through the transfer of technologies". As we can see, the DC is recognizing an international obligation to respect incumbent upon all States that engage in international aid programmes. The idea of *disability mainstreaming* in international development cooperation is one of the core principles of the DC, as illustrated by the reference found in Article 32.a).

As a conclusion, I fully share the views expressed by Wouter Vandenhole on the overall significance of the Article 32 just analysed. According to his qualified opinion, "the inclusion of a stand-alone article on international cooperation is an important step

[73] *Ibidem*, para. 61.
[74] See Article 1 of the Optional Protocol.

forward towards explicit recognition of third State obligations". And this step forward may positively influence the scope of the other human rights treaties, since it "can in turn reinforce a third States obligations conducive interpretation of the CRC (and the ICESCR)"[75].

III. INTERNATIONAL OBLIGATIONS IN THE FIELD OF ESC RIGHTS

Both the doctrine[76] and the ComESCR have continuously referred to the existence of a tripartite scheme of obligations (obligation to *respect*, to *protect* and to *fulfil*) arising from the ICESCR (and related instruments dealing with ESC rights) that can also be applied in order to determine the content and scope of international obligations.

1. International obligation to respect

The *international obligation to respect* requires that States parties refrain from interfering directly or indirectly with the enjoyment of ESC rights in other countries. The ComESCR has affirmed on several occasions this duty of States parties to the Covenant. For example, in the context of the right to food, the Committee, while recognizing "the essential role of international cooperation"[77] and the "commitment to take joint and separate action to achieve the full realization of the right", has explicitly underlined that "States parties should take steps *to respect the enjoyment of the right to food in other countries*"[78] (emphasis added). Specifically, "States parties should refrain at all times from food embargoes or similar measures which endanger conditions for food production and access to food in other countries. Food should never be used as an instrument of political and economic pressure"[79].

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[75] VANDENHOLE, W.: "Economic, Social and Cultural Rights in the CRC…", *op. cit.*

[76] The Maastricht Guidelines on Violations of ESC rights have underlined that ESC rights "impose three different types of obligations on States: the obligations to *respect*, *protect* and *fulfil*", para. 6 (emphasis added). A systematic analysis of this tripartite typology is developed by SEPULVEDA, M.: *The Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights*, Intersentia-Hart, Antwerp, 2002.

[77] It is noteworthy that the Committee relates this reference to international cooperation with the "spirit of article 56 of the Charter of the United Nations".

[78] General Comment 12, *The right to adequate food (art. 11*), UN Doc. E/C.12/1999/5, 12 May 1999, para. 36. Identical statements appear in other General Comments, in General Comment 14, *The right to the highest attainable standard of health (art. 12)*, UN Doc. E/C.12/2000/4, 11 August 2000, para. 39, and General Comment 15, *The right to water (art. 11 and 12*), UN Doc. E/C.12/2002/11, 20 January 2003, para. 31.

[79] General Comment 12, *The right to adequate food…, op. cit.*, para. 37. See, similarly, General Comment 14, *The right to the highest attainable standard of health…, op. cit.*, para. 41, and General Comment 15, *The right to water…, op. cit.*, para. 32. In this sense, the Committee has reflected extensively on the issue of economic, sanctions and their impact on the enjoyment of ESC rights, in General Comment 8, *The relationship between economic sanctions and respect for economic, social and cultural rights*, UN Doc. E/C.12/1997/8, 12 December 1997. On this issue see CRAVEN, M.: "Human Rights in the realm of order: sanctions and extraterritoriality", in COOMANS, F. and KAMMINGA, M.T. (Eds.): *Extraterritorial Application of Human Rights Treaties…, op. cit.*, pp. 233-257, and LIJNZAAD, L.: *Ibidem*, pp. 259-270.

The international obligation to respect is also applicable to development cooperation activities promoted by developed States in the South. Development programmes must be aimed at a further enjoyment of all human rights. As the ComESCR has rightly pointed out, "development cooperation activities do not automatically contribute to the promotion of respect for ESC rights. Many activities undertaken in the name of development have subsequently been recognized as ill-conceived and even counter-productive in human rights terms"[80]. In order to avoid the eventual adverse effects of development programmes in the satisfaction of ESC rights, a *human rights impact assessement* be required of major development cooperation activities[81].

The international obligation to respect ESC rights is also incumbent upon the United Nations and its Specialised Agencies, in particular upon the International Financial Institutions (IFIs)[82]. In the view of the ComESCR, the IFIs, notably the IMF and the World Bank, should pay greater attention of relevant ESC rights in their lending policies and credit agreements and in international measures to deal with the debt crisis such as structural adjustment programmes[83].

2. International obligation to protect

The international obligation to protect requires States parties to prevent third parties from interfering in any way with the enjoyment of ESC rights. The ComESCR has clarified that third parties include "individuals, groups, corporations and other entities as well as agents acting under their authority"[84]. Therefore, the international obligation to protect refers to the responsibility of a States parties for the conduct of non-State actors who act extraterritorially or whose conduct has extraterritorial effect. In light of the Maastricht Guidelines on Violations of ESC Rights,

> "the obligation to protect includes the State's responsibility to ensure that private entities or individuals, including transnational corporations over which they exercise jurisdiction, do not deprive individuals of their economic, social and cultural rights. States are responsible for violations of economic, social and cultural rights that result from their diligence to exercise due diligence in controlling the behaviour of such non-State actors"[85].

[80] General Comment 2, *International Technical Assistance Measures…, op. cit.*, para. 7.
[81] *Ibidem*, para. 8.
[82] A detailed analysis of the human rights obligations of IFIs in DE FEYTER, K.: "The International Financial Institutions and Human Rights. Law and Practice", in GOMEZ ISA, F. and DE FEYTER, K. (Eds.): *International Protection…, op. cit.*, pp. 561-592.
[83] General Comment 12, *The right to adequate food…, op. cit.*, para. 41; General Comment 13, *The right to education…, op. cit.*, para. 60; General Comment 14…, *op. cit.*, para. 64; General Comment 15…, *op. cit.*, para. 60.
[84] General Comment 15…, *op. cit.*, para. 23.
[85] Para. 18. The human rights obligations of non-State actors is an issue that is receiving increasing attention both from a practical and from an academic perspective, see ALSTON, P. (Ed.): *Non-State Actors and Human Rights*, Oxford University Press, Oxford, 2005; CLAPHAM, A.: *Human Rights Obligations of Non-State Actors*, Oxford University Press, Oxford, 2006; JAGERS, N.: *Corporate Human Rights Obligations: in search of accountability*, Intersentia-Hart, Antwerp, 2002.

The ComESCR has stressed that States parties are under the obligation "to prevent third parties from violating" the right to health "in other countries, if they are able to influence these third parties by way of legal and political means, in accordance with the Charter of the United Nations and applicable international law"[86]. In the same line, the Committee has emphasized that States parties have to create an environment conducive to the assumption by non-State actors of their human rights responsibilities. In view of the Committee, "while only States are parties to the Covenant and thus ultimately accountable for compliance with it, all members of society –individuals, including health professionals, families, local communities, intergovernmental and non-governmental organizations, civil society organizations, as well as the private business sector- have responsibilities regarding the realization of the right to health. States parties should therefore provide an environment which facilitates the discharge of these responsibilities"[87]. In the context of the right to water, the ComESCR has defended 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. Where States parties can take steps to influence other third parties to respect the right, through legal or political means, such steps should be taken in accordance with the Charter of the United Nations and applicable international law"[88].

Another aspect of the international obligation to protect is when States parties act as members of International Organisations[89]. The Maastricht Guidelines on Violations of ESC Rights have paid attention to this issue, and have affirmed that

> "the obligations of States to protect economic, social and cultural rights extend also to their participation in international organizations, where they act collectively. It is particularly important for States to use their influence to ensure that violations do not result from the programmes and policies of the organizations of which they are members. It is crucial for the elimination of violations of economic, social and cultural rights for international organizations, including international financial institutions, to correct their policies and practices so that they do not result in deprivation of economic, social and cultural rights…"[90].

Along the same lines, on a number of occasions the ComESCR has referred to the obligation of States parties acting in the framework of International Organisations to pay greater attention to the realization of ESC rights, trying to influence positively their policies. The Committee has affirmed that "States parties have an obligation to ensure that their actions as members of international organizations take due account of the right to health. Accordingly, States parties which are members of international financial institutions, notably the International Monetary Fund, the World Bank, and regional

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[86] General Comment 14..., *op. cit*., para. 39.
[87] *Ibidem*, para. 42. Compare SKOGLY, S.I.: "Economic and Social Human Rights, Private Actors and International Obligations", in ADDO, M.K. (Ed.): *Human Rights Standards and the Responsibility of Transnational Corporations*, Kluwer Law International, Dordrecht, 1999, pp. 239-258.
[88] General Comment 15…, *op. cit*., para. 33.
[89] Compare KUNNEMANN, R.: "Extraterritorial Application of the International Covenant on Economic, Social and Cultural Rights", in COOMANS, F. and KAMMINGA, M.T. (Eds.): *Extraterritorial Application…*, *op. cit*., pp. 213 and ff.
[90] Para. 19.

development banks, should pay greater attention to the protection of the right to health in influencing the lending policies, credit agreements and international measures of these institutions"[91]. When considering the periodic reports, the Committee has specifically dealt with this issue. For example, in the Concluding Observations on Germany the Committee "encourages the State party, as a member of international financial institutions, in particular the IMF 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"[92] (emphasis added). This reference to "to do all it can" has led Magdalena Sepúlveda to defend that "it is apparent that the Committee implies more than merely a negative obligation to refrain from designing or supporting policies or programmes that would violate the Covenant but, rather, a much more active role aimed at the implementation of the Covenant, particularly the obligation to assist and cooperate with other States"[93].

Although this obligation to protect ESC rights in the framework of International Organisations is incumbent upon all States parties, it is evident that developed States, especially those taking part in the governing bodies of the IFIs, have a higher degree of responsibility[94]. The Committee has also implicitly referred to this differentiation of responsibilities when examining the reports submitted by States parties.

3. International obligation to fulfil

The international obligation to fulfil requires States parties to adopt the necessary measures aimed at enabling the full realization of ESC rights in other countries. According to the ComESCR, the obligation to fulfil can be disaggregated into the obligations to *facilitate*, *promote* and *provide*[95]. Although the Committee has made considerable progress in the process of identifying and specifying some fulfillment international obligations, nonetheless we have to recognize that much more reflection and much work needs to be done in order to determine the exact legal nature and the content and scope of this type of obligations.

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[91] General Comment 14..., *op. cit.*, para. 39. See also General Comment 13…, *op. cit.*, para. 60, and General Comment 15…, *op. cit.*, para. 36.

[92] UN Doc. E/C.12/1/Add.68, 2001, para. 31. Identical wording appears in the Concluding Observations on Finland (UN Doc. E/C.12/1/Add.52, 2000, para. 24), on Belgium (UN Doc. E/C.12/1/Add.54, 2000, para. 31) on France (UN Doc. E/C.12/1/Add.72, 2001, para. 32), on Japan (UN Doc. E/C.12/1/Add.67, 2001, para. 37), on Sweden (UN Doc. E/C.12/1/Add.70, 2001, para. 24), on Ireland (UN Doc. E/C.12/1/Add.77, 2002, para. 37) and on the United Kingdom (UN Doc. E/C.12/1/Add.79, 2002, para. 26).

[93] SEPÚLVEDA, M.: "Obligations of 'International Assistance and Cooperation' in an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights", *Netherlands Quarterly of Human Rights*, Vol. 24, nº 2, 2006, p. 283.

[94] The Maastricht Guidelines on Violations of ESC Rights has referred to a distinction between "Member States of such organizations, individually or through the governing bodies" and "countries that lack the resources to resist the pressure brought by international institutions on their decision-making affecting economic, social and cultural rights", para. 19.

[95] General Comment 15..., *op. cit*., para. 25; Draft General Comment 20, *The Right to Social Security (art. 9*), UN Doc. E/C.12/GC/20/CRP.1, 16 February 2006, para. 36.

The *obligation to fulfil-facilitate* requires States parties to take positive measures to assist individuals and communities to enjoy their ESC rights. This obligation to fulfil-facilitate has been specifically identified by the ComESCR in the context of the right to education. Article 14 of the ICESCR requires each State party which has not been able to secure compulsory primary education, free of charge, to undertake, within two years, to work out and adopt a detailed plan of action for its progressive implementation. In this context, the Committee has stipulated that "where a State party is clearly lacking in the financial resources and/or expertise required to 'work out and adopt' a detailed plan, the international community has a clear obligation to assist"[96]. When dealing with the right to food, the Committee has also underlined the international obligation of States to take steps "to facilitate access to food"[97], or to "facilitate access to essential health facilities, goods and services in other countries, wherever possible…"[98].

An aspect of the international obligation to fulfil-facilitate that is especially relevant has to do with the aims and objectives of development cooperation activities. We have already seen that, in light of the international obligation to respect, developed States must ensure that their development cooperation activities do not negatively impact the realization of ESC rights in the developing countries[99]. The international obligation to fulfil-facilitate would require developed States to guarantee that their development cooperation programmes are conducive to the full and effective realization of ESC rights. One of the main problems Official Development Aid (ODA) faces is that it is determined to a great extent by economic and geopolitical considerations. The qualitative dimension of development cooperation, and not only its quantitative one, is of utmost importance, and should receive much more attention both theoretically and practically. As Matthew Craven has rightly expressed, "considerable proportions of world aid go to middle-and-high-income countries; many aid programmes have a tenous link with development; and much aid is 'tied' to the donor country either in the sense of being conditional upon the operation of a trade agreement or being linked to the donor country's own firms and exporters"[100]. Only a small proportion of ODA is devoted to the least developed countries (LDCs)[101] and to the promotion of ESC rights and human priorities[102]. These are the main reasons that make a human rights-based approach to

[96] General Comment 11, *Plans of action for primary education (art. 14*), UN Doc. E/C.12/1999/4, 10 May 1999, para. 9.
[97] General Comment 12..., *op. cit*., para. 36.
[98] General Comment 14..., op. cit., para. 39.
[99] See 2.1. International obligation to respect.
[100] CRAVEN, M.: *The International Covenant on Economic…, op. cit*., p. 150.
[101] According to the Development Aid Committee of the OECD, the percentage of ODA that went to LDCs was only 0,05 per cent of the GNP of the OECD countries in 2000, OXFAM: *The Reality of Aid, 2002-2003*, Oxfam, London, 2003. United Nations recommend that developed countries allocate at least 0,15 per cent of their GNP to LDCs, a commitment that has been reiterated in the *Third International Conference on Least Developed Countries*, Brussels, 14 to 20 May 2001, A/CONF.191/11.
[102] As Kunnemann has referred to, "the OECD average for human priority expenditure is below 10% of its total ODA", KUNNEMANN, R.: "Extraterritorial Application…", *op. cit*., p. 223. In this context, much of the ODA has become what some experts and development NGOs call as "Phantom Aid". Phantom Aid can be defined as "aid that never materializes to poor countries, but is instead diverted to other purposes within the aid system", in RAJASINGHAM SENANAYAKE, D.: "The political economy of aid, conflict, and peace building in Sri Lanka", *Polity*, Vol. 3, nº 5&6, 2006, p. 8.

development cooperation urgent if these activities are to be meaningful from a human rights perspective. The ComESCR is paying an increasing attention to this issue both in its General Comments[103] and in its Concluding Observations. In this sense, the Committee, in the Concluding Observations on the report submitted by Norway, has requested this country to provide in its next periodic report information "on measures taken by the State party to ensure compliance with Covenant obligations in its international development cooperation"[104]. In the same line, the Committee has noted positively that Japan has devoted 40 per cent of its ODA "to areas related to the rights contained in the Covenant"[105]. Similarly, after the consideration of the report submitted by Sweden, the Committee "warmly welcomes the efforts of the State party with respect to the mainstreaming of human rights in bilateral and multilateral development cooperation programmes, in accordance with article 2.1 of the Covenant"[106]. After this analysis, we may conclude that there is a solid legal basis to affirm that developed States are under an obligation to orientate their development cooperation activities towards the full realization of the rights enshrined in the ICESCR.

The *obligation to fulfil-promote* obliges States parties to take steps to ensure that there is appropriate education and awareness concerning ESC rights. Although the Committee has not elaborated on this obligation in its international dimension yet, "it is safe to say that this level would require that international assistance and cooperation programmes aim to increase the awareness of Covenant rights in the recipient country and empower people to identify and claim their rights"[107].

Undoubtedly, the most controversial and disputed international obligation is the *obligation to fulfil-provide*, which requires positive action and the provision of technical and economic assistance on the part of those States that are in a position to do so. Although there is still today much resistance to accept this international obligation to fulfil-provide as a pure legal obligation by developed States, "nevertheless, specific aspects may already be legally binding"[108]. Some 20 years ago, Alston and Quinn, when reflecting on the legal nature and scope of the reference to "international assistance and cooperation" in Article 2.1 of the ICESCR, arrived at the following conclusion:

> "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

[103] General Comment 13, *The right to education…, op. cit.*, para. 60. In the framework of the right to health the Committee has emphasized that "the adoption of a human rights-based approach by the United Nations specialized agencies, programmes and bodies will greatly facilitate implementation of the right to health", in General Comment 14…, *op. cit.*, para. 64.
[104] UN Doc. E/C.12/1/Add.109, 23 June 2005, para. 25. Along the same lines, the Committee welcomed "the importance attached to human rights in the State party's Action Plan for Combating Poverty in the South towards 2015", *Ibidem*, para. 3.
[105] UN Doc. E/C.12/1/Add.67, 2001, para. 4.
[106] UN Doc. E/C.12/1/Add.70, 2001, para. 6.
[107] SEPÚLVEDA, M.: "Obligations of 'International Assistance and Cooperation' in an Optional Protocol…", *op. cit.*, p. 289.
[108] VANDENHOLE, W.: "EU and Development: Extraterritorial Obligations…", *op. cit.*, p. 96.

> 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"[109].

As we can observe, in light of the *travaux préparatoires* of the ICESCR, it is clear that developed States are not under a general legal obligation to provide official development aid[110]. On the other hand, Alston and Quinn defend that the international obligation to cooperate is not meaningless; they leave the door opened to the emergence of concrete international obligations to fulfil-provide "according to the circumstances", and to a reinterpretation of the obligations arising from the Covenant. In this sense, they accept that "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"[111](emphasis added). In my view, this is precisely the scenario in which we are today, with a considerable evolution, both legal and practical, in the field of international development cooperation. As Magdalena Sepúlveda has metaphorically suggested, "much water has passed under the bridge"[112] since this famous statement by Alston and Quinn was made.

As we well know, the remote origin of ODA leads us back to the 60s, when the process of decolonisation exerted a strong influence on the international agenda[113] and on International Law[114]. As early as in 1960, the General Assembly of the United Nations, against the background of Articles 55 and 56 of the Charter of the United Nations, recognized that "… development would be greatly aided by improving the nature and increasing the volume of the present flow of capital and the scope of technical assistance from the economically advanced countries to the under-developed countries". Taking into consideration that the present flow at that time was "inadequate", the General Assembly expressed its hope "that the flow of international assistance and capital should be increased substantially so as to reach as soon as possible *approximately 1 per cent* of the combined national incomes of the economically

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[109] ALSTON, P. and QUINN, G.: "The Nature and Scope of States Parties' Obligations…", *op. cit*., p. 191.

[110] This view is shared by Koen de Feyter. After a comprehensive analysis of the possible sources to base a legal obligation to provide ODA, he concludes that "no legal obligation exists at the universal level requiring from developed States that they commit part of their resources to realize the rights and needs of the populations of developing countries", DE FEYTER, K.: *World Development Law. Sharing Responsibility for Development*, Intersentia, Antwerp-Oxford, 2001, p. 24 and 269.

[111] ALSTON, P and QUINN, G.: *Ibidem*, p. 191.

[112] SEPÚLVEDA, M.: "Obligations of 'International Assistance and Cooperation'…", *op. cit*., p. 280.

[113] See Virally's reflections on the emergence of the so-called *ideology of development*, VIRALLY, M.: *L'Organisation Mondiale*, Armand Colin, Paris, 1972, pp. 314 and ff. Compare also CAIRE, G.: "Idéologie du développement et développement de l'idéologie", *Tiers Monde*, tome XV, nº 57, pp. 5-30.

[114] BENNOUNA, M.: "International Law and Development", in BEDJAOUI, M. (General Editor): *International Law: Achievements and Prospects*, UNESCO-Martinus Nijhoff Publishers, Dordrecht, 1991, pp. 620 and ff.

advanced countries"[115] (emphasis added). This commitment was reiterated by the General Assembly at the occasion of the launching of the First United Nations Development Decade in December 1961[116] and the Second United Nations Development Decade[117], although, at a later stage, the quantity had to be reduced to 0,7 per cent of the gross national product (GNP), given generalised non-compliance by developed States. Subsequent UN Development Decades[118] and Final Declarations of International Conferences[119] have reminded this commitment. In this sense, it is worth mentioning the reference to it in the recent Monterrey Consensus that was adopted at the International Conference for Financing of Development (2002):

> "we urge developed States that have not done so to make concrete efforts towards the target of 0,7 per cent of GNP as ODA to developing countries and 0,15 to 0,20 per cent… to least developed countries…, and underline the importance of undertaking to examine the means and time frames for achieving the targets and goals"[120].

Both the ComESCR and the Committee on the Rights of the Child have continously referred to this 0,7 target in its Concluding Observations on the reports submitted by developed States. The ComESCR has expressed its concern that the level of ODA of certain countries falls short of the UN target of 0,7 per cent of GNP[121] and, accordingly, has urged some States to review their budget allocation for international cooperation with a view to increasing their contributions in accordance with the United Nations recommendation[122] and to set a time frame within which the internationally accepted goal of 0,7 per cent will be achieved[123]. On other occasions, when the ODA "has been in decline since the 1980s", the Committee has manifested its regret[124], recommending its increase "to a level approaching the 0,7 per cent goal established by the United

[115] Resolution 1522 (XV), 15 December 1960, *Accelerated flow of capital and technical assistance to the developing countries*.
[116] Resolution 1710 (XVI), 19 December 1961, *United Nations Development Decade. A programme for international economic cooperation (I)*, and Resolution 1715 (XVI), 19 December 1961, *United Nations Development Decade. A programme for international economic cooperation (II)*.
[117] Resolution 2626 (XXV), 24 October 1970, International Development Strategy for the Second United Nations Development Decade.
[118] Resolution 35/56, 5 December 1980, *International Development Strategy for the Third United Nations Development Decade*; Resolution 45/199, 21 December 1990, *International Development Strategy for the Fourth United Nations Development Decade*.
[119] *International Conference on Population and Development*, Cairo, 5-13 September 1994, UN Doc. A/CONF.171/13 and Add.1; Report of the World Summit on Social Development, Copenhagen, 6-12 March 1995, UN Doc. A/CONF.166/9, 19 April 1995;
[120] *Monterrey Consensus*, UN Doc. A/CONF.198/11, para 42. An analysis of the Conference and its outcomes can be found in GOMEZ ISA, F.: "La Conferencia Internacional sobre la Financiación para el Desarrollo (Monterrey, marzo de 2002)", *Revista Española de Derecho Internacional*, Vol. LIV, nº 2, 2002, pp. 1028-1034.
[121] Italy, UN Doc. E/C.12/1/Add. 103, 2004, para. 15; Belgium, UN Doc. E/C.12/1/Add.54, 2000, para. 16; Finland, UN Doc. E/C.12/1/Add.52, 2000, para. 13; Germany, UN Doc. E/C.12/1/Add.68, 2001, para. 15.
[122] Finland, UN Doc. E/C.12/1/Add.52, 2000, para. 23; Ireland, UN Doc. E/C.12/1/Add.77, 2002, para. 38; Italy, UN Doc. E/C.12/1/Add.103, 2004, para. 34; Germany, UN Doc. E/C.12/1/Add.68, 2001, para. 33.
[123] Japan, UN Doc. E/C.12/1/Add.67, 2001, para. 37.
[124] France, UN Doc. E/C.12/1/Add. 72, 2001, para. 14.

Nations"[125]. Finally, the ComESCR has noted with appreciation and has welcomed that some countries allocate more than 0,7 per cent of GNP to ODA[126].

Some General Comments have also made references, however vague and general, to the international obligation to fulfil-provide. In the context of the right to food, the ComESCR has emphasized the "essential role of international cooperation" and the commitment of States parties "to take joint and separate action to achieve the full realization of the right to adequate food". With a view to implementing this right, "States parties should take steps… *to provide the necessary aid when required*"[127] (emphasis added). An specific international obligation to fulfil-provide is incumbent upon States in times of emergency[128]. In this sense, the Committee has declared that "States have a joint an individual responsibility… to cooperate in providing disaster relief and humanitarian assistance in times of emergency…"[129]. Similarly, as far as the right to education is concerned, the Committee also refers to "… the obligation of States parties in relation to the provision on international assistance and cooperation for the full realization of the right to education"[130]. In the same line, General Comment 14 affirms that "depending on the availability of resources, States should facilitate access to essential health facilities, goods and services in other countries… and provide the necessary aid when required"[131].

Moreover, the ComESCR has emphasized that the international obligation to fulfil-provide is closely linked to the general obligation to ensure the satisfaction of, at the very least, the *core content* of each of the rights recognized in the ICESCR, the minimum essential levels without which these rights are deprived of any meaning[132]. Therefore, "for the avoidance of any doubt, the Committee wishes to emphasise that it is particularly incumbent on States parties and other actors in a position to assist, to provide 'international assistance and cooperation, especially economic and technical' which enable developing countries to fulfil their core and other obligations…"[133].

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[125] *Ibidem*, para. 24.
[126] Luxembourg, UN Doc. E/C.12/1/Add. 86, 2003, para. 6; Denmark, UN Doc. E/C.12/1/Add.102, 2004, para. 5; Sweden, UN Doc. E/C.12/1/Add.70, 2001, para. 7; Norway, UN Doc. E/C.12/1/Add.109, 2005, para. 3.
[127] General Comment 12..., *op. cit.*, para. 36.
[128] On the consideration of humanitarian assistance as a human right, see ABRISKETA, J.: "The Right to Humanitarian Aid: Basis and Limitations", in *Reflections on Humanitarian Action*, Pluto Press, London, 2001, pp. 55-77.
[129] *Ibidem*, para. 38; see also para. 39 for the conditions of the provision of food aid.
[130] General Comment 13..., *op. cit.*, para. 56.
[131] General Comment 14..., *op. cit.*, para. 39. A very similar reference can be found in General Comment 15…, *op. cit.*, para 34.
[132] See CHAPMAN, A. and RUSSELL, S. (Eds.): *Core Obligations: Building a Framework for Economic, Social and Cultural Rights*, Intersentia, Antwerp-Oxford, 2002.
[133] General Comment 14…, *op. cit.*, para. 45. A similar statement appear in General Comment 15…, *op. cit.*, para. 38.

The European Union (EU) has made specific and concrete promises on financing for development, with a detailed timetable for its achievement[134]. Moreover, the Council of the EU has declared that "meeting these targets is crucial for the credibility of the EU"[135]. As far as the EU, the greatest global donor in the world, and its Member States are concerned, I share Wouter Vandenhole's view in the sense that this political commitment is "gradually evolving into a legal obligation at least not to reduce the level of spending on development cooperation, and to take all possible steps with the maximal use of available resources to reach and maintain the 0,7 per cent target as soon as possible, and at the latest at the date envisaged (2015)"[136].

Against all this background, we may conclude that, although there is no a general legally binding obligation to provide the 0,7 per cent of GNP, developed States are obliged not to reduce the level of ODA and to take concrete steps towards the goal recommended some decades ago by the United Nations, including the obligation of developed States to establish a time frame within which it will be achieved.

IV. SOME TENTATIVE CONCLUSIONS

The duty of States to cooperate internationally and, specifically, to cooperate for the protection and promotion of human rights, has a solid basis under general International Law. However, a further process of clarification and elucidation is needed in order to shed light on its content, scope and practical implications in the field of "international assistance and cooperation" aimed at the realization of ESC rights. Much more reflection and synergies are needed between the academia, practitioners and governments. While there is an emerging consensus on the legal status and content of international obligations to respect and to protect ESC rights, it is more difficult and contentious to affirm the existence of an international obligation to fulfil, especially in its fulfil-provide dimension.

[134] In the context of the Monterrey Consensus (March 2002), the EU committed to collectively provide, by 2006, at least 0,39 per cent of the EU combined Gross National Income (GNI) as ODA. On May 2005, the Council of the EU proclaimed the following commitments: "Increased ODA is urgently needed to achieve the MDGs. In the context of reaching the existing commitment to attain the internationally agreed ODA target of 0,7% ODA/GNI, the EU notes with satisfaction that its Member States are on track to achieve the 0,39% target in 2006… contained in the Barcelona commitments. At present, four out of five countries which exceed the UN target… are member States of the EU. Five other have committed to a timetable to reach this target. While reaffirming its determination to reach these targets,… Member States undertake to achieve the 0,7%ODA/GNI target by 2015…", *Conclusions of the Council*, EU Doc. 9266/05, para. 4.

[135] "Keeping Europe's promises on Financing for Development", *Conclusions of the Council*, EU Doc. 9566/07, 15 May 2007, para. 4. It is very interesting to observe that this document of the Council not only addresses the question of the quantity of the EU ODA, but also deals with issues concerning the quality and coherence of the ODA.

[136] VANDENHOLE, W.: "EU and Development: Extraterritorial Obligations…", *op. cit.*, p. 101.