CHAPTER 5
EU AND DEVELOPMENT:
EXTRATERRITORIAL OBLIGATIONS
UNDER THE INTERNATIONAL
COVENANT ON ECONOMIC, SOCIAL
AND CULTURAL RIGHTS*

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INTRODUCTION

The European Union (EU) is a global player and its aid and trade policies, amongst others, can have a significant impact on people’s living conditions in the South. That impact is not necessarily positive: EU policies may well worsen human well-being in the South. Examples include – but are not limited to – agricultural subsidies that lead to export dumping in the South, impacting on the right to an adequate standard of living; funding for infrastructure projects in violation of the right to food of the local population, and; the promotion of user fees and cost recovery measures in health projects, which have had, and continue to have, adverse effects on the right to the highest attainable standard of health.

The question arises whether these policies are reconcilable with the human rights obligations of the EU and its member states, in particular under the International Covenant on Economic, Social and Cultural Rights (ICESCR). For a long time attention has been paid mainly to the domestic obligations of states parties to human rights treaties, ie obligations towards those within a state party’s territory and/or jurisdiction. Recently extraterritorial obligations have started to receive more attention as well; they pertain to acts of a state which take place or have human rights effects outside the territorial jurisdiction of that state.

The ICESCR contains explicit references to international cooperation and assistance for the realisation of the rights guaranteed therein. It can therefore be said to contain

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extraterritorial obligations to cooperate internationally for development. A clear distinction must be made between an obligation to cooperate internationally for development and an obligation to provide development assistance. While the latter is covered by the former, international cooperation for development is not limited to development assistance. The obligation to cooperate internationally for development can be disaggregated into obligations to respect, to protect and to fulfil (with sub-obligations to facilitate, promote and provide). It will be argued that the EU is at least under a general obligation to respect and to protect economic, social and cultural rights (ESC rights) in the South, while some specific extraterritorial obligations of fulfilment are also incumbent upon it.

In what follows, first the legal status of extraterritorial obligations under the ICESCR, particularly in North-South relations, is briefly discussed. The second section considers whether the ICESCR is applicable to the EU. The nature and content of extraterritorial obligations for the EU in particular is explored in the third section. Finally, some issues of concern as to the EU’s observance of its extraterritorial obligations are identified.

EXTRATERRITORIAL OBLIGATIONS UNDER THE ICESCR

Primary attention has been paid so far by scholars and the UN Committee on Economic, Social and Cultural Rights (CESCR) to domestic obligations, ie the obligations of domestic states parties to the ICESCR. One reason for this predominant focus on domestic obligations may be found in the contentious nature in the past of ESC rights as justiciable rights or even as human rights. Considerable effort has therefore gone into clarifying the nature of domestic states’ obligations under the ICESCR, through the elaboration of conceptual tools such as core obligations and a tripartite typology of obligations (in the context of the so-called obligations approach), as well as by defining potential violations (in the so-called violations approach). Another reason may lie in the fact that, undeniably, the domestic state bears primary responsibility under the ICESCR or any other human rights treaty. The domestic state party cannot and should not be allowed to escape from its obligations. The existence of extraterritorial obligations does not exempt domestic states in any way from their own human rights obligations.¹ Extraterritorial

¹ Compare the position of the CESCR in the case of sanctions. In its concluding observations on Iraq, while recognising that the living standard of large sections of the Iraqi population had been reduced to subsistence level since the imposition of the embargo following the invasion of Kuwait, the CESCR underlined ‘that the State party remain[ed] responsible to implement its obligations under the Covenant “to the maximum of its available resources”.’ (CESCR, Concluding Observations: 86 Intersentia
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Obligations do not lower or obliterate domestic state responsibility. In that sense, extraterritorial obligations are always complementary to domestic state obligations. Notwithstanding this fundamentally complementary character, they are not necessarily secondary or subsidiary obligations. Extraterritorial obligations to respect and to protect apply simultaneously with the obligations of the domestic state. Only the extraterritorial obligation to fulfil, which has serious resource implications, is to be considered secondary or subsidiary. This obligation only applies if the domestic state is unable, for reasons beyond its control, to fulfil economic, social and cultural rights, notwithstanding the use of the maximum available resources.2

Notwithstanding the dominant focus on domestic state obligations in human rights law, some attention has been paid to cases in which another state had responsibility too. Most often these cases were closely connected to issues of jurisdiction, for the majority of human rights treaties on civil and political rights contain a jurisdiction clause by which the human rights responsibility of the states parties is in principle limited to persons under their jurisdiction.3 The International Covenant on Civil and

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1 Iraq, UN Doc. E/C.12/1/Add.17 (1997) para. 9. A broader statement on the obligations of any state affected by economic sanctions was made in a general comment on the issue:

The imposition of sanctions does not in any way nullify or diminish the relevant obligations of that State party. As in other comparable situations, those obligations assume greater practical importance in times of particular hardship. The Committee is thus called upon to scrutinize very carefully the extent to which the State concerned has taken steps “to the maximum of its available resources” to provide the greatest possible protection for the economic, social and cultural rights of each individual living within its jurisdiction. While sanctions will inevitably diminish the capacity of the affected State to fund or support some of the necessary measures, the State remains under an obligation to ensure the absence of discrimination in relation to the enjoyment of these rights, and to take all possible measures, including negotiations with other States and the international community, to reduce to a minimum the negative impact upon the rights of vulnerable groups within the society.


Political Rights (ICCPR) holds an even more restrictive provision that limits responsibility to individuals subject to a state’s jurisdiction and within its territory. The European Court of Human Rights (ECtHR) rightly argued in its famous Bankovic judgment that ‘from the standpoint of public international law, the jurisdictional competence of a State is primarily territorial’.

In the case law of the supervisory bodies monitoring some of the UN core human rights treaties, exceptions have nevertheless been allowed for in specific circumstances, even in the case of a very restrictive jurisdiction clause such as in the ICCPR. The commonly used criterion for establishing extraterritorial jurisdiction is whether authority/power/control over territory and/or persons is being exercised. Extraterritorial jurisdiction has been assumed to be exercised in the event of military occupation of territory, or of support for a local regime that could not survive without a third state’s support, and of the arrest or detention of a person. So, clearly, in the presence of a jurisdiction clause extraterritorial jurisdiction has only been accepted in cases in which there was a strong degree of direct and/or physical control over territory or persons.

The ICESCR differs from human rights treaties dealing with civil and political rights in that it does not contain a jurisdiction clause and explicitly refers to international assistance and cooperation for the realisation of ESC rights. The relevance of the absence of a jurisdiction clause may be grasped properly by comparing the ICESCR with other treaties where such a clause is equally absent, such as the four Geneva Conventions and the Genocide Convention. The International Court of Justice (ICJ)

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5. In López Burgos v. Uruguay, the Human Rights Committee (HRC) opted for a disjunctive reading of the phrase ‘within its territory and subject to its jurisdiction’, as if the undertaking to respect and to ensure human rights covered both persons within the territory of a state and persons subject to a state’s jurisdiction (see HRC, López Burgos v. Uruguay, No. 52/1979, UN Doc. CCPR/C/13/D/52/1979 (1981) para. 12.3). This reading was confirmed in the Committee’s General Comment No. 31 on the Nature of the General Legal Obligation Imposed on States Parties to the Covenant, UN Doc. CCPR/C/21/Rev.1/Add.13 (2004) para. 10.
6. See, eg, ECtHR (GC, Preliminary Objections), Loizidou v. Turkey, No. 15318/89, 23 March 1995; ECtHR (GC), Cyprus v. Turkey, No. 25781/94, 10 May 2001; ECtHR (GC), Ilascu v. Moldova and Russia, No. 48787/99, 8 July 2004.
8. For a qualifying note with regard to the HRC’s recent approach in the reporting procedure, in which it seems to have opted for a more liberal, contextual approach, see M. Scheinin, ‘Extraterritorial Effect of the International Covenant on Civil and Political Rights’ in F. Coomans and M. Kamminga (eds), Extraterritorial Application of Human Rights Treaties, (Antwerp, Intersentia, 2004) 73, at 81.
identified an extraterritorial obligation under the Geneva Conventions in its famous Nicaragua judgment. It held: ‘The Court considers that there is an obligation on the United States Government, in the terms of Article 1 of the Geneva Conventions, to “respect” the Conventions and even “to ensure respect” for them “in all circumstances”.’ It was argued that this rule derived not only from the Geneva Conventions themselves, but also from the general principles of humanitarian law. More recently, the ICJ has read even more explicitly a positive extraterritorial obligation in common Article 1 of the Geneva Conventions:

It follows from that provision that every State party to that Convention, whether or not it is a party to a specific conflict, is under an obligation to ensure that the requirements of the instruments in question are complied with.\(^9\)

Similarly, the ICJ has held in the Bosnia case that the rights and obligations enshrined in the 1950 Genocide Convention are rights and obligations \textit{erga omnes} and that the obligation each state has to prevent and to punish the crime of genocide is not territorially limited by the Convention.\(^10\) Craven has pointed out that this judgment ‘does (…) raise the possibility that, absent a jurisdictional clause, human rights treaty obligations may generally be regarded as extending to all acts of state irrespective of where they may be taken as having effect’.\(^11\)

Confirmation of Craven’s submission may be found in a decision of the Inter-American Commission in application of the American Declaration, which similarly does not contain a jurisdictional clause. Civil planes had been ‘downed’ by Cuban military aircraft. The Inter-American Commission submitted that the act of downing brought the individuals in the civil planes under the jurisdiction of the state to which the military aircraft belonged.\(^12\) The Inter-American Commission has thus accepted that it is not so much direct and/or physical control but rather the \textit{adverse impact} of the action undertaken by a state’s agents on individuals in another state that is sufficient to bring the affected individuals under the former state’s jurisdiction.


\(^10\) ICJ (Advisory Opinion), \textit{Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory}, 9 July 2004, para. 158.


The criterion for establishing responsibility is the *causation* of adverse effects.\(^\text{14}\) It is interesting to note that both the Court of First Instance of the European Communities\(^\text{15}\) and the CESCR\(^\text{16}\) have established extraterritorial obligations in the context of sanctions, which do not necessarily imply direct and/or physical control over territory or persons.

In conclusion, the criterion of effective control is inappropriately strict in the context of the ICESCR, for that criterion was elaborated and has been applied with regard to treaties that have a jurisdiction clause, which the ICESCR does not. Causation should not be approached strictly either. Causation beyond any doubt may be impossible to prove in the case of general policies. Also, the policies of another state or of an international organisation may be only one of a complex set of factors causing non-conformity with ESC rights. It is therefore sufficient that a reasonable degree of likelihood of causation can be demonstrated. It would then be for the state or international organisation concerned to rebut responsibility by proving that no causal relationship exists between its policies and the *prima facie* non-conformity with ESC rights.\(^\text{17}\)

The ICESCR, differently from human rights treaties on civil and political rights, also contains explicit references to international assistance and cooperation. Article 2 of the ICESCR, which enshrines the general obligation to take steps in order to achieve, progressively, the full realisation of the rights in the Covenant, contains a reference to international assistance and cooperation. Article 11, too, dealing with the right to an adequate standard of living, including the right to food, refers to international cooperation. Finally, procedural Articles 22 and 23 of the Covenant refer to international measures and international action.

The precise meaning of these references to international cooperation and assistance is still a moot point. The preparatory work may not be conclusive, although several authors have submitted that extraterritorial obligations were envisaged by the drafters.\(^\text{18}\) Alston’s and Quinn’s position that, on the basis of the *travaux préparatoires*,


\(^{16}\) CESCR, General Comment No. 8, *supra* n. 1, para. 8.

\(^{17}\) Reversal of the burden of proof is not unknown to human rights litigation.

no legally binding obligation upon any particular state to provide any particular form of assistance can be inferred, is not necessarily in contradiction therewith. The latter clearly focuses on the extraterritorial obligation to fulfill. At least extraterritorial obligations to respect and to protect may therefore have been envisaged by the drafters.

Recourse can also be had to references to international cooperation in subsequently negotiated human rights treaties like the Convention on the Rights of the Child (CRC) and the Disability Convention. While an obligation to provide development assistance has still been rejected quite categorically, states by and large have remained silent on extraterritorial obligations to respect and to protect. As to the CRC, the reference to international cooperation was never the subject of huge controversy as a matter of principle, although some discomfort was expressed by the United States with mentioning international cooperation in the preamble. Moreover, the repeated references to ‘international cooperation’ and ‘the needs of developing countries’ in a significant number of provisions in the CRC testify to the uncontested nature. No declarations and reservations have been made on international cooperation either, which may be interpreted as additional evidence of the fact that the references to international cooperation were not objected to by any of the states parties.

The issue of international cooperation has featured prominently in the discussions and negotiations on the draft Disability Convention. Northern countries, and in particular the EU, have gradually adopted a more constructive approach on the issue, although at the price of excluding an explicit reference to international cooperation for development. Initially, in the 2004 Working Group, Ireland explained that it had ‘grave reservations about creating international obligations regarding developmental aid’ and that, in the UN context, the term international cooperation had often been ‘code for developmental assistance’. The adoption of Article 32 as a stand-alone

21 There were 193 states parties to the CRC as of 6 December 2006.
article on international cooperation in the Disability Convention is an important step towards explicit recognition of extraterritorial obligations. This can in turn reinforce an interpretation of the ICESCR (and the CRC) conducive to extraterritorial obligations. The, by now unchallenged, nature of the extraterritorial obligation to respect is illustrated by the broad consensus, beyond the North-South divide, on disability mainstreaming in international cooperation for development.\textsuperscript{23} Donor countries accept that in the framework of development cooperation they are at least to \textit{refrain} from violating the rights of persons with disabilities in the South.

The ICJ too has recently suggested some space for the extraterritorial application of the ICESCR, albeit in a far too restrictive way. It held:

\begin{quote}
The International Covenant on Economic, Social and Cultural Rights contains no provision on its scope of application. This may be explicable by the fact that this Covenant guarantees rights which are essentially territorial. However, it is not to be excluded that it applies both to territories over which a State party has sovereignty and to those over which that State exercises territorial jurisdiction. Thus Article 14 makes provision for transitional measures in the case of any State which “at the time of becoming a Party, has not been able to secure in its metropolitan territory or other territories under its jurisdiction compulsory primary education, free of charge”.\textsuperscript{24}
\end{quote}

From the beginning the CESCR has emphasised consistently the extraterritorial obligations contained in the Covenant, thereby using the, by now common, tripartite typology of obligations to respect, to protect and to fulfil. While the Committee has identified unqualified and general obligations for states other than the domestic state to respect and to protect ESC rights, it has been more specific in identifying aspects of an extraterritorial obligation to fulfil.

With regard to the extraterritorial obligation to \textit{respect}, the Committee has pointed out that states ‘should take steps to respect the enjoyment of the right to food in other

\textsuperscript{23} Ad Hoc Committee Daily Summary, Vol. 4, No. 1 of 24 May 2004, at 7, 12, 14–15 (Thailand, supported by NGO Landmine Survivors Network); AHCDS, Vol. 4, No. 8 of 3 June 2004, at 10 (Thailand); at 15 (People with Disabilities Australia; World Blind Union, Rehabilitation International); at 16 (ILO); AHCDS, Vol. 5, No. 5 of 27 August 2004, at 11–12 (China, Thailand and Australia); AHCDS, Vol. 5, No. 6 of 30 August 2004, at 11 (Thailand) and 14 (Viet Nam); AHCDS, Vol. 7, No. 1 of 1 August 2005, at 14 (IDC, European Disability Forum); AHCDS, Vol. 8, No. 15 of 3 February 2006, at 3–4 (IDC; International Disability and Development Consortium).

\textsuperscript{24} ICJ, \textit{supra} n. 10, para. 112. The ICJ’s suggestion \textit{in passim} that the absence of a jurisdictional clause in the ICESCR might be explained by the fact that it guarantees rights ‘which are essentially territorial’ is not substantiated and is difficult to reconcile with the multiple references to international assistance and cooperation in the Covenant.
countries’, 25 and have to respect the enjoyment of the right to health and to social security in other countries. 26 International cooperation requires states to refrain from actions that interfere, directly or indirectly, with the enjoyment of the right to water in other countries. Any activities undertaken within a state’s jurisdiction should not deprive another country of the ability to realise the right to water for persons in its jurisdiction. 27 By asking, in its recent concluding observations on Norway, for information on measures taken to ensure compliance with Covenant obligations in its international development cooperation, the Committee has indicated that the extraterritorial obligation to respect applies undoubtedly in the context of development assistance too. 28 Moreover, states are to refrain at all times from embargoes or similar measures which use food, medicines and medical equipment, and water as an instrument of political and economic pressure. 29 Sepúlveda adds to this list an obligation to refrain from ‘(i)mposing burdensome conditionality when formulating international assistance programmes’. 30 Whatever the merits of such an obligation, it is hard to find strong evidence for this obligation in the Committee’s work. 31

In the view of CESCR, the international financial institutions (IFIs) should pay greater attention to economic, social and cultural rights in their lending policies, credit agreements, international measures to deal with the debt crisis, structural adjustment programmes and development projects. 32 International financial institutions promoting measures of structural adjustment should ensure that such measures do not compromise the enjoyment of the rights to adequate housing 33 or to work, 34 in

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25 CESCR, General Comment No. 12 (Art. 11) on the Right to Adequate Food, UN Doc. HRI/GEN/1/Rev.7 (1999) para. 36.
27 CESCR, General Comment No. 15 (Arts. 11 and 12) on the Right to Water, UN Doc. HRI/GEN/1/Rev.7 (2002) para. 31.
29 CESCR, General Comment No. 15, supra n. 27, para. 32; CESCR, General Comment No. 14, supra n. 26, para. 41; CESCR, General Comment No. 12, supra n. 25, para. 37.
30 M. SEPÚLVEDA, supra n. 14, at 281.
31 Paragraph 12 of the Committee’s 2001 Statement on Poverty and the ICESCR, which Sepúlveda refers to, only mentions that the right to participate is part of the international human rights normative framework (CESCR, Statement on Poverty and the International Covenant on Economic, Social and Cultural Rights, UN Doc. E/C.12/2001/10(2001)).
32 CESCR, General Comment No. 18 (Art. 6) on the Right to Work, UN Doc. E/C.12/GC/18 (2005) para. 53; CESCR, General Comment No. 15, supra n. 27, para. 60; General Comment No. 13, supra n. 26, para. 64; CESCR, General Comment No. 13 (Art. 13) on the Right to Education, UN Doc. HRI/GEN/1/Rev.7 (1999) para. 60; CESCR, General Comment No. 12, supra n. 25, para. 41.
33 CESCR, General Comment No. 4 (Art. 11(1)) on the Right to Adequate Housing, UN Doc. HRI/GEN/1/Rev.7 (1991) para. 19.
34 CESCR, General Comment No. 18, supra n. 32, para. 53.
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particular, International agencies should scrupulously avoid involvement in projects which, for example, involve the use of forced labour in contravention of international standards, or promote or reinforce discrimination against individuals or groups contrary to the provisions of the Covenant, or involve large-scale evictions or displacement of persons without the provision of all appropriate protection and compensation.\(^{35}\) The World Bank and other agencies are, moreover, required to respect fully the World Bank and Organisation for Economic Co-operation and Development (OECD) guidelines on relocation and/or resettlement, insofar as these guidelines reflect the obligations contained in the Covenant.\(^ {36} \)

With regard to the obligation to protect, the CESCR has emphasised that states are to prevent their own citizens and companies from violating, for example, the right to water and the right to social security of individuals and communities in other countries. Where possible, states have to take steps to influence third parties to respect these rights, through legal or political means.\(^{37}\) States, as members of international organisations, are under the obligation to pay greater attention to the protection of economic, social and cultural rights, for example by influencing the lending policies, credit agreements and international measures of these institutions.\(^ {38}\) States are to ensure that the policies of financial institutions, ‘particularly those concerning the role of the private sector in social security and structural adjustment’, do not hinder but rather promote the right to social security.\(^ {39}\) International or regional agreements concerning trade liberalisation, for example, should not curtail or inhibit a country’s capacity to ensure the full realisation of the rights to water\(^ {40}\) or to social security.\(^ {41}\)

The extraterritorial obligation to protect has also been stressed in the Committee’s concluding observations. It has thus encouraged states parties, as members of international organisations, including IFIs such as the International Monetary Fund and the World Bank, to do all they can to ensure that the policies and decisions of those organisations are in conformity with the obligations of states parties under the

\(^{35}\) CESCR, General Comment No. 2 (Art. 22) on International Technical Assistance Measures, UN Doc. HRI/GEN/1/Rev.7 (1990) para. 6.

\(^{36}\) CESCR, General Comment No. 7 (Art. 11(1)) on the Right to Adequate Housing: Forced Evictions, UN Doc. HRI/GEN/1/Rev.7 (1997) para. 18.

\(^{37}\) CESCR, Draft General Comment No. 20, supra n. 26, para. 45; CESCR, General Comment No. 15, supra n. 27, para. 33.

\(^{38}\) CESCR, General Comment No. 18, supra n. 32, para. 30. Compare CESCR, General Comment No. 17 (Art. 15, para. 1(c)) on the Right of Everyone to Benefit From the Protection of the Moral and Material Interests Resulting From any Scientific, Literary or Artistic Production of Which He or She is the Author, UN Doc. E/C.12/GC/17 (2005) para. 56.

\(^{39}\) CESCR, Draft General Comment No. 20, supra n. 26, para. 48.

\(^{40}\) CESCR, General Comment No. 15, supra n. 27, para. 35.

\(^{41}\) CESCR, Draft General Comment No. 20, supra n. 26, para. 47.
Covenant, in particular with the obligation contained in Articles 2.1, 11.2, 15.4 and 23 concerning international assistance and cooperation.42

Finally, the Committee has also identified some fulfilment obligations that require positive action. The principle was established as early as 1990:

The Committee wishes to emphasize that in accordance with Articles 55 and 56 of the Charter of the United Nations, with well-established principles of international law, and with the provisions of the Covenant itself, international cooperation for development and thus for the realization of economic, social and cultural rights is an obligation of all States. It is particularly incumbent upon those States which are in a position to assist others in this regard. (…) It emphasizes that, 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 realization of economic, social and cultural rights will remain an unfulfilled aspiration in many countries.43

In subsequent general comments it has become clear that the extraterritorial obligation to fulfil mainly pertains to the core obligations, ie obligations to ensure the minimum essential levels of a right.44

The obligation to fulfil is composed of sub-obligations to facilitate, to promote and to provide. The sub-obligation to fulfil-facilitate entails active measures that enable and assist individuals and communities to enjoy a right. An extraterritorial obligation to fulfil-facilitate with regard to the right to food implies, for example, that food aid should be organised in ways that facilitate the return of the beneficiaries to food self-reliance.45 Appropriate UN programmes and agencies should assist in drafting framework legislation for the implementation of a national strategy concerning the right to food and in reviewing sectoral legislation.46 Where a state party is clearly lacking in the financial resources and/or expertise required to ‘work out and adopt’ a detailed plan of action for primary education, the international community has a clear obligation to assist.47 In the draft general comment on the right to social security, the scope of the extraterritorial obligation to fulfil-facilitate is explicitly qualified by

43 CESCR, General Comment No. 3 (Art. 2, para. 1) on the Nature of States Parties’ Obligations, UN Doc. HRI/GEN/1/Rev.7 (1990) para. 14.
44 CESCR, Draft General Comment No. 20, supra n. 26, para. 51; CESCR, General Comment No. 17, supra n. 38, para. 40; CESCR, General Comment No. 15, supra n. 27, para. 38; CESCR, General Comment No. 14, supra n. 26, para. 45.
45 CESCR, General Comment No. 12, supra n. 25, para. 39.
46 Id. para. 30.
47 CESCR, General Comment No. 11 (Art. 14) on Plans of Action for Primary Education, HRI/GEN/1/Rev.7 (1999) para. 9.

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the availability of resources. It is nevertheless pointed out that the ‘economically developed States parties have a special responsibility and interest to assist developing States in this regard.’ 48 In disaster relief and emergency assistance priority is to be given to Covenant rights.49 Providers of financing that are states parties to the Covenant should ensure that a substantial proportion of financing is devoted to creating conditions leading to a higher number of persons being adequately housed.50 While the Committee has not said so explicitly the latter obligation, like many others mentioned in a General Comment on a specific right, arguably extends to all other ESC rights. States are also to take monitoring measures with regard to the right to adequate food in order to implement their obligations under Articles 2.1 and 23 of the ICESCR.51

An element of the sub-obligation to fulfill-promote ESC rights could be the obligation for international agencies to act as advocates of projects and approaches which contribute also to enhanced enjoyment of the full range of economic, social and cultural rights.52 The Committee has thus recommended the international community to support the diversion of resources to social welfare measures by the Guatemalan government, and to ensure the regular and close monitoring and reviewing of projects undertaken pursuant to the peace agreements.53 To comply with their extraterritorial obligations in relation to the right to work, states are to promote the right to work in other countries as well as in bilateral and multilateral negotiations.54

The domestic sub-obligation to fulfill-provide is understood as an obligation for the domestic state to realise a right ‘whenever an individual or group is unable, for reasons beyond their control, to enjoy an (ESC) right by the means at their disposal’.55 The extraterritorial sub-obligation to fulfill-provide can be understood in the same way. The CESCR has identified a number of fulfilment obligations for donor countries and/or the international community. Central to the extraterritorial sub-obligation to fulfill-provide is the duty to live up to the oft repeated political commitment to spending 0.7 per cent of Gross National Product on development assistance.56 The Committee has urged donor countries to spend at least 0.7 per cent of their GDP on

48 CESCR, Draft General Comment No. 20, supra n. 26, para. 46. Similar language had been used earlier by the Committee with regard to the extraterritorial obligation to fulfill-provide emergency assistance and disaster relief (CESCR, General Comment No. 14, supra n. 26, para. 40).
49 CESCR, General Comment No. 15, supra n. 27, para. 34.
50 CESCR, General Comment No. 4, supra n. 33, para. 19.
51 CESCR, General Comment No. 12, supra n. 25, para. 31.
52 CESCR, General Comment No. 2, supra n. 35, para. 6.
54 CESCR, General Comment No. 18, supra n. 32, para. 30.
55 CESCR, General Comment No. 12, supra n. 25, para. 15.
development assistance,\footnote{CESCR, Concluding Observations: Spain, UN Doc. E/C.12/1/Add.99 (2004) paras. 10 and 27; CESCR, Concluding Observations: Italy, UN Doc. E/C.12/1/Add.103 (2004) para. 15.} or welcomed the fact that they were doing so.\footnote{See, eg, CESCR, Concluding Observations: Norway, UN Doc. E/C.12/1/Add.109 (2005) para. 35; CESCR, Concluding Observations: Denmark, UN Doc. E/C.12/1/Add.102 (2004) para. 5.} Secondly, states and international organisations have a joint and individual responsibility to cooperate in providing disaster relief and humanitarian assistance in times of emergency.\footnote{CESCR, General Comment No. 14, supra n. 26, para. 40; CESCR, General Comment No. 12, supra n. 25, para. 38.}

The CESCR has paid particular attention to extraterritorial obligations in the context of the imposition of sanctions. It has identified three obligations for ‘the party or parties responsible for the imposition, maintenance or implementation of the sanctions, whether it is the international community, an international or regional organization, or a State or group of States’.\footnote{CESCR, General Comment No. 14, supra n. 26, para. 40; CESCR, General Comment No. 12, supra n. 25, para. 38.} First, ESC rights are to be taken fully into account when designing a sanctions regime.\footnote{Id. para. 12.} This may mean that an ESC rights impact assessment should be made prior to the adoption of sanctions, that particular goods and services are exempted and that the sanctions are as targeted as possible. Second, effective monitoring is to be undertaken throughout the period that sanctions are in force.\footnote{Id. para. 13.} Finally, there is ‘an obligation “to take steps, individually and through international assistance and cooperation, especially economic and technical” in order to respond to any disproportionate suffering experienced by vulnerable groups within the targeted country’.\footnote{Id. para. 14.}

In sum, extraterritorial obligations to respect and to protect ESC rights seem not to be questioned and can be argued to be part of hard law.\footnote{Compare, eg, Nowak on the Draft Guidelines: A Human Rights Approach to Poverty Reduction Strategies (M. NOWAK, ‘A Human Rights Approach to Poverty’, in M. SCHEININ and M. SUKSI (eds), Human Rights in Development Yearbook 2002: Empowerment, Participation, Accountability & Non-Discrimination: Operationalising a Human Rights-Based Approach to Development, (Leiden, Martinus Nijhoff, 2003) 15, at 34).} According legally binding status to the extraterritorial obligation to fulfill, and in particular the sub-obligation to provide development assistance, still meets with resistance. Nevertheless, specific aspects may already be legally binding. Moreover, it cannot be ruled out that other aspects of an extraterritorial obligation to fulfill, which for now may still belong to soft law, will gradually evolve into hard law.
APPLICABILITY OF EXTRATERRITORIAL OBLIGATIONS UNDER THE ICESCR TO THE EU

The European Union consists of three pillars: the European Community (EC), a Common Foreign and Security Policy (CFSP), and Police and Judicial Cooperation in Criminal Matters (PJCC). While the EC can be described as a supranational organisation to which member states have transferred some sovereign powers, and which enjoys legal personality on the basis of its constituent treaty, the EU is more aptly depicted as an international organisation. The latter’s constituent treaty does not endow it with legal personality under international law. However, that does not mean it does not enjoy at least the passive dimension of international personality.

For an internationally wrongful act of an international organisation to arise, one of the two conditions necessary is that the conduct constitutes a breach of an international obligation of that organisation. Obviously, no obligations under the ICESCR are directly incumbent upon the EU, for it is not a party to this treaty. A fundamental issue is whether and to what extent human rights obligations are incumbent on the EU as an international organisation. The issue will not be developed here in detail. Rather, we will attempt to show that the human rights obligations of the EU should not be excluded a priori. Several avenues of reasoning exist.

In accordance with Article 6(2) EU Treaty, the Union is to respect fundamental rights, as guaranteed by the European Convention on Human Rights (ECHR) and as they result from the constitutional traditions common to the member states, as general principles of Community law. It is established case law of the European Court of Justice too that fundamental rights form an integral part of the general principles of EU law. The Court draws inspiration from the constitutional traditions common to its member states and from the guidelines supplied by international human rights instruments to which the member states are signatories. Treaties taken into account include, in particular, the ECHR, the ICCPR and the CRC. The rationale for singling out the latter instruments seems to be the fact that they bind each of the member

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66 That will no longer be the case when the Treaty Establishing a Constitution for Europe has entered into force, see Art. 1-7, OJ 16.12.2004, C 310/11.
67 By passive dimension is meant that third actors may raise claims against the EU when it has infringed rules of international law, see C. TOMUSCHAT, 'The International Responsibility of the European Union’ in E. CANNIZZARO (ed), The European Union as an Actor in International Relations, (The Hague, Kluwer Law International, 2002) 177, at 182.
states. The ICESCR could be included on the same ground, for all 27 EU member states are states parties to the ICESCR.

Another possible line of reasoning can be found in the Yusuf judgment of 21 September 2005, which is currently under appeal. The Court of First Instance of the European Communities examined in this case the European Court of Justice’s scope of review, ie its power to check the lawfulness of resolutions of the Security Council with regard to *ius cogens*. In principle, the European Court of Justice is believed not to be empowered to check the lawfulness of the resolutions of the Security Council. However, an exception is to be made for *ius cogens*, ‘understood as a body of higher rules of public international law binding on all subjects of international law, including the bodies of the United Nations, and from which no derogation is possible’. To this body of higher rules belongs – in the view of the European Court of Justice – ‘the (universal) protection of the fundamental rights of the human person’, as referred to in the UN Charter. The argument can be construed that the European Union is bound by the rights protected by the ICESCR. The universal protection of human rights is a norm of *ius cogens*. The EU, like all other subjects of international law, is bound by *ius cogens*. The EU is therefore bound by an obligation to protect human rights universally, including the ESC rights guaranteed by the ICESCR. To the extent that extraterritorial obligations under the ICESCR have been identified, they too of course apply to the EU.

Yet a different argument to arrive at the same conclusion that the EU is bound by international human rights law has been advanced by Clapham. Clapham has argued that the EC in fact recognises that it is bound by international human rights law, by including a human rights clause in, for example, the Cotonou Agreement with the African, Caribbean and Pacific (ACP) countries. In his view, the obligations stemming from this human rights clause build on the presumption that the Community is already bound to respect human rights under customary international law. By extension, he believes the same applies to the European Union.

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71 Id. para. 279.
72 It remains to be seen whether this judgment will be upheld on appeal and more particularly whether the concept of *ius cogens* will be said to include the protection of all human rights. It is more commonly assumed that only a few human rights, such as the prohibition of torture, are *ius cogens* norms.
We have examined elsewhere in more detail whether violations of extraterritorial obligations by the EC would also be imputable to their member states. We have argued that decisions taken by the European Council, which is an intergovernmental body in which states freely decide on their voting behaviour, could also be imputed to member states individually. Although the European Community has separate legal personality, a member state cannot ignore its extraterritorial obligations under the ICESCR when participating in European Council decision-making. As to accountability, Sepúlveda has argued that a future complaints and inquiry procedure under the ICESCR could and should deal with violations of the extraterritorial obligations to respect and to protect. Complaints or inquiries could only be directed against the EC as such if it were to become a state party to the ICESCR.

EXTRATERRITORIAL OBLIGATIONS UNDER THE ICESCR INCUMBENT ON THE EU

The domestic obligation to respect means that a state is to abstain from unjustified interference with the enjoyment of an ESC right. The extraterritorial obligation to respect implies that the EU should refrain from any unjustified interference with the enjoyment of an ESC right by individuals in the South. This obligation of abstention comes into play at the level of policies, bilateral and multilateral agreements and projects. When elaborating external policies or internal policies with external effects, such as in the areas of development, trade and agriculture, adverse effects on the ESC rights of individuals in the South are to be avoided. This is also the case when negotiating and concluding trade and development partnership agreements. The European Commission’s development aid implementation arm, EuropeAid Co-operation Office, should avoid involvement in projects which involve the use of forced labour in contravention of international standards, promote or reinforce discrimination against individuals or groups, or involve large-scale evictions or displacement.

75 M. SEPÚLVEDA, *supra* n. 14, at 298 and 200.
76 Accession of the EU to the European Convention of Human Rights has been studied and prepared both by the EU and the Council of Europe. It has been argued from a legal perspective that the accession of the EU to the European Social Charter is also perfectly possible (see O. DE SCHUTTER, ‘Anchoring the European Union to the European Social Charter: The Case for Accession’, in G. DE BURCA and B. DE WITTE (eds), *Social rights in Europe*, (Oxford, Oxford University Press, 2005)). Compare eg also the Revised European Code of Social Security, which is explicitly open for signature by the EC. There appears to be no fundamental stumbling block to EC accession to the ICESCR either. See also the Vienna Convention on the Law of Treaties between States and International Organisations or between International Organisations of 21 March 1986.
Chapter 5: EU and Development: Extraterritorial Obligations Under the ICESCR

Millennium Development Goals: EU Contribution to the Review of the MDGs at the UN 2005 High Level Event – Conclusions of the Council and the Representatives of the Governments of the Member States Meeting within the Council, Doc. 9266/05, para. 4.

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of persons without the provision of all appropriate protection and compensation. A human rights impact assessment may be the most appropriate tool for ensuring compliance with Covenant obligations in international development cooperation. Finally, the EU is to refrain from using food, medicines and medical equipment, and water as instruments of political and economic pressure.

The extraterritorial obligation to protect requires the EU to prevent European companies from violating the ESC rights of individuals and communities in the South. The obligation requires the EU to elaborate and impose a regulatory framework on European companies when active outside the EU, and in particular in the South, so as to prevent them from violating ESC rights through their action or inaction.

Finally, certain aspects or dimensions of an extraterritorial obligation to fulfil may also be applicable to the EU. In the context of the provision of emergency aid and food aid in particular, the extraterritorial obligation to fulfil-facilitate requires the EU to organise its food aid in ways that facilitate the return to food self-reliance of the beneficiaries. The EU must also ensure that a substantial proportion of its development financing is devoted to the realisation of ESC rights. Prioritisation of ESC rights is required in the provision of disaster relief and emergency assistance. A rights-based approach, both to development assistance in general and to disaster relief and emergency assistance in particular, can be conducive to such prioritisation.

The extraterritorial sub-obligation to fulfil-promote implies that the EU is to act in bilateral and multilateral negotiations and agreements as an advocate of projects and approaches which contribute to enhanced enjoyment of the full range of economic, social and cultural rights in the South.

As to the sub-obligation to fulfil-provide, the EU should live up to the political promise to spend 0.7 per cent of Gross National Product on development assistance by 2015.77 The political commitment is submitted to be 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 (ie 2015). The hardening of the political commitment into a legal obligation is supported by the integration of the target and of a time path to reach it in internal

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77 Millennium Development Goals: EU Contribution to the Review of the MDGs at the UN 2005 High Level Event – Conclusions of the Council and the Representatives of the Governments of the Member States Meeting within the Council, Doc. 9266/05, para. 4.
EU instruments, as well as by the establishment of a monitoring mechanism to assess progress towards meeting the target. There is also a clear obligation to provide disaster relief and emergency assistance in times of emergency. With regard to the right to education, where a state is clearly lacking in the financial resources and/or expertise, the EU should assist this country to work out and adopt a detailed plan of action for primary education. It is to be accepted nevertheless that the extraterritorial sub-obligation to fulfil-provide is qualified – as the domestic sub-obligation to fulfil-provide is – by the general provision in Article 2 of the ICESCR, which imposes the obligation to take steps only, and subject to the maximum available resources.

With regard to the imposition of sanctions, as was pointed out above, food, water, medicines and medical equipment should never be used as an instrument of political and economic pressure. Moreover, ESC rights are to be fully taken into account when designing a sanctions regime. Basic goods and services need therefore to be exempted and an ESC rights impact assessment should be made ex ante. Furthermore, the impact of the sanctions regime, once in place, on ESC rights is to be monitored. Finally, development assistance is to be provided to the most vulnerable groups if they suffer disproportionately as a result of the sanctions.

ISSUES OF CONCERN

We now turn to some issues of concern, ie instances in which the EU may well find itself not in conformity with its extraterritorial obligations under the ICESCR. This section does not purport to offer a comprehensive overview, but only to highlight some potential instances of non-conformity.

The criterion used in this section to establish EU responsibility is that of causation, as discussed earlier in this chapter. The CESC has come close to adopting this criterion in its general comment on sanctions, in which it held that ‘(w)hen an external party takes upon itself even partial responsibility for the situation within a country (ie by imposing economic sanctions), it also unavoidably assumes a

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78 See Id., as well as the European Consensus on Development, adopted on 20 December 2005 (OJ of 24 February 2006, 2006/C 46). Integration in binding internal instruments would further strengthen the legally binding character of the 0.7% target.

responsibility to do all within its power to protect the economic, social and cultural rights of the affected population’.80

The Obligation to Respect

Aspects of EU agricultural trade policy may be at odds with the extraterritorial obligation to respect ESC rights in the South. Agricultural subsidies that lead to export dumping in the South, with demonstrated adverse impact on local producers in the South, are not in conformity with the right to an adequate standard of living. Adverse impact has been convincingly shown with regard to export subsidies for sugar, for example.81 More generally, agricultural subsidies leading to export dumping in the South that the EU knows, or ought to know, will negatively affect ESC rights of individuals in the South are not in conformity with the extraterritorial obligation to respect ESC rights.

A second example concerns the development cooperation policy of the EU. The European Commission has provided funding for the development and the rehabilitation of part of the road system in the rainforest area of Cameroon. The roads mainly benefit logging companies, which deplete the rainforest’s natural resources and threaten the Baka Pygmies’ right to food. Their ability to feed themselves heavily depends on the forest’s resources.82 It is submitted that the EU funding is in violation of the extraterritorial obligation to respect ESC rights, in particular the right to food. The EU knew, or should have known, the adverse impact of the funding it provided, the more so since the project had been turned down earlier by other donors such as the African Development Bank and the World Bank because of its anticipated adverse impact on the right to food of the indigenous population. An ESC rights impact assessment could have highlighted the problematic character of the project.

According to Médecins Sans Frontières, in a parallel report to the Belgian third periodic report under the ICESCR, the European Commission promotes user fees in quite a number of countries and supports health reforms with cost recovery as a main element, both through its financing policies and through its technical assistance.83 User fees and other cost recovery measures have been proven to result in reduced attendance rates and thus impact on access to health care and the right

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80 CESCR, General Comment No. 8, supra n. 1, para. 13.
81 See W. VANDENHOLE, supra n. 74 for references.
83 See www.11.be, click ‘themes’ and ‘human rights’.
to the highest attainable standard of health. In the UN Millennium Project, the elimination of user fees for basic health services has been labelled a ‘Quick Win’ intervention, ie an intervention that ‘can and should be implemented immediately if the world is serious in its commitment’. EU policy that supports user fees for basic health care is therefore not in conformity with the extraterritorial obligation to respect the right to the highest attainable standard of health.

Through the purchase of fishing rights outside the EU, indirect EU subsidies have been given for fishing fleets. The EU fishing rights have been argued to lead to over-fishing off West Africa, with adverse effects on the realisation of the right to food of the local population. Although following the 2002 Common Fisheries Policy reform access agreements have been transformed into partnership agreements, in which attention to the sustainability of fishing stocks is said to have grown, criticism has not withered away. Greenpeace has recently called on the EU to prevent the export of its fishing overcapacity to the South.

The Obligation to Protect

The European Commission blames pirate fishing for the problem of overfishing. Illegal, unregulated and unreported fishing (IUUF) often occurs by flying ‘flags of convenience’, ie by flying the flags of countries that do not control observance of international fisheries law. It can be argued that the extraterritorial obligation to protect obligates the EC to regulate or impose regulation on companies that own and operate ‘flag of convenience’ registered fishing vessels within its member states’ jurisdiction.

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88 See the World Wild Fund for Nature’s criticisms on www.panda.org/about_wwf/what_we_do/marine/our_solutions/sustainable_fishing/improving_management/access_agreements/index.cfm; see also European Parliamentarian Written Questions Nos. E/2830/05 and E/2524/05 on the fisheries partnership agreements.
The Obligation to Fulfil

A final illustration concerns the extraterritorial obligation to fulfil-provide. As was argued earlier, there is no general extraterritorial obligation to fulfil-provide. It was argued that the political commitment made at the UN to raise public expenditure for development cooperation to 0.7 per cent of GNP, which has been consistently reiterated by EU member states over the past three decades and which has also been endorsed by the EU, was gradually developing 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 (ie 2015). This requires that the (increase in) official development assistance (ODA) flows be sustainable, and therefore not mainly attributable to debt relief operations, as is currently the case.91

The above-mentioned issues of concern, selected at random and not at all aiming at being comprehensive, show how both external policies (trade, development cooperation) as well as internal policies with external effects (agriculture, fisheries) may amount to situations of non-conformity with the EU’s extraterritorial obligations under the ICESCR. Although not exclusively, many concerns seem to relate primarily to the obligation to respect ESC rights in other countries, ie to abstain from violating ESC rights. This obligation could easily be abided by if an ESC rights impact assessment were to be undertaken systematically for all EU policies and programmes.92

It is also to be noted that many of the issues of concern highlighted here had already been flagged as problematic either from the perspective of free trade (in the case of export subsidies for sugar) or policy coherence for development, as embraced by the EU (in the case of subsidies for fishing access), or by other donors or donor initiatives (in the case of funding for roads in Cameroon and user fees for basic health care). The EU is, or should therefore be, aware of these violations. Causation can, moreover, be established rather easily.


CONCLUSION

The EU has failed so far to recognise explicitly in its policy documents that it is bound by international human rights law in its external policies and in its internal policies with external effects. The time has come for the EU to realise and recognise that human rights in the context of cooperation for development are not only about the observance of human rights standards by developing countries but also about its own observance of human rights standards in all policies and actions which may affect the human rights of individuals in the South. Extraterritorial obligations partly overlap with the concern of policy coherence for development, so as to prevent the effects pursued or achieved through development assistance from being thwarted or annulled unintentionally by other policies and to reinforce the case for policy coherence. A systematic ESC rights impact assessment would enable the EU to avoid failures to abide by its obligation to respect ESC rights in other countries. In part, extraterritorial obligations also go beyond the requirement of policy coherence for development, and require the EU, for example, to live up to the commitments it has made with regard to the level of spending on development cooperation.