

## EXTRATERRITORIAL OBLIGATIONS OF STATES ON ECONOMIC, SOCIAL, CULTURAL RIGHTS AND DEVELOPMENT OPERATIONS

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**ABSTRACT:** The work in question, therefore, aims to analyze the extraterritorial obligations of ICESCR Contracting Parties in the context of development cooperation operations that could jeopardize the enjoyment of human rights across the border. Following the detailed examination of some cases specifically related to bilateral development financing activities, and to the effects on economic, social and cultural rights of the recipient populations, the analysis will focus briefly on the issue of state responsibility for the violation of human rights in third countries through international organizations and financial institutions. It can be anticipated that if the development cooperation practice derived from the rulings of the Committee on Economic, Social and Cultural Rights (CESCR) and the further monitoring bodies active in the United Nations provides relatively significant indications. The nature of state obligations in bilateral cooperation activities, the respective commitments of Contracting Parties of International Covenant on Economic, Social and Cultural Rights in the context of participation in international institutions or organizations, however, remain difficult to verify and identify.

Keywords: human rights, development cooperation, ICESCR, extraterritorial obligations

### INTRODUCTION

International development cooperation area in bilateral relations between states and in multilateral contexts within international financial institutions is a privileged field for analyzing the nature of human rights obligations arising from the Treaties on economic rights, social and cultural issues<sup>2</sup>.

Bilateral economic assistance and support, as well as multilateral cooperation projects conducted in particular through World Bank and International Monetary Fund, have a significant impact on the ability of development cooperation recipient states to pursue their economic policies freely, determining a significant impact on the enjoyment of human rights populations of these states<sup>3</sup>.

Economic reform projects carried out by international financial institutions through the structural adjustment programs or the poverty reduction strategy papers, implemented through "conditionality" to obtain funding by states, and often for the contextual reconstruction of foreign debt, are emblematic examples of the potential detrimental effects of development cooperation policies in third countries<sup>4</sup>.

While it is true that funding and loans granted by states bilaterally or through World Bank and International Monetary Fund are primarily aimed at increasing economic growth,

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<sup>2</sup>P. ALSTON, Development and the rule of law: Prevention versus cure as a human rights strategy, International Commission of Jurist, 1981. G. ABI SAAB, Le Droit au développement, in *Annuaire Suisse de Droit International*, 44, 1988, pp. 924ss. A. SEN, Development as freedom, Oxford University Press, Oxford, 1999. K. DE FEYTER, World development law: Sharing responsibility for development, Boston/Antwerp, 2001. M. BEDJAOU, L'humanité en quête de paix et de développement, Cours général de droit international public, in *Recueil des cours*, Vol. 325, ed. Brill, The Hague, 2006, pp. 954ss. S. JOSEPH, A. MC BETH (a cura di), Research handbook on international human rights law, Edward Elgar Publishers, Cheltenham, 2010, pp.168ss. S. STUART, Development human rights and the rule of law, ed. Elsevier, The Hague, 2016, pp. 198ss. T. KARIMOVA, Human rights and development in international law, ed. Routledge, London & New York, 2016. T.E. PAUPP, Redefining human rights in the struggle for peace and development, Cambridge University Press, Cambridge, 2014, pp. 140ss.

<sup>3</sup>S. SKOGLY, The human rights obligations of the World Bank and the International Monetary Fund, ed. Routledge, New York & London, 2012.

<sup>4</sup>M. DARROW, Between lights and shadows: The World Bank, the International Monetary Fund and international human rights law, Hart Publishing, Oxford & Oregon, Portland, 2003. B. LYON, Discourse in development: a post colonial "agenda" for the United Nations Committee on Economic, Social and Cultural Rights, in *American Journal of Gender, Social Policy and Law*, 10 (3), 2002, pp. 536ss.

producing income and restoring the debt accumulated by beneficiary countries, they also promote the implementation in third countries of free-market policies, including privatization, abolition of trade barriers, introduction of mandatory tariffs for the use of public services; all measures that end up causing a considerable deterioration in the capacity of the receiving state to meet the obligations to protect economic, social and cultural rights of its population<sup>5</sup>.

In other words, far from promoting the reduction of poverty and fiscal imbalances, the measures taken by states at bilateral level and within international financial institutions, aimed at implementing economic growth and restructuring external debt through the imposition of conditionality often produce disastrous consequences for the enjoyment of human rights in the countries benefiting from development aid.

As highlighted by the Independent Expert on the Effects of Foreign Debt and other related international financial obligations on the full enjoyment of human, economic, social and cultural rights:

“While it is generally accepted that external finance (including foreign loans) can contribute to countries’ development, excessive debt burdens continue to be a significant obstacle both to development and realization of human, economic, social and cultural rights, as well as the attainment of the Millennium Development Goals, in developing countries. Studies indicate that some countries spend more each year on servicing debt than they do on the basic needs of their people or on human rights related public services, such as education and health care, combined. The gains from debt relief are often diluted by other factors, including conditions attached to debt relief and the lack of competitiveness of developing countries in an unequal global trading environment. High debt repayments and the conditions attached to debt relief and new loans which typically limit public spending (even at the expense of funding essential public services, such as education and health care), promote economic liberalization (including privatization of public enterprises, investment deregulation and introduction of user fees for access to public services) and prioritize debt service over fulfillment of basic needs have not only exacerbated poverty, they have also had a particularly severe impact on access to education and health care in developing countries”<sup>6</sup>.

The ability of states to significantly affect the enjoyment of human rights in development cooperation operations with third states thus requires questioning the extent of obligations arising from human rights treaties, and in particular the nature and effectiveness of obligation to provide assistance and international cooperation set out in International Covenant on Economic and Cultural Rights in these contexts. It must be questioned whether states parties to the treaty can be held accountable for their development cooperation activities carried out outside the territorial sovereignty, or which have detrimental effects on the enjoyment of human rights of persons located across the border.

While it is true that in line with international law the responsibility for human rights realization is primarily the responsibility of the territorial state, the international control bodies responsible for the protection of human rights have however variously interpreted the obligations arising from the treaties on human rights as having also an extraterritorial nature.

The protection of human rights in the context of bilateral and multilateral development cooperation activities would be characterized, in particular, by the simultaneous imposition of restrictions on the plurality of states involved in cooperation projects, in accordance with the duty to comply with the obligation for international assistance and cooperation set out in the Treaties to protect economic, social and cultural rights.

In this context, the provision in article 2 (1) ICESCR would thus be able to impose on states the obligation to respect, protect and promote human rights in development cooperation activities, the effects of which are reflected in third states<sup>7</sup>.

<sup>5</sup>Council of Human Rights, Report of the Independent expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights, Cephias Lumina, A/HRC/11/10, 3 April 2009, par. 2426.

<sup>6</sup>A.P.M. COOMANS, R. KÜNNEMANN, Cases and concepts on extraterritorial obligations in the area of economic, social and cultural rights, Cambridge University Press, Cambridge, 2012. M. GIBNEY, S. SKOGLY, Universal human rights and extraterritorial obligations, University of Pennsylvania Press, Pennsylvania, 2012. E. BENVENISTI, G. NOLTE, Community interests across international law, Oxford University Press, Oxford, 2018, pp. 382ss. M. SSENIONYO, Economic, social and cultural rights in international law, Hart Publishing, Oxford & Oregon, Portland, 2016, pp. 64ss.

<sup>7</sup>R. HOWSE, The concept of odious debt in public international law, UNCTAD Discussion Paper No. 185, Geneva, UNCTAD,

## 1The Ship Export Campaign case: The cancellation of foreign debt by Norway against Ecuador

The story of Ship Export Campaign between Norway and Ecuador dates back to seventies in the economic policies promoted by the Norwegian government and aimed at supporting the shipbuilding industry by granting loans to developing countries for the purchase of Norwegian ships. This is the first case in which a European state has publicly recognized its co-responsibility for the extraterritorial effects of bilateral cooperation operations conducted with third countries<sup>8</sup>. In particular, it is considered an emblematic signal of the prejudicial effects of the "illegitimate debt" contracted by developing towards financing countries, i.e. cases in which loans granted in the form of development aid, far from achieving the objectives underlying the cooperation program, would act as a stimulus for exporting economies for the exclusive benefit of industrialized countries. In such situations, the country receiving the loan in the form of development aid, charged by the imposition of a debt which has become increasingly substantial, ends up using most of its economic resources for the restructuring of external debt rather than for the social destined to the realization of economic, social and cultural rights of its population.

In 1976, following a serious crisis in the Norwegian ship market, Parliament approved the so-called Ship Export Campaign with the aim of supporting the increase in exports of the shipping industry through loans to be allocated to developing countries. These were in particular loans that can be provided through the support of the Export Credit Agency (Garantiinstituttet for Ekksportkreditt), and aimed at the purchase of Norwegian ships<sup>9</sup>. The verification of economic consequences of the investment, the risks regarding the restitution of loans by the recipient countries, as well as the potential benefits in terms of project development aid were respectively assigned to the prior assessment of the Export Credit Agency (GIEK) and the Norwegian Agency for International Development (NORAD).

Notwithstanding the forecast of the aforementioned assessments on the solvency of countries benefiting from loans and the related impact in terms of development aid in their respective territories, the Norwegian Ministry of Economy decided to proceed with the stipulation of loans with 21 countries, without taking the opinion of the agencies into consideration. In the period between 1978 and 1981, Flota Banana Ecuatoriana (FBE) bought four ships from Norway for a business of about fifty-six million dollars, of which four million paid immediately as an advance on the total price, and the remaining part-financed from export credits. The inability of FBE company to repay the loan received soon became evident, the Transave state company took responsibility for part of the contract debt, while the remaining sum was renegotiated by Ecuador in the Paris Club. In 2004 Ecuador's debt to Norway amounted to five times the original contracted amount and the debt recovery expenditure was six times higher than the amounts allocated to public health<sup>10</sup>.

The deleterious effects of foreign debt on the economy of Ecuador thus became the object of significant protests from civil society. In 2001, the non-governmental organizations Slett ULandsGjelda (SLUG) and Centro de Derechos Economicos y Sociales (CDES) launched a protest campaign calling the Norwegian government to immediately cancel the debt related to the Ship Export Campaign, also requesting the intervention of the Commission for Civil Control of Corruption, an independent body established by the Ecuadorian Constitution, for the latter to conduct an inquiry into the nature of the debt between the two countries.

In line with expectations of the illegitimate nature of Ecuador's debt to Norway, the Commission concluded that the Ship Export Campaign had the sole purpose of providing export subsidies for the rehabilitation of Norwegian industry, and that under no circumstances the campaign could be considered "a loan for development assistance but rather a commercial loan"<sup>11</sup>.

2007. M.J. STRAUSS, Territorial leasing in diplomacy and international law, ed. Brill, The Hague, 2015, pp. 36ss.

<sup>8</sup>KG. ABILDSNES, Why Norway took creditor responsibility the case of the Ship Export Campaign, The Norwegian Debt Campaign (SLUG) (2007).

<sup>9</sup>Council of Human Rights, Report of the Independent expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights, Cephas Lumina, A/HRC/11/10, op. cit., par. 32.

<sup>10</sup>Centro de Derechos Economicos y Sociales, Upheaval in the Back Yard, Illegitimate Debts and Human Rights, The case of Ecuador Norway", 2002, pp. 42ss.

<sup>11</sup>M. GIBNEY, S. SKOGLY, Universal human rights and extraterritorial obligations, op. cit.

The Commission thus stated that the loan between the two countries appeared to be in violation with

"[...] the spirit and meaning of international assistance and cooperation recognized under ICESCR, ratified by the General Assembly of the United Nations on December 16, 1966, articles 1.2 and 11.1, because international economic cooperation should be based on the principle of mutual benefit and should prevent denying a people its own means of subsistence without prejudice to any obligations arising out of international economic cooperation"<sup>12</sup>.

On the basis of the above reasons, the Commission, therefore, invited national authorities, through the appropriate diplomatic channels, to request from Norway the complete cancellation of the debt owed to Ecuador in the Paris Club, a debt to be considered illegitimate for the aforementioned reasons.

On October 2, 2006, after years of pressure from the Norwegian and international civil society, the Minister for Economic Development announced the unilateral cancellation of the debt contracted by Ecuador in the Ship Export Campaign, declaring the co-responsibility of Norway for what it was defined as "a development policy failure", and recognizing the violation of internal rules that would have imposed the assessment of risks associated with the investment and analysis of potential benefits of the development assistance program<sup>13</sup>.

The decision on the total cancellation of debt followed a prior admission of co-responsibility by the Foreign Affairs Committee of the Norwegian Parliament that two years earlier had ruled that: "the term illegitimate debt precisely points to the two-sided nature of debt where both parties have rights and duties. A rights based development policy must, therefore, be willing to question lending practice and the creditors' responsibility for their own actions"<sup>14</sup>.

Moreover, confirming the desire to assume responsibility for the cancellation of the illegitimate debt that would have happened shortly thereafter, the new Norwegian government coalition, established in 2005, had previously expressed the intention to commit itself internationally to debt cancellation of third world countries. And indeed, according to the Norwegian government:

Norway must adopt an even more offensive position in the international work to reduce the debt burden of poor countries. The UN must establish criteria for what can be characterized as illegitimate debt, and such debt must be canceled. Norway will lead the way in the work to ensure the debt cancellation of the poorest countries outstanding debt in line with the international debt relief initiative. The costs of debt cancellation must not result in a reduction of Norwegian aid, i.e. the adopted debt repayment plan. No requirements must be made for privatization as a condition for the cancellation of debt. The Government will support the work to set up an international debt settlement court that will hear matters concerning illegitimate debt [...]<sup>15</sup>.

The cancellation of Norway's unilateral debt to Ecuador in Ship Export Campaign is, therefore, the first case in which an ICESCR state party has officially assumed co-responsibility for the extraterritorial effects of development cooperation policies conducted with third states.

The affair in question also appears particularly significant insofar as the financing state has admitted that it is obliged to conduct such operations according to the principle of shared responsibility, a principle which requires both parties to assess in advance the detrimental effects of debt and the possibility of rehabilitation of the same not only with regard to the poverty level of the debtor nation, but rather on the basis of the principle of economic justice that takes into account the effective financial capacity of the debtor nation.

The case described above between Norway and Ecuador has given rise to an ever-increasing interest by the supervisory bodies responsible for safeguarding economic, social and cultural rights due to the effects of the illegitimate debt accumulated by developing

<sup>12</sup>Royal Norwegian Ministry of Foreign Affairs "Cancellation of debts incurred as a result of the Norwegian Ship Export Campaign (197680), Press Release No. 118/06, 02.06. 2006.

<sup>13</sup>KG. ABILDSNES, Why Norway took creditor responsibility the case of the Ship Export Campaign, op. cit., pp. 6ss.

<sup>14</sup>M. GIBNEY, S. SKOGLY, Universal human rights and extraterritorial obligations, op. cit.

<sup>15</sup>CESER, Concluding observations Ecuador, UN Doc. E/C.12/1/Add.100, 7 June 2004, par. 9. M.J. STRAUSS, Territorial leasing in diplomacy and international law, ed. Brill, The Hague, 2015, pp. 36ss. J. KING, The doctrine of odious debt in international law: a restatement, Cambridge University Press, Cambridge, 2016, pp. 42ss.

countries, and sparked an intense debate on international obligations for the realization of human rights in the context of cooperation activities with third states.

Given the story as a whole, it is now possible to reflect on the nature of duties incumbent on both states, respectively ICESCR parties, and this on the basis of the relevant bodies practice monitoring human rights treaties, and in particular CESCR's positions and Independent Expert's rulings on investigating debt effects for the enjoyment of economic, social and cultural rights.

The monitoring bodies established by the treaties within United Nations have on several occasions recognized the detrimental consequences of development cooperation policies, and in particular the obstacles that excessive public debt implies on the ability of states to realize economic, social and cultural rights of its population.

For example, in the analysis of the second Report presented by Ecuador, in accordance with the procedure for scrutinizing treaty implementation in the respective member states, CESCR emphasized the inability of member state to fulfill the obligations arising from ICESCR towards its population, and this because of the heavy financial burdens related to the excessive public debt resulting from the imposition of structural adjustment programs<sup>16</sup>.

Detrimental effects on the enjoyment of economic, social and cultural rights produced by the need to repay foreign debt contracted as part of economic restructuring programs were also documented in the concluding observations of 2001 against Honduras where CESCR stated that: "The efforts of state party to comply with its obligations under the Covenant are impeded by the fact that it is classified as a highly indebted poor country and that up to 40 percent of its annual national budget is allocated to foreign debt servicing. The Committee also acknowledges that the structural adjustment policies in the state party have negatively affected the enjoyment of economic, social and cultural rights by the population, especially the vulnerable and marginalized groups of society"<sup>17</sup>.

Thus assessed the disruptive impact of external debt on the ability to fulfill the parallel obligation to protect human rights, CESCR has repeatedly supported in several concluding remarks the need for states to balance the duties related to debt consolidation and the respective obligations in the field of economic, social and cultural rights. While recognizing the difficulties arising from the imposition of burdensome public debt and heavy structural adjustment reforms, CESCR has indeed decided to recommend to the contracting parties to respect and promote the rights protected by ICESCR in all aspects of the negotiations with financial international institutions in order to safeguard the enjoyment of economic, social and cultural rights of its population and in particular of the most vulnerable sections of society.

For example, the monitoring body has called upon states parties to consider their obligations under ICESCR in their relations with financial institutions, World Bank, International Monetary Fund and the World Trade Organization. Thus, in the concluding remarks adopted against Egypt:

The Committee regrets that the state party does not take its obligations under the Covenant into account in its negotiations with international financial institutions. The Committee strongly recommends that Egypt's obligations under the Covenant should be taken into account in all aspects of its negotiations with international financial institutions, like International Monetary Fund, World Bank and World Trade Organization, to ensure that economic, social and cultural rights, particularly of the most vulnerable groups, are not undermined<sup>18</sup>.

The joint reading of the aforementioned observations, although not binding, would

<sup>16</sup>CESER, Concluding observations Honduras, UN Doc. E/C.12/Add.57, 21 May 2001, par. 910.

<sup>17</sup>CESER, Concluding Observations Algeria UN Doc. E/C.12/Add.71, 30 November 2001, par. 34, 43; Concluding Observations Morocco, UN Doc. E/C.12/1/Add.55, 1 December 2000, par. 10, 38; Concluding Observations Syrian Arab Republic, UN Doc. E/C.12/1/Add.63, 24 September 2001, par. 29; Concluding Observations Sudan UN Doc. E/C.12/1/Add.48, 1<sup>st</sup> September 2000, par. 15; Concluding Observations Benin, UN Doc. E/C.12/1/Add.78, 5 June 2002, par. 7; Concluding Observations Senegal, UN Doc. E/C.12/1/Add.62, 24 September 2001, par. 10; Concluding Observations Zambia, UN Doc. E/C.12/1/Add.106, 23 June 2005, par. 48; Concluding Observations Bolivia, UN Doc E/C.12/1/Add.60, 21 May 2001, par. 9; Concluding Observations Nepal, UN Doc. E/C.12/1/Add.66, 24 September 2001, par. 11; and Concluding Observations Kyrgyzstan, UN Doc. E/C.12/1/Add.49, 1<sup>st</sup> September 2000, par.10.

<sup>18</sup>See, for example, ex multis, the concluding remarks with regard to Brazil in 2001 where it is stated that: "the Committee regrets that a state party does not take its obligations under the Covenant into account in its negotiations with international financial institutions. The Committee strongly recommends that Egypt's obligations under the Covenant should be taken into account in all aspects of its negotiations with international financial institutions, like the International Monetary Fund, World Bank and World Trade Organization, to ensure that economic, social and cultural rights, particularly of the most vulnerable groups, are not undermined". CESER, Concluding Observations Brazil, UN Doc. E/C.12/1/Add.44, 23 May 2000, par. 1428.

seem to indicate that the obligation to respect, protect and enforce the rights set out in the Treaty would be of a priority nature and should be considered prevalent with regard to debt restructuring obligations at least in the case in which an excessive use of resources for this last purpose is likely to significantly undermine the ability of the state to comply with its own citizens those that in the CESCR practice are defined minimum core obligations<sup>19</sup>.

CESCR would also appear to state the thesis that privileging debt reparation on their socio-economic obligations should, in any case, be considered a non-fulfillment of duties arising from the treaty whenever the state jeopardizes the realization of economic, social and cultural rights of the most vulnerable sections of their population. With this in mind, the obligation to ensure with the maximum available resources the rights protected in the Treaty, according to general clause in article 2 (1) ICESCR would entail state honor giving priority to socio-economic obligations on those related to debt repair.

In relation to Ecuador v. Norway case, and on the basis of CESCR indications having taken over the debt of a private company as public debt, and having spent six times as much debt recovery with the creditor country as public health expenditure, Ecuador would have violated ICESCR provisions to privileged the burden of restructuring the external debt with respect to the protection of socio-economic rights of its population.

Control bodies' approach to states responsibility for the violation of human rights in economic cooperation would, however, be characterized by the broader duty of states to conduct the full range of support and development assistance operations according to a model that takes due account of all international legislation to protect human rights. We refer here to the theory of human rights based approach to development according to which states operations in supporting third countries, but more generally policies of international development cooperation on side sensuous, should be guided by the verification of the principle of respect, protection and implementation of human rights as a parameter of legitimacy for the fulfillment of obligations arising from internationally relevant instruments<sup>20</sup>. Thus, the adoption of human rights based to development approach would require that the primary objective of development cooperation policies be assessed in terms of their impact on the progressive realization of human rights by the beneficiaries of development operations.

According to the definition given by the Independent Expert on the full enjoyment of human rights, particularly economic, social and cultural rights, for example, the adoption of human rights approach to development based in terms of external debt would burden the borrowing state of the obligation to assess in advance the sustainability of the debt contracted with the creditor country, as well as to conduct the various phases of analysis, negotiation and debt restructuring according to the principles of advertising, transparency and accountability<sup>21</sup>. In this regard, respect for rights protected by ICESCR would result in state obligation to commit itself in order to ensure full transparency in transactions for the negotiation of loans or debt restructuring with international financial institutions. Ensuring the right of participation and access to information on the use of public funds used by the government would also allow the assumption of state responsibility towards the population for the use of the same funds.

The obligation to conduct bilateral and multilateral cooperation and debt management operations with countries and international financial institutions according to transparency principle, publicity and responsibility stated above is thus an expression of state obligation to guarantee economic, social and cultural rights of its population, but also and above all the more general obligation to cooperate for the realization of human rights, contained in the various international protection instruments, and in particular in ICESCR. According to CESCR, in fact, the problem of damaging consequences of cooperation activities, and particularly of illegitimate debt, could not by its nature be solved through the unilateral action of individual countries receiving development aid but, on the contrary, only through a concerted action between these, individual states and the International Financial Institutions involved from time to time.

Specifically, in relation to the foreign debt problem, CESCR in General Comment 2, expressed itself in the sense that "international measures to deal with the debt crisis should

<sup>19</sup>CESER, General Comment 3, The Nature of States Parties' Obligations, op. cit., par. 10.

<sup>20</sup>The Human Rights Based Approach to Development Cooperation: Towards a Common Understanding Among UN Agencies (2003).

<sup>21</sup>Council on Human Rights, Report of the Independent expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights, Cephas Lumina, A/HRC/11/10, cit., par. 46.

take full account of the need to protect economic, social and cultural rights through, inter alia, international cooperation. A matter which has been of particular concern to the Committee in the examination of states parties reports is the adverse impact of debt burden and of relevant adjustment measures on the enjoyment of economic, social and cultural rights in many countries. The Committee recognizes that adjustment programmes will often be unavoidable and that these will frequently involve a major element of austerity. Under such circumstances, however, endeavours to protect the most basic economic, social and cultural rights become more, rather than less, urgent states parties to the Covenant, as well as the relevant United Nations agencies, should thus make a particular effort to ensure that such protection is, to the maximum extent possible, built in to programmes and policies designed to promote adjustment. Such an approach, which is sometimes referred to as “adjustment with a human face” or as promoting “the human dimension of development” requires that the goal of protecting the rights of the poor and vulnerable should become a basic objective of economic adjustment. Similarly, international measures to deal with the debt crisis should take full account of the need to protect economic, social and cultural rights through, inter alia, international cooperation”<sup>22</sup>.

## **2 The principle of shared responsibility in development finance operations**

If in line with international human rights law, states are first and foremost burdened by the obligation to guarantee the rights set out in ICESCR to individuals on their territory, in accordance with Article 2 (1) and the interpretation of international assistance and cooperation obligations elaborated by CESCR would also be burdened with the duty to take into account the extraterritorial effects of cooperation policies and their consequences on the protection of human rights of citizens located in third states. It therefore follows that with regard to liability for the effects of illegitimate debt on the enjoyment of economic, social and cultural rights, the assessment of conduct of the territorial state should be considered taking due account also and especially of the parallel conduct of the financing state, and in particular of latter's ability to influence the fulfillment of the first state of its protection obligations towards its own citizens.

The recognition of the principle of shared responsibility in the operations of development cooperation, and in the management and problems resolution related to foreign debt, was recognized in the Monterrey Declaration of 2002, approved document in order to guarantee better conditions for poor countries subject to excessive indebtedness towards Industrialized countries, where the principle of shared responsibility between debtors and creditors for debt management is emphasized for the first time, and in explicit terms<sup>23</sup>.

If responsibility for the recovery of foreign debt contracted by developing countries has traditionally been based on the exclusive responsibility of the borrowing state to honor the commitment undertaken, the adoption of the shared responsibility principle in the Monterrey Declaration has given life to an international debate on the co-responsibility of the creditor in debt negotiation transactions with third countries. The principle of shared responsibility for the management of debt problem in developing countries is also reflected in a long series of international instruments, declarations and resolutions of UN General Assembly highlighting the need for a common political commitment for the resolution of this problem in developing countries. In this sense see paragraph 10 of the Vienna Declaration and Program of Action in which the International Community refers to the International Community “to make all efforts to help alleviate the external debt burden of developing countries, in order to supplement governments efforts of such countries to attain the full realization of economic, social and cultural rights of their people”<sup>24</sup>.

Moreover, it is easy to note that CESCR itself has shown that it adheres to the principle of shared responsibility between the territorial and financing state in the operations of international economic cooperation. Although in extremely general terms, the supervisory body of ICESCR has repeatedly recommended ensuring states that the adoption of development cooperation policies in third states appears in accordance with the obligation of international assistance and cooperation for the implementation of human rights as set out in article 2 (1) of the Treaty.

In parallel, CESCR encouraged creditor states to recognize the negative consequences of excessive debt imposition and effects of structural adjustment programs on

<sup>22</sup>CESER, General Comment 2, cit., par. 89.

<sup>23</sup>“Debtors and creditors must share the responsibility for preventing and resolving unsustainable debt situations.” Report of the International Conference on Financing for Development, Monterrey, Mexico, 1822 March 2002, par. 47.

<sup>24</sup>Vienna Declaration and Programme of Action, UN Doc. A/CONF.157/23, 12 July 1993, par.10.

the realization of economic, social and cultural rights of developing countries population as well as commit themselves to development policies and decisions taken within the international financial institutions comply with the obligations arising from ICESCR. An explicit reference to the obligation of international assistance and cooperation in the context of multilateral development cooperation operations is also made in the concluding remarks made against Germany, where it is stated that: "The Committee encourages state party, as a member of international financial institutions, in particular International Monetary Fund and World Bank, to do all it can to ensure that policies and decisions of those organizations are in conformity with state parties obligations to the Covenant, in particular, the obligations contained in articles 2 (1), 11, 15, 22 and 23 concerning international assistance and cooperation"<sup>25</sup>.

Important indications regarding the nature of creditor states obligations under ICESCR with respect to the management of foreign debt, and more generally to financing operations for development in third countries, are also derived from the report presented to the UN General Assembly by the Independent Expert on the effects of debt and other financial obligations of states on the enjoyment of economic, social and cultural rights, Cephias Lumina.

With a view to identifying and giving substance to the principle of shared responsibility, the Independent Expert enumerates some principles and guidelines, capable of clearly delineating creditor's co-responsibility hypotheses in the global debt crisis, based on the concepts of predictability, decisive influence and due diligence. In particular, according to this approach, lender states would have the obligation to assess the extent to which they contributed to the formation of unsustainable debt in developing countries and consequently to recognize their responsibility for the harmful consequences deriving therefrom. In line with the obligation to assess in advance the effects of development finance policies in beneficiary countries, the state should thus be held responsible for the design or implementation of projects whose detrimental effects could be avoided by using more incisive prevention standards aimed at protecting population rights of the borrowing state<sup>26</sup>. In this regard, the principle that the entire international community should work together is reaffirmed

"[...] to ensure responsible lending and borrowing that benefits the populations of the indebted countries and enhances governments capacity of such countries not only to invest in basic services but also to fulfill their human rights obligations. One possible way of achieving this could be through the inclusion of provisions in loan agreements which explicitly respect national sovereignty and development priorities of borrower countries. Loan agreements could also include clauses concerning human rights implications of the loan<sup>27</sup>.

As regards the obligation to provide for ex-ante evaluation mechanisms for development cooperation projects in third states, lending states would also be burdened with the duty to conduct lending by first checking their impact on local population human rights and taking care to ensure the widest participation of all the actors involved, including the communities particularly interested in the cooperation projects. This obviously implies, according to the Independent Expert, that donor countries ensure that funding programs and related loans are aimed at achieving the development objectives of democratically elected governments and that beneficiary countries possess the freedom "(...) to design national policies that would enhance their capacity to achieve their development objectives and to fulfil their human rights obligations"<sup>28</sup>.

In order to ensure that loans in the context of cooperation projects achieve the objectives set in terms of promoting human rights of the communities concerned, all states involved, debtors and creditors would, in any case, be burdened by the obligation to develop

<sup>25</sup>CESER, Concluding Observations Germany UN Doc. E/C.12/1/Add.68, 24 September 2001, par. 31. CESER, Concluding observations Italy, UN Doc E/C.12/1/Add.43, 23 May 2000, par. 20. CESER, Concluding observations Belgium,, UN Doc E/C.12/1/Add.54, 1<sup>st</sup> December 2000, par. 31. CESER, Concluding Observations Sweden UN Doc.

<sup>26</sup>E/C.12/1/Add.70, par. 24; E/C.12/1/Add.72, par. 32. CESER, Concluding Observations France, UN Doc E/C.12/1/Add.79, par. 26.

<sup>27</sup>Council on Human Rights, Report of the Independent Expert on the Effects of Foreign Debt and other related International Financial Obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights, Cephias Lumina, UN Doc.

<sup>28</sup>Thus, the independent expert encourages both parties to the financing process to consider setting up mechanisms to monitor the use of loans in line with the development objectives and respect for human rights of local populations.



mechanisms verification, including in particular auditing commissions that ensure accountability, transparency and control over the use of loans, and in particular that they are allocated in accordance with the purposes previously identified<sup>29</sup>.

The definition of state obligations according to a shared responsibility approach to the problem of foreign debt in developing countries is finally outlined in an analytical way with the elaboration by the Independent Expert of the recent Guiding Principles on Foreign Debt and Human Rights adopted in the 2011, following the Decision 2/109 of UN Human Rights Council<sup>30</sup>. The Guiding Principles are the result of years of studies and investigative missions in several countries on the effects of illegitimate debt on the enjoyment of economic, social and cultural rights and contribute even more clearly to shedding light on the nature of member states duties, i.e. respect, protection and implementation of human rights.

The section expressly dedicated to the duty of international cooperation between states in which explicit recognition is attributed to the obligation is particularly relevant “to ensure that their activities, and those of their residents and corporations, do not violate the human rights of people abroad and that states, individually or through membership of international institutions, do not adopt or engage in policies that undermine the enjoyment of human rights or further engender disparities between and within states”<sup>31</sup>.

Thus, the duty of international cooperation provided for by human rights treaties again translates into the affirmation of a shared responsibility between the financing and beneficiary state, where the co-responsibility of the lender state takes on more defined characteristics, explicitly reflecting the obligation “to perform due diligence on the creditworthiness and ability to repay of the borrower as well as the duty to refrain from providing a loan in circumstances where the lender is aware that the funds will be used for nonpublic purposes or for a nonviable project”<sup>32</sup>. At the same time, as regards the position of the debtor state, the obligation to repay the debt within a sufficiently defined period is confirmed, and even before that, to borrow and use the funds received with the primary aim of increasing the welfare of its population.

The borders identified by the Independent Expert are still interesting for what concerns the decision to borrow and to lend respectively to beneficiary and lending country. With reference to the first, this would be burdened with the duty to elaborate an annual strategy on the debt according to the aforementioned principles of transparency and responsibility, taking care to evaluate, before the request for new loans, the possibility of reallocating existing resources at its disposal, providing the proof, otherwise, of the impossibility of following up these operations. At the same time, lending countries should ensure that the recipient country has decided to contract debts in line with the guarantees set out above and that the use of funds “will not be wasted through official corruption, economic mismanagement or other unproductive uses in the borrower state. If any such eventuality is reasonably foreseeable under the circumstances, lenders should not provide the loan or continue with the disbursement of the loan”<sup>33</sup>.

In operational terms, care is translated into a state duty that intends to invest or finance specific activities in the country of destination to conduct effective human rights impact assessments as a precondition for the provision of new financing to the receiving state. On the basis of the practice analyzed, the relationship between lending and beneficiary state are therefore defined with reference to the ability of both parties to fulfill their obligations deriving from the accession to human rights treaties of a socio-economic nature according to

<sup>29</sup>“Debtor countries should consider conducting debt audits to obtain a comprehensive picture of their debt portfolios and elicit information to assist them in the development of appropriate accountability and debt management frameworks. Likewise, creditor countries should consider conducting audits of their lending portfolios, with a view to objectively determining whether all loans are contracted and used in a manner not only consistent with their national development cooperation policies and universally recognized human right principles but also supportive of the development priorities of debtor countries”. Human Rights Council, Report of the Independent Expert on the Effects of Foreign Debt and other related International Financial Obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights, Cephass Lumina, UN Doc. A/64/289, cit. par.71.

<sup>30</sup>For further details see: J. PABLO BOHOLAVSKY, J. LETNAR CERNIC, *Making sovereign financing and human rights work*, Hart Publishing, Oxford & Oregon, Portland, 2014.

<sup>31</sup>Council on Human Rights, *Guiding principles on foreign debt and human rights*, Report of the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights, Cephass Lumina. A/HRC/20/23, 10 April 2011, par. 2

<sup>32</sup>See art. 11. For further details see: ICESCR, I. BANTEKAS, L. OETE, *International human rights law and practice*, Cambridge University Press, Cambridge, 2013, pp. 686ss. B. SAUL, D. KINLEY, J. MOWBRAY, *The International Covenant on Economic, Social and Cultural Rights: commentary, cases and materials*, Oxford University Press, Oxford, 2014.

<sup>33</sup>M. GIBNEY, S. SKOGLY (a cura di), *Universal human rights and extraterritorial obligations*, op. cit.,

the principle of international cooperation and assistance.

The explicit recognition by the supervisory bodies of the positive prevention and due diligence obligations incumbent on creditor states in the context of cooperation in the development and negotiation and management of the foreign debt with third countries is even more significant.

In particular, and as in the case examined in the foreign debt between Norway and Ecuador, what is important for a clearer attempt to define the extraterritorial obligations of states in the areas examined here is the explicit recognition not only of the relationship between external debt and enjoyment of socio-economic rights of the populations concerned, but above all the assessment of causal relationship existing between the conduct of lending states, characterized by the imposition of an extremely burdensome debt, and the consequent impossibility for the receiving countries to respect, protect and implement the rights of its population. In this regard, and with regard to the "feasibility" of rights protected in ICESCR, the primary identification of obligations of conduct, respectively of creditor and debtor countries, is functional to better allow in the near future the union on state responsibility for the violation of its contractual obligations in the context of development financing operations, and this also following the entry into force of the new optional protocol to ICESCR, which expressly authorizes CESCR to receive individual communications and to rule on inter-state appeal procedures following the violation of economic, social and cultural rights by a contracting party.

In conclusion, on the basis of indications that can be obtained from the practice, it would seem possible to state that in the case of foreign debt between Norway and Ecuador, the creditor state could have assessed in advance the consequences deriving from the Ship Export Campaign towards the countries development aid and the consequences of the imposition of an excessively burdensome debt on their ability to fulfill their obligations to protect the socio-economic rights of their population.

The admission of responsibility by Norway for the failure of the Ship Export Campaign and the willingness to work towards the cancellation of the illegitimate debt would appear to indicate that the state is obliged to conduct development cooperation activities in third countries in compliance with human rights treaties and in line with the international assistance and cooperation obligation resulting from article 2 (1) ICESCR.

### 3 Financing of land grabbing activities in Cambodia

We refer here and again to the analysis of ICESCR states parties obligations in the context of development cooperation with third states both for what concerns the bilateral assistance directly provided to the territorial state and as regards the economic support coming from the participation to international financial institutions such as World Bank or International Monetary Fund. Support aimed at the realization of major works and development programs supporting and increasing the well-being of the population of the receiving state.

The case of the management, allocation and redistribution of land in Cambodia (LMAP Land Management and Administration Project), initiated by the government with the support of international donors, including Germany and Finland, as well as World Bank, allows investigating the nature of states obligations under ICESCR in the case of bilateral assistance, as well as highlighting the detrimental consequences of development cooperation activities that result in complicity with the territorial state in violating local population human rights.

In particular, the well-known phenomenon of land grabbing, as a result of which substantial portions of territories of developing states are subtracted from the availability of local populations and intended for purchase or rent by foreign investors in concert with national governments, is under examination now on. Such practices often result in the expropriation of land to the detriment of territorial state citizens, resulting in a significant deterioration of economic, social and cultural rights of the same, and in particular right violation to adequate living conditions governed by article 11 of ICESCR<sup>34</sup>.

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<sup>34</sup>It should be noted, however, that the German Government has on several occasions emphasized the need to conduct development cooperation policies with third states, in accordance with obligations arising from conventional commitments on human rights. See, for example, the Development Policy Action Plan on Human Rights 2004 2007 of the Ministry for Economic Cooperation and Development (BMZ), which states that: "Human rights represent a global vision, which finds its

In such contexts, it becomes essential to question the extent of financing states obligations, both as regards the economic assistance provided directly to the territorial state and the support granted to national investors for the acquisition of lands of the same state, and this to the detriment of local populations. The analysis, therefore, has the object of ICESCR states parties responsibility in the context of the well-known phenomenon of forced displacements to the detriment of local communities, if such practices violate the right of the latter to an adequate standard of living, the right to food and the housing<sup>35</sup>.

Regarding the facts in question, the Ministry of Land Management, Urban Construction and Planning in Cambodia (MLMUPC) adopted in 2002 the Land Management Administration Project (LMAP), a land management and distribution plan, aimed at registering property of the Cambodian population. In particular, in order to promote social stability and the recognition of land tenure rights in Cambodia, the parliament issued land law recognizing the possibility of registration of property rights for those who held land previously in 2001, as well as the collective ownership rights of the indigenous communities allocated therein. The Land Management and Administration Project was funded by international donors, first of all, Germany, which since 1995 is one of the countries most involved in development cooperation operations with the Cambodian government, as well as World Bank, whose loans were a conditional implementation of the aforementioned program. Specifically, the German Ministry of Economic Development undertook to support the Cambodian government on condition that the land management program took place respecting human rights of the local population, subsequently reconfirming the economic support provided with additional funding provided in 2011 and 2012<sup>36</sup>.

Despite the formal legislative recognition of converting ownership rights to land, based on the new titration program, the government proceeded to allocate land in an arbitrary manner. Indeed, land tenure rights and to access the registration program were foreclosed to most rural communities and poorer families, thus privileging their acquisition by private individuals and foreign investors (economic land concessions). The authorities also refused to issue title deeds to certain groups of families despite the proven possession of lands prior to the enactment of land law. Many of the families requiring registration of their ownership rights were in fact forced to abandon their lands on the basis of the corresponding economic concessions granted to foreign private investors and multinational companies.

The Government also omitted to consider the ownership rights on the lands of various indigenous communities and refused to take into consideration the demands of the latter regarding the registration of their respective ownership rights. This inevitably led to the forced transfer of indigenous peoples from their ancestral territories and the violation of their socio-economic and cultural rights. The causes of evictions concerned for the most part, and once again, the release of economic concessions and licenses on land to private and multinational companies aimed at carrying out mining activities, infrastructure development and construction of major works.

The situation was aggravated by the government's failure to assess possible alternatives to forced eviction and failure to comply with the obligation to consult the affected populations. The government thus made itself responsible for the non-fulfillment of the obligation to pursue activities of consultation and participation of individuals to provide suitable alternatives to forced relocation, forcing them to resettle in other areas, or in other cases by ensuring insufficient compensation for the expropriations suffered and well below the market value of lands previously owned.

Thanks to investigations and work done in parallel by Cambodian and German NGOs, in 2009 the situation of dispossession of land and forced displacement in Cambodia following the arbitrary implementation of Land Management and Administration Project was made known and brought to the attention of CESCR during the procedure for monitoring compliance with the conventional obligations of ICESCR, underlining the serious violations of state law of

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normative expression in international conventions and covenants. As a result, human rights are no longer regarded as an internal matter for individual states but as a touchstone of international community's commonly values, binding on all concerned. This means that, in development policy, all the partners involved largely share the same standards and can use this as a springboard for a dialogue between equals.

<sup>35</sup>Federal Ministry for Economic Cooperation and Development, BMZ Concepts. Development policy action plan on human rights 2004–2007, 2004, p.7.

<sup>36</sup>Land and Housing Right in Cambodia, Parallel Report Submitted to the United Nations Committee on Economic, Social and Cultural Rights Concerning Article 11 (1) Right to Adequate Housing of the Covenant on Economic, Social and Cultural Rights, Land and Housing Working Group Cambodia (2009) p. 5ss.

an adequate standard of living of the populations concerned<sup>37</sup>.

Parallel to Cambodia's primary responsibility for the detrimental effects of the arbitrary implementation of the land management program, the respective obligations of international donors were assessed as regards the implementation of the Land Management and Administration Project. More specifically, and in relation to the obligations of financing countries and multilateral development agencies, there was a duty to conduct development assistance policies in third states in accordance with the respect of socio-economic and cultural rights of the population of the territorial state, and this is in line with the indications elaborated in CESCR practice and related to the right to adequate housing obtainable from the General Comments 4 and 7<sup>38</sup>. Similarly, the German non-governmental organization FIAN presented relevant information on the indirect involvement of Germany for the violation of the right to an adequate standard of living of the Cambodian peoples primarily due to the government on the basis of the land-titration program. The detrimental effects of financing states policies in the context of development cooperation and consequently their duties to comply with ICESCR in these operations were also highlighted<sup>39</sup>.

Finally, the World Bank Inspection Panel produced a report on August 2009, in response to an inspection request promoted by the non-governmental organization Center for Housing Rights and Evictions (COHRE) on behalf of some indigenous communities, confirming the violation internal policies and operating procedures, for failing to adequately supervise and implement the Land Management and Administration Project and to have contributed to the forced displacement of 4000 families in the region. The Panel also acknowledged that the World Bank had violated the guidelines relating to resettlement policies of local populations that would have led to the obligation to adequately compensate the latter for the prejudices suffered, as well as a series of directives relating more generally to the non-fulfillment of implementation and supervision obligations of the procedure in progress.

The Land Management and Administration Project in Cambodia proves useful in the context of our analysis because it raises the question of the co-responsibility of the financing state for the indirect violation of socio-economic and cultural rights in the cooperation policies undertaken with third states. In this regard, the objective of investigation we are going to undertake here is to verify whether international human rights law, and in particular for what concerns us, the practice of CESCR and other control bodies within the United Nations, provide relevant indications regarding the extraterritorial nature of states obligations in the context of cooperation operations with third states. To this end, a parallel analysis of the obligations imposed on both states deriving from ICESCR membership appears necessary.

#### **4 Indirect complicity and responsibility with the territorial state in the violation of economic, social and cultural rights in international cooperation operations**

In the concluding observations addressed to the Cambodian government in 2009 regarding the respect of obligations deriving from ICESCR, CESCR stated expressly recognizing the critical conditions of access to land and titration program, as well as the damage suffered by local populations and indigenous communities connected to expropriation and forced eviction: "the Committee is gravely concerned over reports that since the year 2000, over 100,000 people were evicted in Phnom Penh alone; that at least 150,000 Cambodians continue to live under threat of forced eviction; and that authorities of the state party are actively involved in land grabbing. The Committee notes with deep concern that the rate of large scale forced evictions has increased over the last 10 years due to increased public works, city beautification projects, private urban development, land speculation, and

<sup>37</sup>"Bilateral and multilateral donors providing support to land and natural resources sector should use the Covenant and guidelines adopted by the Committee, including in its General Comments No. 4 on the right to adequate housing and No. 7 on forced evictions, as a framework for development assistance and make their development assistance contingent on Government compliance with the Covenant. Donors should ensure that accountability for these projects is significantly improved, including through the implementation of rigorous monitoring systems and by making representations to the Government on the illegality of serious violations of the Covenant when they occur". Land and Housing Working Group Cambodia (2009) Land and Housing Rights in Cambodia, Parallel Report 2009, pp. 37ss.

<sup>38</sup>FIAN Germany, Germany's Human Rights Obligations in Development Cooperation. Access to Land and Natural Resources and Germany's support of the Land Sector in Cambodia, Additional information presented by FIAN Germany to the Committee on economic, social and cultural Rights 46th session, May 2nd, 2011.

<sup>39</sup>World Bank, World Bank Board of Executive Directors Considers Inspection Panel Report on Cambodia Land Management and Administration Project, Press Release, Washington, 8 March 2011.

granting of concessions over vast tracks of land to private companies. It is also concerned about the lack of effective consultation with, and legal redress for, persons affected by forced evictions, as well as the inadequate measures to provide sufficient compensation or adequate relocation sites to families who have been forcibly removed from their properties. It is also concerned over reports of violence during the evictions, in some cases carried out by the police”<sup>40</sup>.

Noting the serious situation regarding access to land in Cambodia, and the consequent violations of a number of provisions of ECESCR in the implementation of the titration program, CESCR urged the state to respect its conventional duties, defining their related obligations to light of the known tripartite dimension of the obligation to respect, protect and implement economic, social and cultural rights of its population. And indeed, if state responsibility would arise primarily in relation to the obligation to refrain from harmful conduct that could affect the rights guaranteed by the conventional provisions, the positive obligations to protect these rights are also particularly significant it concerns us more closely, with respect for the right to adequate housing as part of the more general duty to guarantee a satisfactory standard of living in accordance with article 11 ICESCR. With this in mind, CESCR underlines Cambodia's obligation to take urgent measures to allow participation and consultation of individuals concerned prior to the implementation of land distribution programs, as well as the duty to ensure adequate compensation as a result of expropriations suffered: “the Committee urges state party to implement a moratorium on all evictions until the proper legal framework is in place and the process of land titling is completed, in order to ensure the protection of human rights of all Cambodians, including indigenous peoples. The Committee recommends that the state party undertake urgent consultations with all stakeholders in order to reach a definition of “public interest” to complement the 2001 Land Law and develop clear guidelines for possible evictions [...]”<sup>41</sup>. The Committee strongly recommends that the state party, as a matter of priority, undertake open, participatory and meaningful consultations with affected residents and communities prior to implementing development and urban renewal projects and to ensure that persons forcibly evicted from their properties be provided with adequate compensation and/or offered relocation that complies with the guidelines adopted by the Committee in its general comment No. 7 (1997)<sup>42</sup> on forced evictions and guarantee that relocation sites are provided with basic services including drinking water, electricity, washing and sanitation, as well as adequate facilities including schools, health care centers and transportation at the time the resettlement takes place. The Committee also draws the attention of the state party to the guidelines on Development based Evictions and Displacements (A/HRC/4/18), prepared by the Special Rapporteur on adequate housing”<sup>43</sup>.

Furthermore, as regards the obligation of the territorial state to protect socio-economic and cultural rights of its citizens, the considerations made by CESCR regarding the protection of the indigenous peoples present in the Cambodian territory appear to be of significant importance. In this perspective, the supervisory body emphasizes the duty of the state to regulate economic activities of individuals susceptible of prejudicing the right to exploitation of natural resources in their respective territories, as a corollary of the broader right of self-determination guaranteed by article 1 ICESCR:

the Committee notes with concern that 2001 Land Law, which provides for the titling of indigenous communities communal lands, has not been implemented effectively and that so far, no indigenous community has received any land title. The Committee also notes with concern, the adverse effects of the exploitation of natural resources, in particular, mining operations and oil exploration that are being carried out in indigenous territories, contravening the right of indigenous peoples

<sup>40</sup>CESER, Concluding observations Cambodia, UN Doc E/C.12/KHM/CO/1, 12 June 2009, par. 30.

<sup>41</sup>“Failure to enforce Land Law has undermined the realization of adequate housing for thousands of families in urban and rural areas, as has the absence of national housing policies and legislation that take into proper account the rights and poor rural and urban livelihoods who do not have access to adequate housing or the means to secure it.” Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, Miloon Kothari, Addendum Mission to Cambodia, E/CN.4/2006/41/Add.3 21 March 2006.

<sup>42</sup>Report of the Special Rapporteur on the situation of human rights in Cambodia, Surya P. Subedi, UN Doc. A/HRC/27/70, 15 August 2014, par. 4651.

<sup>43</sup>CESER, Concluding observations Cambodia, E/C.12/KHM/CO/1, cit., par. 30. CESER, Concluding observations Madagascar, UN Doc. E/C.12/MDG/CO/2, 16 December 2009 par. 12, “(...) the Committee recommends that the state party revise Law No. 2007037 and facilitate the acquisition of land by peasants and persons living in rural areas, as well as their access to natural resources. It also recommends that the state party carry out a national debate on investment in agriculture and seek, prior to any contracts with foreign companies, the free and informed consent of the persons concerned (...)”.

to their ancestral domains, lands and natural resources (art. 1). The Committee urges state party to implement 2001 Land Law without further delay and to ensure that its policies on registration of communal lands do not contravene the spirit of this law. The Committee emphasizes the need for carrying out environmental and social impact assessments and consultations with affected communities with regard to economic activities including mining and oil explorations, with a view to ensuring that these activities do not deprive the indigenous peoples of the full enjoyment of rights to their ancestral lands and natural resources. The Committee encourages state party to consider ratifying ILO Convention no. 169 on Indigenous and Tribal Peoples in Independent Countries<sup>44</sup>.

CESCR thus recognizes in clear and precise terms not only the negative obligation of the state to refrain from prejudicing the enjoyment of the right to economic self-determination of the indigenous communities affected by the land-titration project, but analytically defines its connotations, requiring the state to carry out preventive impact assessments and consultation activities with those directly involved, as well as to guarantee remedies and compensation for the expropriations suffered. In support of this argument, it is particularly interesting to note, then, how states obligations to consult indigenous peoples have been recognized both in some rulings by the Regional Courts on Human Rights and on national courts at the state level<sup>45</sup>.

Further confirming the obligation to respect and inform the population of the effects of development cooperation projects, it is also possible to note that the right to land and obligation to consult the indigenous communities have been recognized in the UN Declaration on Indigenous peoples of 2007<sup>46</sup>. Thus, for example, article 32 of the same Declaration, concerning State's obligation to guarantee<sup>47</sup> the indigenous communities the right to freely pursue their own economic and social development, provides that: "indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources. States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate the adverse environmental, economic, social, cultural or spiritual impact"<sup>48</sup>. International practice provides significant elements about the nature of states parties obligations to ICESCR in order to protect the socio-economic and cultural rights of its population in the context of development cooperation operations conducted with foreign states. In particular, and as regards specifically the right to guarantee an adequate standard of living, and housing with dignity, the territorial state would be burdened by the triple obligation to respect this right by refraining from expropriation or forced displacement, to protect the population from violations caused by private actors and to implement support measures aimed at guaranteeing respect for the properties of territories of the local communities allocated therein.

## 5 (Follows) On the obligations of the financing state

<sup>44</sup>CESER, Concluding observations Cambodia, E/C.12/KHM/CO/1, cit., par.16.

<sup>45</sup>Inter-American Court of Human Rights (IACtHR), Case of the Sawhoyamaya Indigenous Community v. Paraguay, sentence of 29 March 2006. Centre for Minority Rights Development (Kenya) and Minority Rights Group on behalf of Endorois Welfare Council v. Kenya, Communication n. 276/200, where the Commission recognizes the non-compliance with the obligation to consult, finding a violation of Article 21 of the African Charter in relation to the right of peoples to dispose of their natural resources.

<sup>46</sup>At state level, and with regard to the obligation to consult populations for economic activities likely to affect their human rights, see also the decision of the High Court of Kenya in Kenya Small Scale Farmers case, in which the court declared the violation of obligation to consult the population complaining about the potential harm to a series of human rights, and in particular the detrimental effects on the enjoyment of the right to food, which can be derived from the conclusion of the Economic Partnership Agreement (EPA) with EU Member States. High Court of Kenya, Kenya Small Scale Farmers v. Republic of Kenya, Petition 1174 of 2007, Kenya Law Reports 2014. On the obligation of the State to consult the indigenous peoples with regard to travel and resettlement in different areas as a result of development cooperation projects in third countries, it can be recalled the World Bank's Indigenous Peoples' policy (OP 4.10, July 2005). See in argument. D.L. CLARK, The World Bank and human rights: the need for greater accountability, in Harvard Human Rights Journal, 15, 2002.

<sup>47</sup>General Assembly, United Nations Declaration on the Rights of Indigenous Peoples, U.N. Doc. A/RES761/295, 13 September 2007.

<sup>48</sup>M. GIBNEY, S. SKOGLY, Universal human rights and extraterritorial obligations, op. cit.

Thus defined the obligations of the territorial state, recipient of a cooperation program or promoter of the adoption of a development project on its territory supported by international donors, I now analyze the correlative responsibilities of the financiers states regarding the violation of socio-economic and cultural rights of individuals located outside their territorial sovereignty.

Invested of the question concerning the detrimental effects of development cooperation programs conducted in third countries by international states and donors, CESCR seems to have accepted that ICESCR contracting parties would be burdened with the duty to conduct their own cooperation policies with third states in line with compliance with law provisions, even in cases where they act across the border.

Although expressed in general terms, and in line with the recommendation nature of the observations issued by the monitoring body, the responsibility of states parties to the Treaty for the protection of socio-economic and cultural rights in the context of cooperation with third states would appear to be as parallel or complementary to the ordinary liability regime affecting the territorial state.

In support of such a vision, the statement by the ICESCR supervisory body can be reported in the concluding remarks directed in Germany in 2011, expressly recognizing the involvement of the state in development cooperation operations detrimental to economic, social and cultural rights of individuals located in third states, and where, moreover, the land title project in Cambodia is explicitly referred to: “the Committee is concerned that state party’s development cooperation programme has supported projects that have reportedly resulted in the violation of economic, social and cultural rights, such as in case of the land titling project in Cambodia (art. 2.1, 11, 22 and 23)”<sup>49</sup>.

Recognizing the detrimental impact of development funding programs carried out by Germany in third countries, CESCR recommended accordingly “the development cooperation policies to be adopted by the state party contribute to the implementation of economic, social and cultural rights of the Covenant and do not result in their violation”<sup>50</sup>.

Note also the importance, for the analysis of the extraterritorial obligations of states under ICESCR, of the further call of ONHCHR to the respect of the rights deriving from the treaty also for what concerns the commercial and investment policies whose effects reverberate on individuals located beyond the territorial sovereignty of the state. In particular, reference is made here to subsidies granted by states to support their own economy, especially in the field of agriculture, which frequently have the effect of undermining the enjoyment of the rights of citizens located in third states, leading to a significant impoverishment of economic capacity local producers and, therefore, the right to economic self-determination and food of the populations concerned<sup>51</sup>.

On the basis of the above, Germany could be considered responsible under ICESCR for the complicity, aid and economic assistance given to the Cambodian government in the implementation of the land-titration program, which subsequently resulted in expropriation and forced displacement damage of the population? Furthermore, the direct responsibility of the financing state under ICESCR could be considered for not having as primary investor, ex ante mechanisms for assessing the impact of the land titration project and for not having monitored the foreseeable harmful effects in terms of respect and protection of human rights of the local population? <sup>52</sup>

What is relevant is obviously to understand if, and on the basis of what arguments, Germany, in relation to the case in question, can be held responsible on the one hand, for the

<sup>49</sup>M. GIBNEY, S. SKOGLY, *Universal human rights and extraterritorial obligations*, op. cit.

<sup>50</sup>CESER, *Concluding observations Germany*, E/C.12/DEU/CO/5, 20 May 2011, par.11.

<sup>51</sup>“(…) the Committee notes with deep concern the impact of state party’s agriculture and trade policies, which promote the export of subsidised agricultural products to developing countries, on the enjoyment of the right to an adequate standard of living and particularly on the right to food in the receiving countries. (art. 2.1, 11, 22 and 23). The Committee urges the state party to fully apply a human rights based approach to its international trade and agriculture policies, including by reviewing the impact of subsidies on the enjoyment of economic, social and cultural rights in importing countries. In this regard, the Committee draws the attention of state party to the guidelines on international measures, actions and commitments as contained in the FAO Voluntary Guidelines on the Right to Food (2004)”.

<sup>52</sup>The events described above highlight the clear involvement of the German state in the implementation of the Land Management and Administration Project in concert with the Cambodian government, a plan supported on several occasions by the financing state, despite Germany being aware of the large-scale violations of population rights. Note, however, as noted above, that Germany undertook to refinance the project in 2011 and 2012, despite the fact that the World Bank had long suspended funding to the state for non-compliance with the directives on resettlement of populations affected by forced expropriation.

economic and logistical support provided to Cambodia (aimed at implementing the plan of land administration, subsequently translated into the expropriations and forced displacements of the communities of that state); on the other for the direct responsibility as project financier, unable to prevent the violation of human rights of the Cambodian population.

The doctrine that has dealt with the issue in question, and more specifically with the indirect responsibility or complicity with the territorial state in the violation of human rights, is inclined to base state responsibility for extraterritorial violations of economic, social and cultural rights by recalling the rules on state liability for the commission of an international offense drafted by the International Law Commission, and specifically the rules on the liability of a state related to the act of another state referred to in Chapter IV of the International Articles Project Law Commission (ILC) of 2001<sup>53</sup>.

In relation to international support operations and cooperation aimed at development aid with third states, the financing state would thus be liable to incur an international offense by participating in the commission of the same offense perpetrated by the territorial state on the basis of aid and assistance provided to the latter, and this in accordance with the provision of article 16 of the Project<sup>54</sup>. As you know, the article in question, entitled "help or assistance in the commission of an internationally unlawful act" specifically states that: "A state which aids or assists another state in the commission of an internationally wrongful act by the latter is internationally responsible for doing so. Thus, if that state does so with knowledge of the circumstances of the internationally wrongful act; and (b) the act would be internationally wrongful if committed by that state"<sup>55</sup>

As can be seen from the commentary on article 16 of the Draft of "Articles on the Responsibility of States", the hypotheses likely to provoke the complicity of the third state in the commission of an international offense by another state are specified (having regard to the hypotheses of help and assistance) in the following terms: "such situations arise where a state voluntarily assists or aids another state in carrying out conduct which violates the international obligations of the latter, for example, by knowingly providing an essential facility or financing the activity in question. Other examples include providing means for the closing of an international waterway, facilitating the abduction of persons on foreign soil, or assisting in the destruction of property belonging to nationals of a third country (...) the requirement that the assisting state be aware of the circumstances making the conduct of the assisted state internationally wrongful is reflected by the phrase "knowledge of the circumstances of the internationally wrongful act [...]"<sup>56</sup>.

Thus conceived the responsibility of financing states for the complicity given to the territorial state in violation of economic, social and economic rights in the area of economic, social and cultural rights expressly titled "indirect interference" on extraterritorial obligations of economic, social and cultural rights, constructed on behalf of articles 16 and 18 of the Draft of "Articles on the Responsibility of States". States must refrain from any conduct which: a) impairs the ability of another state or international organization to comply with that state or that international organization's obligations as regards economic, social and cultural rights; or b) aids, assists, directs, controls or coerces another state or international organization to breach that state's or that international organization's obligations as regards economic, social and cultural rights, where the former states do so with knowledge of the circumstances of the act.

Coomans and Kunnemann, for example, sustain in relation to the case of forced evictions in Cambodia, the co-responsibility of Germany for the violation of the right to an adequate standard of living and in particular to adequate housing of the indigenous peoples and communities affected by land grabbing<sup>57</sup>.

In order to base responsibility for international cooperation operations conducted in

<sup>53</sup>O. DE SCHUTTER, A. EIDE, A. KHALFAN, M. ORELLANA, M. SALOMON, I. SEIDERMAN, Commentary to the Maastricht principles on extraterritorial obligations of States in the area of economic, social and cultural rights, in *Human Rights Quarterly*, 34, 2012, pp. 1088ss. N. BHUTA, *The frontiers of human rights*, Oxford University Press, Oxford, 2016. M. GIBNEY, W. VANDENHOLE, *Litigating transnational human rights, obligations. Alternative judgments*, ed. Routledge, London & New York, 2013. M. LANGFORD, W. VANDENHOLE, M. SCHEININ, *Global justice, State duties: the extraterritorial scope of economic, social and cultural rights in international law*, Cambridge University Press, Cambridge, 2013.

<sup>54</sup>G. NOLTE, *Treaties and subsequent practice*, Oxford University Press, 2013, pp. 170ss.

<sup>55</sup>See 21 of the Maastricht Principles on Extraterritorial Obligations of the General Assembly, Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries 2001, (A/56/10), Yearbook of the International Law Commission, 2001, vol. II, Part Two.

<sup>56</sup>J. CRAWFORD, *The law of International responsibility: a commentary*, Oxford University Press, Oxford, 2010.

<sup>57</sup>A.P.M. COOMANS, R. KÜNNEMANN, *Cases and concepts on extraterritorial obligations*, op. cit., pp. 168ss.



third states, the aforementioned doctrine also notes the progressive training in international human rights law of rules which would require states to evaluate the effects of their cooperation policies according to principles of predictability, precaution and prevention<sup>58</sup>.

This refers in particular to the aforementioned positive obligations regarding impact assessment of development policies on the enjoyment of human rights of the recipient states population, but more extensively to the application of human rights approach based to the full range cooperation activities relevant in relations between states. Thus, for example, article 14 of the aforementioned Maastricht Principles on extraterritorial obligations in the field of economic, social and cultural rights enhances the obligation of states to carry out preventive assessments of risks and potential extraterritorial effects of their respective laws, policies and practices on enjoyment of economic, social and cultural rights through public participation of individuals located beyond their territorial sovereignty. The commentary on the article in question then establishes more specifically that this duty is substantiated by the obligation of each state "[...] to assess the impact of its conduct, to implement preventive measures, to ensure cessation of violations as well as effective remedies when rights are negatively impacted, to inform themselves about the potential impact of their conduct on the enjoyment of economic, social, and cultural rights outside their national territories prior to adopting such conduct"<sup>59</sup>.

In relation to land titling case in Cambodia, adhering to such a view on the scope of obligations arising by ICESCR membership would clearly imply the responsibility of the state party for not properly monitoring the land-toll program, for failing to conduct adequate impact assessments on the foreseeable detrimental effects of the same program and, above all, for not having interrupted the funding to the Cambodian state, once the situation about the expropriations and the large-scale forced transfers had been made known to German state authorities.

The considerations made so far regarding the extraterritorial nature of state obligations in the context of cooperation policies conducted with third states also appear to be endorsed by CESCR practice in the repeated calls made in several general comments on the obligation of the contracting parties to elaborate, interpret and apply international agreements (among which obviously international cooperation agreements are also included) in a manner consistent with the pre-existing obligations arising from human rights treaties of which states are parties. In this regard, the control body for the implementation of ICESCR, in general, comment n. 12 on the right to food has noted in particular that "states parties should, in international agreements whenever relevant, ensure that the right to adequate food is given due attention"<sup>60</sup>; and again in general comment n. 14 on health right affirmed that: "in relation to the conclusion of other international agreements, states parties should take steps to ensure that these instruments do not adversely impact upon the right to health"<sup>61</sup>.

The aforementioned comments, therefore, seem to highlight the obligation of the state to take into consideration the pre-existing obligations arising from the accession to the treaties on human rights in the signing of international agreements and at the same time avoiding the assumption of additional international obligations that are incompatible with them.

On the basis of the indications derived from the practice examined, it would thus seem possible to affirm that financing states of development projects and programs in third countries are considered recipients of extraterritorial obligations and, therefore, indirectly responsible, in agreement with the territorial state, for the violation of economic, social and cultural rights of individuals located across the border. Nevertheless, given the absence to date of CESCR of inter-state appeals or individual communications that have specifically addressed these issues, and based on a practice consisting mainly of soft law instruments, it becomes

<sup>58</sup>International Court of Justice, *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, sentence of 20 April 2010. See also: General Assembly, *Draft Principles on the Allocation of Loss in the Case of Transboundary Harm Arising out of Hazardous Activities*, Yearbook of the International Law Commission, 2006, vol. II, Part Two.

<sup>59</sup>O. DE SCHUTTER, A. EIDE, A. KHALFAN, M. ORELLANA, M. SALOMON, I. SEIDERMAN, *Commentary to the Maastricht principles on extraterritorial obligations of States in the area of economic, social and cultural rights*, op. cit.

<sup>60</sup>M. GIBNEY, S. SKOGLY, *Universal human rights and extraterritorial obligations*, op. cit.

<sup>61</sup>CESER, *General Comment 12, The Right to Adequate Food*, par. 36; *General Comment 14, The right to the highest attainable standard of health* par. 3. In a substantially similar manner, *General Comment 15, The Right to Water*, par. 3536. It is believed that the same considerations can also be made concerning the obligation to stipulate international agreements in line with the duty to respect the right to adequate housing guaranteed by article 11 of the Treaty, and elaborated in *General Comment 2 and V. Principle n. 17 of the Maastricht Principles*: "States must elaborate, interpret and apply relevant international agreements and standards in a manner consistent with their human rights obligations. Such obligations include those pertaining to international trade, investment, finance, taxation, environmental protection, development cooperation, and security".

problematic to investigate the characteristics with greater accuracy of the respective obligations of the territorial and financed state also for the purposes of "feasibility" of the economic, social and cultural rights in an extraterritorial perspective.

## **6 Right to housing, extraterritorial obligations in development cooperation operations and practices of United Nations supervisory bodies**

Financing activities in third states conducted by the most industrialized countries, through bilateral assistance or international financial institutions, are likely to jeopardize the enjoyment of socio-economic and cultural rights of local populations. Classical examples are represented by the creation of major works in third countries: think of the forced transfer of masses of individuals from their respective territories to make room for the construction of dams, or even to state support to private and multinational companies for the execution of mining activities beyond the border. In all these cases one wonders if, and in what terms, the foreign state that finances such activities can be held responsible for the violation of rights of individuals located beyond their territorial sovereignty for the so-called forced evictions carried out by the territorial state receiving development aid and aimed at carrying out the aforementioned works.

The analysis of CESCR practice concerning the phenomenon of forced evictions that we are about to make allows us to more clearly verify the extent of the state's commitments regarding the right to adequate housing<sup>62</sup>.

CESCR dealt with the detrimental effects of development cooperation policies, among other things, regarding the respect of the right to housing, from the beginning of its activity in the late eighties, recognizing the intimate relationship between international development policies and enjoyment of human rights in developing countries.

As noted with respect to the case of external debt, ICESCR monitoring body would seem to welcome a perspective that highlights the shared responsibility of the funding state for the protection of socio-economic and cultural rights of the population of the receiving country of the cooperation program. The nature of transnational obligations of contracting parties to the Treaty, engaged in cooperation projects in third states which result in forced displacement and expropriation to the detriment of local population, leading to the violation of the right to an adequate standard of living, and in particular to a adequate housing, has been emphasized by CESCR in several general comments, as well as by some Special Rapporteurs in the framework of the inquiry procedures conducted under the UN mandate.

CESCR recommended that the contracting parties adopt policies of international cooperation with third states in accordance with the respect of the rights protected by the treaty since 1990, namely through the elaboration of General Comment 2, relating to international technical assistance measures as referred to in article 22 of the Treaty, and in subsequent comments aimed at clarifying the scope of states obligations in these contexts.

Negative effects of international development cooperation policies have been strongly criticized by Graham Hancock since 1989. A series of projects carried out by the World Bank since the early 50s in Ghana, Brazil, India, which proved disastrous to local populations concerned, they then led to the establishment of the Morse Commission. The Commission, authorized by the World Bank to undertake an assessment of Bank's work for the construction of the Sardar Sarovar dam on the Narmada River in India, constitutes the first institutionalized attempt to investigate the responsibility of international financial institutions and states in the field of cooperation projects conducted in third countries. Based on the Morse Commission experience, the World Bank has subsequently created an Inspection Panel project, which is required to assess the compliance of the Bank's actions with its internal operational policies and guidelines.

In its general commentary, CESCR underlines the importance for international development agencies "of seeking to integrate human rights concerns into development activities", recognizing that the activities of cooperation with third states do not contribute the promotion and protection of economic, social and cultural rights of ICESCR member states. According to the supervisory body, this would result in the negative obligation of "scrupulously avoid involvement in projects which, for example, involve large scale evictions or displacement of persons without the provision of all appropriate protection and compensation". In positive

<sup>62</sup>Art. 11 (4) ICESCR. For further details see: I. BANTEKAS, L. OETE, *International human rights law and practice*, op. cit. B. SAUL, D. KINLEY, J. MOWBRAY, *The International Covenant on Economic, Social and Cultural Rights: commentary, cases and materials*, op. cit.

terms, the adoption of a human rights based approach to development would mean that agencies should act "(...) as advocates of projects and approaches which contribute not only to economic growth or other broadly defined objectives, but also to enhanced enjoyment of the full range of human rights (...). Every efforts should be made, at each phase of a development project, to ensure that the rights contained in the Covenants are duly taken into account. This would apply, for example, in the initial assessment of the priority needs of a particular country, in the identification of particular projects, in project design, in the implementation of the project, and in its final evaluation [...]"<sup>63</sup>.

Although the comment refers primarily to international agencies for economic development, general guidelines drawn up by the monitoring body for the protection of economic, social and cultural rights are addressed in parallel with states parties to the treaty. And indeed CESCR, (as noted earlier during the examination of the Norway-Ecuador case on external debt), is specifically addressed to states, as well as to international agencies, for what concerns the restructuring of external debt and implementation of structural adjustment in line with the need not to undermine the capacity of the recipient state of funding to fulfill its socio-economic obligations. Thus according to CESCR: "the Committee recognizes that adjustment programmes will often be unavoidable and that these will frequently involve a major element of austerity. Under such circumstances, however, endeavours to protect the most basic economic, social and cultural rights become more, rather than less, urgent. States parties to the Covenant, as well as the relevant United Nations agencies, should thus make a particular effort to ensure that such protection is, to the maximum extent possible, built in to programmes and policies designed to promote adjustment. Such an approach, which is sometimes referred to as "adjustment with a human face" or as promoting "the human dimension of development" requires that the goal of protecting the rights of the poor and vulnerable should become a basic objective of economic adjustment. Similarly, international measures to deal with the debt crisis should take full account of the need to protect economic, social and cultural rights through, inter alia, international cooperation"<sup>64</sup>.

In addition, as we will be able to verify during the negotiation of cooperation activities of states undertaken in the international financial agencies and institutions, it would seem possible to find a consensus in doctrine and in practice in the sense that the obligations deriving from the treaties on the rights of man shall not cease to bind the contracting parties for the activities carried out within those organizations.

The obligation of states to conduct cooperation policies in line with respect for human rights (and in particular, for what concerns us here, of the duty to refrain from activities of eviction and forced expropriation as a corollary of the right to a adequate accommodation guaranteed by article 11) would then be further confirmed by the subsequent CESCR practice which would seem to delineate the extraterritorial scope of the obligations of states to respect the right to adequate housing in General Comments 4 and 7<sup>65</sup>.

Also significant is the specification of CESCR according to which "(...) tenure takes a variety of forms, including rental (public and private) accommodation, cooperative housing, lease, owner occupation, emergency housing and informal settlements, including occupation of land or property. Notwithstanding the type of tenure, all persons should possess a degree of tenure security which guarantees legal protection against forced eviction, harassment and other threats. States parties should consequently take immediate measures aimed at conferring legal security of tenure upon those persons and households currently lacking such protection, in genuine consultation with affected persons and groups"<sup>66</sup>.

From this point of view, CESCR's appeal is particularly relevant to the fact that expropriations and forced displacements must be considered *prima facie* incompatible with

<sup>63</sup>M. GIBNEY, S. SKOGLY, *Universal human rights and extraterritorial obligations*, op. cit.

<sup>64</sup>CESER, General Comment 4, The right to adequate housing, UN Doc. E/1992/23, 1991, par. 7.

<sup>65</sup>In this regard, CESCR dedicated the General Comment 4 to the specification of the nature of states obligations with regard to the protection of the right to adequate housing. Preliminarily, and with regard to the content of the law in question, CESCR provides a characterization such that "the right to housing should be interpreted in a narrow or restrictive sense which equates it with, for example, the shelter provided by simply having a roof over one's head or views shelter exclusively as a commodity. Live in security, peace and dignity". In this regard, refer to the various components that contribute to making effective the right to adequate housing, and in particular, according to the formulation given by the control body, "(a) Legal security of tenure; (b) Availability of services, materials, facilities and infrastructure; (c) Affordability; (d) Habitability; (e) Accessibility; Location, (which allows access to employment options, healthcare services, schools and other social facilities); (g) Cultural adequacy".

<sup>66</sup>Council of Human Rights, Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, op. cit.,

the respect of conventional obligations and capable of being justified only in exceptional circumstances.

If the indications regarding the obligation to respect and protect the right to housing in the context of cooperation operations in third countries appear to be significant, and this evidently due to their potentially extraterritorial scope, significant appear also the expressions of the treaty body to the transnational dimension of protection of the right to housing. In this regard, CESCR emphasizes the essential importance of international cooperation for the realization of this right. Indicative of the extraterritorial scope of states obligations with regard to compliance with the right to housing in the comment under consideration, the final considerations on the obligation to fulfill the obligations related to the invitation addressed to states parties to collectively allocate an adequate level of resources for the realization of the right in question appear. Thus, after highlighting the reluctance of the international community to engage effectively in the promotion and implementation of the right to adequate housing through concerted actions at international level<sup>67</sup>, CESCR is addressed to states, respectively financiers and beneficiaries of cooperation projects, and to international financial institutions, inviting them to ensure: “a substantial proportion of financing is devoted to creating conditions leading to a higher number of persons being adequately housed. States parties should, when contemplating international financial cooperation, seek to indicate areas relevant to the right to adequate housing where external financing would have the most effect. Such requests should take full account of the needs and views of the affected groups”<sup>68</sup>.

CESCR in 1997 dedicated an entire general comment (General Comment 7) to the protection of the right to adequate housing, and in particular to forced evictions<sup>69</sup>, paying particular attention to the detrimental effects of the phenomenon in the context of international development cooperation.

After reiterating the opposition of forced evictions with respect to obligations arising from ICESCR, CESCR clearly outlines the duties of states in this context, enumerating a series of positive steps to be put in advance in such operations, as well as the related legal experience once these acts have been unlawfully made. In this regard, according to CESCR: “states parties shall ensure, prior to carrying out any evictions, and particularly those involving large groups, that all feasible alternatives are explored in consultation with the affected persons, with a view to avoiding, or at least minimizing, the need to use force. Legal remedies or procedures should be provided to those who are affected by eviction orders. States parties shall also see to it that all the individuals concerned have a right to adequate compensation for any property, both personal and real, which is affected. In this respect, it is pertinent to recall article 2.3 of “the International Covenant on Civil and Political Rights”, which requires states parties to ensure “an effective remedy” for persons whose rights have been violated and the obligation upon the “competent authorities (to) enforce such remedies when granted”<sup>70</sup>.

The comment in question, however, appears extremely relevant for the reference to

<sup>67</sup>CESCR, General Comment 4, op. cit., “Traditionally, less than 5 per cent of all international assistance has been directed towards housing or human settlements, and often the manner by which such funding is provided does little to address the housing needs of disadvantaged groups”, op. cit. par. 19.

<sup>68</sup>Council of Human Rights, Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, op. cit., “(...) the term forced evictions is defined as the permanent or temporary removal against their will of individuals, families and/or communities from the homes and/or land which they occupy, without the provision of, and access to, appropriate forms of legal or other protection. The prohibition on forced evictions does not, however, apply to evictions carried out by force in accordance with the law and in conformity with the provisions of the International Covenants on Human Rights”; CESER, General Comment 7, The Right to adequate housing. Forced Evictions, UN Doc. E/1998/22, annex IV, par. 3.

<sup>69</sup>CESER, General Comment 7, op. cit., “(...) many instances of forced eviction are associated with violence, such as evictions resulting from international armed conflicts, internal strife and communal or ethnic violence. Other instances of forced eviction occur in the name of development. Evictions may be carried out in connection with conflict over land rights, development and infrastructure projects, such as the construction of dams or other largescale energy projects, with land acquisition measures associated with urban renewal, housing renovation, city beautification programmes, the clearing of land for agricultural purposes, unbridled speculation in land (...)”, op. cit., para. 7.

<sup>70</sup>See also par. 15 of the same General Comment which the Committee affirmed that: “(...) (a) an opportunity for genuine consultation with those affected; (b) adequate and reasonable notice for all affected persons prior to the scheduled date of eviction; (c) information on the proposed evictions, and, where applicable, on the alternative purpose for which the land or housing is to be used, to be made available in reasonable time to all those affected; (d) especially where groups of people are involved, government officials or their representatives to be present during an eviction; (e) all persons carrying out the eviction to be properly identified; (f) evictions not to take place in particularly bad weather or at night unless the affected persons consent otherwise; (g) provision of legal remedies; and (h) provision, where possible, of legal aid to persons who are in need of it to seek redress from the courts (...)”.

the phenomenon of forced evictions in the context of development cooperation operations, typically extraterritorial activities that would require states, as well as international agencies, to conduct their activities in third countries in line with the dictates of the treaties of which are contracting parties. In this regard, CESCR, in reiterating the potential detrimental effects of transnational cooperation operations, expressly refers to General Comment 2 which was examined and reiterates states duty to ensure full implementation at every stage of the cooperation project of conventional rights.

Moreover, in a perspective of analysis of states obligations under ICESCR, the respect of guidelines on resettlement and relocation adopted within international financial institutions is revealed in order to minimize the negative consequences of development cooperation projects.

With this in mind, CESCR highlights that: “some institutions, such as World Bank and the Organisation for Economic Cooperation and Development (OECD) have adopted guidelines on relocation and/or resettlement with a view to limiting the scale of human suffering associated with “Committee's awareness that various development projects financed by international agencies within state parties territories have resulted in forced evictions. In this regard, the Committee recalls its general comment no. 2 (1990) which states, inter alia, that international agencies should scrupulously avoid involvement in projects which, for example [...] 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. Every effort should be made, at each phase of a development project, to ensure that the rights contained in the Covenant are duly taken into account [...] such practices often accompany large scale development projects, such as dam building and other major energy projects. Full respect for such guidelines, insofar as they reflect the obligations contained in the Covenant, is essential on the part of both the agencies themselves and states parties to the Covenant. The Committee recalls in this respect the statement in the Vienna Declaration and Programme of Action to the effect that while development facilitates the enjoyment of all human rights, the lack of development may not be invoked to justify the abridgement of internationally recognized human rights”<sup>71</sup>.

Finally, it should be noted that the enucleation of obligations relating to the respect of economic, social and cultural rights by ICESCR's contracting parties engaged in international cooperation projects, (and in particular the respect of the right to housing and to an adequate standard of living as set out in article 11 of the Treaty) has been fully developed in the guidelines of the Special Rapporteur, Miloon Kothari<sup>72</sup>.

Specific principles and guidelines on development based evictions and displacements drawn up by the Special Rapporteur expressly address states and international community as a whole to combat the phenomenon of expropriation and forced displacement in the context of cooperation programs conducted in concert between international donors and developing states<sup>73</sup>. The guidelines of the special rapporteur thus represent a further significant contribution in outlining the states duties in the field of development cooperation, specifying in clear terms what was stated by CESC in General Comments 4 and 7 dedicated to the duty of respect for adequate housing in these contexts<sup>74</sup>.

In particular, a specific reference to the role of international protection of housing rights both within states and international organizations is given in paragraphs 71 to 73, entitled Role of the international community, including international organizations, where the Special Rapporteur takes care to specify that: “the international community bears an obligation to promote, protect and fulfil the human right to housing, land and property. International

<sup>71</sup>Council of Human Rights, Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, Miloon Kothari, UN Doc. A/HRC/4/18, 5 February 2007.

<sup>72</sup>Council of Human Rights, Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, op. cit., “In the context of the present guidelines, development based evictions include evictions often planned or conducted under the pretext of serving the “public good”, such as those linked to development and infrastructure projects (including large dams, large scale industrial or energy projects, or mining and other extractive industries); land acquisition measures associated with urban renewal, slum upgrades, housing renovation, city beautification, or other land use programmes (including for agricultural purposes); property, real estate and land disputes; unbridled land speculation; major international business or sporting events; and, ostensibly, environmental purposes. Such activities also include those supported by international development assistance (...)”, par. 8.

<sup>73</sup>See also the Comprehensive human rights guidelines on development based displacement UN Doc. E/CN.4/Sub.2/1997/7 e i Guiding Principles on Internal Displacement UN Doc. E/CN.4/1998/53/Add.2.

<sup>74</sup>Council on Human Rights, Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, Miloon Kothari, op. cit., par. 7173.

financial, trade, development and other related institutions and agencies, including member or donor states that have voting rights within such bodies, should take fully into account the prohibition on forced evictions under international human rights law and related standards. International organizations should establish or accede to complaint mechanisms for cases of forced evictions that result from their own practices and policies. Legal remedies should be provided to victims in accordance with those stipulated in these guidelines. Transnational corporations and other business enterprises must respect the human right to adequate housing, including the prohibition on force evictions, within their respective spheres of activity and influence [...]”<sup>75</sup>.

In line with what has been shown regarding the respect of the right to housing in international development cooperation operations, it can finally be noted that the principles set out above have now become relevant through the Declaration of Indigenous Peoples, and this also with regard to the responsibility of states and international donors who become protagonists of violations of human rights across the border. It seems in fact to be able to affirm that the Declaration emphasizes the possibility of direct forms of cooperation between indigenous peoples and financing states in the context of international activities of support for development in third countries<sup>76</sup>. For example, having regard to articles 39-41 of the Declaration, we are talking about the right of states “to have access to financial and technical assistance by states, and to parallel duty of multilateral development agencies and intergovernmental organizations to contribute to the full implementation of provisions of this declaration through the mobilization, inter alia, of financial cooperation and technical assistance (...)”<sup>77</sup>.

With this in mind, the Declaration also affirms the right of indigenous peoples towards states and international agencies of the United Nations to be consulted before hand to choices that may prejudice their human rights (think first of the right to economic self-determination, and in particular the right to land and exploitation of its natural resources), as well as the right “to access and to prompt decision through just and fair procedures for the resolution of conflicts and disputes with states or other parties, as well as to effective remedies for all infringements of their individual and collective rights”<sup>78</sup>.

In conclusion, it can therefore be noted that human rights control bodies seem to agree in recommending to states the respect of economic, social and cultural rights and in particular, the right to an adequate standard of living, towards individuals located across the border. This is widely reflected in CESCR's remarks and in practice of the monitoring bodies established by UN Charter, such as special rapporteurs and independent experts, who thus show that they hold states responsible for the violation of human rights in cooperation development conducted or having effects beyond the territory of the contracting parties.

## 7 Health right violation and global gag rule

To complete the analysis of the overview of some of the many case studies useful to investigate the extent of states obligations in the context of international bilateral cooperation activities, we now turn our gaze to the typical assumptions of assistance and transfer of resources of the richest in relation to developing countries, subject to the implementation of certain obligations by the beneficiary state. These obligations often result in a prejudice to the enjoyment of socio-economic and cultural rights of the population of the same state.

Here we refer specifically to the phenomenon of conditionalities linked to the disbursement of loans to the recipient states, both bilaterally and through international financial institutions, able to condition, for various reasons, the enjoyment of basic socio-economic rights of the population of the latter state. Consider, among others, the negative effects of imposition of structural adjustment programs (SAPs) that impose and entail drastic reductions in social spending related to public health or education in developing countries. This typically occurs in the context of conditionalities, achieved through the imposition of user fees for access to essential public services phenomena capable of greatly affecting the possibility of enjoying the economic, social and cultural rights of the targeted population of the aid, but also in relation to conditionalities linked to policies and practices imposed by the financing state for

<sup>75</sup>M. GIBNEY, S. SKOGLY, *Universal human rights and extraterritorial obligations*, op. cit.

<sup>76</sup>UN Doc. A/RES/61/295, 2 October 2007, par. 39 41.

<sup>77</sup>M. GIBNEY, S. SKOGLY, *Universal human rights and extraterritorial obligations*, op. cit.

<sup>78</sup>M. GIBNEY, S. SKOGLY, *Universal human rights and extraterritorial obligations*, op. cit.

obtaining the aforementioned loans from the beneficiary state. Therefore, it is a question of imposing precise obligations on the beneficiary state on how to use development aid, which could jeopardize its ability to fulfill its obligations to respect, protect and implement the economic, social and cultural rights of its population and to negatively affect the rights of the recipients of the assistance in question. In all these cases one wonders if, and in what terms, financing ICESCR contracting parties, can be held responsible for the negative effects deriving from the conditionality on the enjoyment of economic, social and cultural rights of the beneficiary populations. This is evident in actions that cannot be defined as typically extraterritorial, but whose negative effects appear to reverberate on individuals located beyond the territorial sovereignty of donor states.

The problematic nodes linked extraterritorial obligations of ICESCR states parties in this context appear different. Firstly, it is easy to see how, in cases of imposition of conditionality for the provision of development aid to third states, major problems arise in relation to the causal link between the actions of states parties and violations suffered by individuals allocated over the border.

The extraterritorial applicability of the treaty, as is known, cannot be connected to the prior verification of the existence of a particular causal link between the conduct of the foreign state and the detrimental consequences suffered by the population of the recipient states of aid subject to conditionality<sup>79</sup>. It should be noted, in line with what has been highlighted in the various case studies, how the necessity of establishing the causal link between the activities of financing state and prejudice to the enjoyment of human rights of individuals located in third states characterizes the whole theme of conduct and extraterritorial effects of bilateral and multilateral cooperation and assistance policies in third states. If in relation to land grabbing activities in Cambodia previously examined, the causal link between activities of financing state and violations suffered by the population of territorial state would seem to be able to appreciate more immediately, given the direct involvement of donors in the support to the titration program, the cases of the foreign debt between Norway and Ecuador and the activities in Kenya, which we are willing to examine, instead raise more important problems in terms of identifying a causal link between the conduct of foreign state and prejudice suffered by the population of the recipient state. It can also be noted that in this context, but more generally in the context of the analysis of states obligations for the assistance and bilateral development cooperation considered as a whole, territorial state's conduct appears particularly indicative in order to appreciate in terms clearer compliance with ICESCR of the respective conduct of the financing state involved in the development project. In other words, what is extremely significant, in order to assess the fulfillment by the contracting parties of the obligations to respect and implement the rights protected by ICESCR, is to understand whether, and to what extent, the conduct of receiving state may be able to justify, mitigate, or in some way contribute to the definition of the degree of responsibility of the former. The complex issue concerning the division of responsibility between territorial state and financing state or donor, which we have faced in cases of debt and land grabbing, is now being discussed here, and is now underlined in the imposition of conditionality on the part of United States for the promotion of the right to health in third countries, following the adoption of the Mexico City Policy, better known as "global gag rule"<sup>80</sup>.

The case of global gag rule allows us to question the nature of the obligation to implement ICESCR by both financing and beneficiary states for what concerns development aid characterized by the use of conditionality. In particular, the events in question concern the negative effects on the enjoyment of the right to health of populations of developing countries produced by the aforementioned law, introduced by the Regan administration, endorsed by Bush government, and finally abolished during the Obama presidency in 2009. Specifically, by virtue of this law, Non Governmental Organizations destined to federal funds for the work in third countries were subjected to a considerable number of limitations regarding the faculty to promote health and information services in the field of abortion in developing countries. According to a number of non-governmental organizations operating in the field, the law produced devastating effects in many African countries, including in particular Kenya, due to

<sup>79</sup>M. GIBNEY, S. SKOGLY, *Universal human rights and extraterritorial obligations*, op. cit. pp. 258ss.

<sup>80</sup>HOODBHOY, *Exporting despair: the human rights implications of U.S. restrictions on foreign health care funding in Kenya*, in *Fordham International Law Journal*, 29 (1), 2005, pp. 1126ss. S.C. CAREY, M. GIBNEY, S.C. POE, *The politics of human rights the quest for dignity*, Cambridge University Press, Cambridge, 2010, pp. 62ss. M. GIBNEY, *international human rights law: returning to universal principles*, Rowman & Littlefield, New York, 2015.

the total dependence of government on the support provided by international donors for the realization of the right to reproductive health of their citizens. And in fact, at the time of facts in question, the country was devoid of a coordinated plan to promote the reproductive rights of its population, nor the budget for public spending for the promotion of the right to health provided for the allocation of part of the funds to protect the aforementioned rights. Ultimately, the complete subordination of the country to support international donors for the realization of the reproductive health rights of its citizens made non-governmental organizations recipients of funds entirely dependent on the policies and priorities of international donors.

The situation then became particularly burdensome, due to the obligation imposed on US International Development Agency (USAID) to operate in accordance with the dictates of the aforementioned law, and in this case entailed the impossibility for non-governmental organizations aid to continue to conduct its business on the protection of health and reproductive rights of women. Indeed, the complete subjection of NGOs to the allocation of foreign funds made these organizations in all respects subject to policies of the donor states, which is why some of them decided to refuse the aforementioned funds in order to guarantee the possibility of continuing to operate independently, with the aim of guaranteeing the right to women's health and their reproductive rights. The application of the global gag rule in the relations between international donors and NGOs in Kenya thus ended up having a highly harmful impact on the enjoyment of the right to health in the state in question, with the further effect of discriminating the rights of women in the most disadvantaged economic conditions, evidently due to the detrimental effects of the application of restrictive US policies for development assistance, characterized by the imposition of cross-compliance.

The events under review highlight issues related to the obligation of states to provide assistance and development cooperation in third countries in line with the respect of the rights protected by ICESCR, and once again raise the need to understand the nature of the respective duties of territorial and financing state in these contexts.

The case in question is then closely linked to the problem of the nature of international obligations of donor states in terms of protection of the right to health and the definition of modalities of aid and assistance in compliance with obligations arising from ICESCR. The objective of the analysis that follows is therefore to evaluate in more specific terms to what extent the activity of international development cooperation, per se legitimate, and in line with the presumed duty to realize an international system aimed at the transfer of resources towards the poorest countries, both in parallel subordinated to the respect of a series of guarantees by the financing state so that this assistance is compatible with norms and objectives set out in the Treaty. This raises the question of the possibility that the union regarding treaty obligations respect by the state be further extended to modalities and concrete content of assistance given to developing countries.

## **8 International obligations related to health right financing. Obligation to conduct development cooperation activities in line with ICESCR provisions.**

As regards the allocation of responsibility among various state actors, it appears first of all necessary to analyze the nature of obligations to respect and promote health right of its citizens the territorial state, and this in line with the duties descended by article 12 ICESCR. If, as repeatedly stated, the responsibility for the protection of socio-economic and cultural rights of its population is primarily delegated to the territorial state, the analysis must consequently start from the understanding of these obligations, also and above all with a view to better defining the correlative responsibilities of the donor state.

Under article 12 ICESCR, states parties recognize the right of everyone to enjoy the best physical and mental health conditions. Implicitly related to protection are also states duties in terms of reproductive rights guarantee, and more generally, the obligation to protect sexual health as a specific component of their population health right.

In line with international recognition of health protection as a fundamental human right, CESC recently dedicated a whole General Commentary on the right to sexual and reproductive health, as a specification of the right to health enshrined in article 12 ICESCR.

General Comment n. 22 makes a significant contribution to defining states obligations in this delicate matter. The Comment, adopted by CESCR in early 2016, is characterized by a detailed description of states parties obligations on population reproductive rights protection, also dedicating a significant part of its analysis to the definition of states extraterritorial obligations in the context of health right international promotion.



The express reference to states international obligations for the promotion of the right in question, in the perspective once again of recognition of a shared responsibility between states and international community for the realization of health right, is a concrete example of the will of control organ control to providing an evolutionary interpretation of the treaty that goes beyond the presumption of exclusively territorial protection to be granted to the protection of economic, social and cultural rights. In other words, the overall idea that can be derived from a careful reading of the General Comment under consideration, in parallel with the additional General Comment no. 14 on the right to health, is that the realization of the same right appears only possible through the concerted effort of individual states, international donors and international development agencies.

In particular, as regards the content of General Comment no. 22, CESCR adheres to the known tripartition relating to the obligations of respect, protect, fulfil to better define the characteristics of the respective commitments of the Contracting Parties to effectively implement health and the related reproductive rights of individuals.

In this regard, and according to a perspective expressly recognizing the transnational nature of contracting parties obligations in matters of health right, control body establishes that violations of sexual and reproductive health rights include "[...] the adoption of legislation, regulations, policies or programmes which create barriers to the realization of sexual and reproductive health right in the state party or in third countries, or the formal repeal or suspension of legislation, regulations, policies or programmes necessary for the continued enjoyment of the right to sexual and reproductive health"<sup>81</sup>.

As regards, then, the interpretation given by CESCR about states obligations to protect the rights in question, it is reiterated the duty to take positive action in order to prevent individuals' actions liable to adversely affect the enjoyment of population sexual and reproductive rights. The express reference to extraterritorial obligations (and this in line with the adoption of the recent principles of Maastricht) appears to be particularly relevant in this context, according to which

"[...] states also have an extraterritorial obligation to ensure that transnational corporations, such as pharmaceutical companies operating globally, do not violate the right to sexual and reproductive health of people in other countries, for example through non consensual testing of contraceptives or medical experiments"<sup>82</sup>.

Finally, as regards the obligation to adopt and implement the right to reproductive health, CESCR specifies that the state incurs a breach of this obligation when it fails to adopt and comply with all the measures necessary to facilitate and promote the right to reproductive health according to the classic criterion of maximum available resources. Thus, breaches of the obligation to fulfill would occur in the hypotheses in which states

"[...] fail to adopt and implement a holistic and inclusive national health policy that adequately and comprehensively includes sexual and reproductive health or where a policy fails to appropriately address the needs of disadvantaged and marginalized groups. In addition, violations of the obligation to fulfil occur where states fail to take affirmative measures to eradicate legal, procedural, practical and social barriers to the enjoyment of the right to sexual and reproductive health and to ensure that health care providers treat all individuals seeking sexual and reproductive health care in a respectful and nondiscriminatory manner"<sup>83</sup>.

Moreover, as reiterated in the matter of obligations for immediate implementation,

<sup>81</sup>M. GIBNEY, S. SKOGLY, *Universal human rights and extraterritorial obligations*, op. cit.

<sup>82</sup>Furthermore, Committee's indications on states obligations in the context of stipulation of regional and international agreements, likely to affect human rights, are relevant for the purpose of this issue. "(...) States parties should ensure, in compliance with their Covenant obligations, that their bilateral, regional and international agreements dealing with intellectual property or trade and economic exchanges, do not impede access to medicines, diagnostics or related technologies required for prevention or treatment of HIV/AIDS or other diseases related to sexual and reproductive health. States should ensure that international agreements and domestic legislation incorporate to the fullest extent any safeguards and flexibilities therein that may be used to promote and ensure access to medicines and health care for all. States parties should review their international agreements, including on trade and investment, to ensure that these are consistent with the protection of the right to sexual and reproductive health, and should amend them as necessary (...)" par. 51.

<sup>83</sup>Moreover, for the purposes of dealing with the issue in question, the identification of core obligations such as: (a) To repeal or eliminate laws, policies and practices that criminalize, obstruct or undermine individual's or particular group's access to sexual and reproductive health facilities, services, goods and information; (e) To take measures to prevent unsafe abortions and to provide post abortion care and counselling for those in need; (f) To ensure all individuals and groups have access to comprehensive education and information on sexual and reproductive health, that is nondiscriminatory, non biased, evidence based and taking into account the evolving capacities of children and adolescents.

states would be burdened with the constraint of ensuring a minimum level of protection in sexual and reproductive rights of their population. It is interesting to note that in relation to the core obligations in this context, CESCR specifies its content, taking care to point out that it is one of the obligations for immediate realization, the duty to adopt and implement a national strategy and an action plan for public health with relative allocation of resources to the adequate promotion and implementation of sexual and reproductive rights.

Applying the principles derived from the practice examined in the case of imposition of cross-compliance in Kenya, it emerges a clear violation by the state in question of the triple obligation to respect, protect and implement sexual and reproductive rights of its population.

And indeed, not only would the state in question fail to fulfill the immediate implementation obligations that required to adopt a plan to protect the health of its population, but the same would also have avoided taking preventive measures to protect this last from the effects of conditionalities imposed by the United States. Kenya was further responsible for failing to comply with the obligation to request assistance from international community for the realization of socio-economic rights<sup>84</sup>. Once the guaranteed funds from the United States had ceased to exist, the state had previously been able to take action to request in international community a parallel aid. And in fact, in line with what was established by CESCR, states that are not able to ensure economic, social and cultural rights protection, would be burdened by the obligation to request the intervention of international community in order to realize the minimum essential content of the rights protected by ICESCR. On the contrary, it is evident that, in this case, the state has not used, once the support from the United States has ceased, to request the help of international community or other donors in order to prevent the harmful consequences for its population resulting from the interruption of funds by international donors, thus incurring a clear violation of health right protected by article 12 ICESCR.

The practice examined, as we have seen, also highlights the responsibility for development finance, which results in the violation of economic, social and cultural rights by third states towards individuals located across borders. Based on documents and in particular General Comment no. 14 and 22, it appears possible, as previously noted, to draw significant indications on the extraterritorial scope of states obligations for development aid provided to foreign states.

The possibility of reviewing the modalities of development assistance by donor states also came into prominence as regards health's right international financing established in the United Nations Charter.

Particularly interesting in this context are the indications derived from the analysis carried out by the Special Rapporteur on health right, in the report presented to the General Assembly in 2012 dedicated, among other things, to issues related to assistance and cooperation between territorial and financing state for the best international realization of health right.

On the basis of what was seen in case of cross-compliance imposition on health funds in Kenya, the Special Rapporteur recognizes that development assistance to third countries "is often conditioned on recipient states adopting policies in line with social, political or economic interests and ideologies of donors [...]. Conditional aid may require recipient states to implement specific health strategies preferred by donors in order to obtain funds. Donor driven strategies, however, may not be aligned with the health needs of recipients States and may instead distort domestic health priorities"<sup>85</sup>.

Recognizing the impact of development finance policies subject to conditionality on the enjoyment of health right in third states, the rapporteur emphasizes the need to accept the principle of shared responsibility between territorial and financing state as regards international cooperation activities for international promotion of health right. In this regard, international donors would be so burdened with the duty to ensure that development finance activities are oriented towards respect for human rights. In this light, according to the Rapporteur: "international funders should ensure that their activities respect health right. Funders activities should therefore be directed towards meeting domestic health needs and promoting the development of self sustaining interventions and health systems. Towards that

<sup>84</sup>See par. 50 of General Comment n. 22 which is affirmed that: "(...) in compliance with article 2.1, states that are not able to comply with their obligations and cannot realize the right to sexual and reproductive health due to a lack of resources must seek international cooperation and assistance (...) that are in a position to do so must respond to such requests in good faith and in accordance with the international commitment of contributing at a minimum 0.7% of their gross national income for international cooperation and assistance".

<sup>85</sup>General Assembly, Interim Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, UN Doc. A/67/302, 13 August 2012, par. 27.

end, donors should incorporate the participation of civil society and affected communities in their activities in order to ensure that health interventions are responsive and sustainable and in accordance with health right. Donors should also abstain from attaching pernicious conditionalities to the receipt of international assistance [...]. Donor states should therefore not be driven by social, political or economic ideologies when designing and implementing health interventions. In accordance with health right, donors should instead ensure that they implement the most effective health strategies available given the needs of the recipient state as articulated by local stakeholders<sup>86</sup>.

The obligation to provide development assistance to receiving state population in line with the protection of economic, social and cultural rights and in a non-discriminatory manner was finally highlighted in relation to a long series of rights protected by ICESCR. From this point of view, it is possible to recall, as regards the right to food, the recommendations of the Special Rapporteur, De Schutter, pronounced in the sense that "the provision of aid should be nondiscriminatory, based on an objective evaluation of other countries needs rather than donor's "political, strategic, commercial or historically rooted interests".

Ultimately, at the end of the discussion on development financing activities in third states, we seem to recognize the progressive recognition in the practice of international control bodies of an interpretation of the obligation to provide development assistance in line with the non-discrimination prohibition protected by ICESCR.

## **9 Thoughts and observations on bilateral development cooperation practice in third states**

The events under review highlight how the protection of economic, social and cultural rights in the context of development cooperation in third states is more effectively achieved through the principle of shared responsibility between territorial state, an actor primarily responsible for the protection of population rights allocated therein, and donors from time to time engaged in supporting or financing cross-border cooperation programs and projects.

As we have noted, states parties obligation engaged in a cooperation project can take many different facets in different contexts. While this obligation is immediately identified with the negative duty not to interfere with the respect of economic, social and cultural rights in third countries, significant indications are also obtained with respect to the positive obligations of prevention and due diligence of activities potentially damaging human rights of individuals located there.

In all these cases, what appears particularly relevant is the element of possible co-responsibility and complicity in the commission of an international human rights violation in territorial state<sup>87</sup>. All the events previously examined allow indeed to found, at least in abstract, ICESCR's contracting parties responsibility for the complicity in violation of economic, social and cultural rights from time to time affected by the behavior of their state of origin.

The responsibility of donor or financing state on a development cooperation project is based on the valorization of regulatory paradigms in matters of complicity, help, assistance in the commission of an international offense governed by article 16 of the International Law Commission Articles Project. If it is easier to affirm the responsibility of the financing state in the case of bilateral development cooperation, the violation of economic, social and cultural rights in third countries presents some problems with regard to development cooperation activities carried out through organizations or international financial institutions.

The case studies thus far raise, in fact, the question of states responsibility for the violation of economic, social and cultural rights in the context of multilateral cooperation activities conducted, or having harmful effects on the protection of human rights in third countries, undertaken within international financial organizations and institutions.

In this case, the most relevant issues in order to answer the question on ICESCR's extraterritorial applicability in these contexts specifically concern two profiles: first, whether international human rights obligations apply also to states parties that act within organizations or financial institutions. Secondly, one wonders whether it is possible to assert the

<sup>86</sup>Council on Human Rights, Report of the Special Rapporteur on the Right to Food, Olivier De Schutter : the role of development cooperation and food aid in realizing the right to adequate food : moving from charity to obligation, UN Doc. A/HRC/10/5, 24 January 2014.

<sup>87</sup>H.P. AUST, *Complicity and the law of state responsibility*, Cambridge University Press, Cambridge, 2011. S. EGAN, *Extraordinary rendition and human rights. Examining state accountability and complicity*, ed. Springer, Berlin, 2018. V. LANOVOY, *Complicity and its limits in the law of international responsibility*, Hart Publishing, Oxford & Oregon, Portland, 2016,

responsibility of states for their conduct within the organization or institution or, at the same time, to consider contracting parties responsible for the commission of a human rights violation committed by the organization itself. Ultimately, on what basis can states incur the commission of an international human rights violation deriving from participation in multilateral cooperation activities undertaken by such institutions or organizations?

## 10 State responsibility for multilateral development cooperation activities in international institutions and organizations

Following the analysis of states obligations under ICESCR for bilateral development cooperation operations conducted in third countries, it is now appropriate to briefly turn to the issue of state responsibility for the violation of human rights for activities undertaken this time in international financial institutions or through participation in international organizations<sup>88</sup>. The issue of state responsibility for actions undertaken in multilateral contexts, and in particular in international organizations and institutions, is of great relevance in international law and is further intertwined with the problem related to the responsibility of non-state actors for the commission of an international human rights offense<sup>89</sup>.

In fact, it is easy to see that most of socio-economic and cultural rights violations often occur as a result of the work of non-state actors, and this increasingly thanks to the influence exerted on them by the same states, that support economically and politically activities in third countries. The responsibility human rights violation in the context of multilateral development cooperation projects is therefore one of the most significant scenarios highlighting ICESCR applicability<sup>90</sup>.

Aware of the need to give adequate responses to the phenomenon of proliferation of human rights violations by private actors, the doctrine is divided between authors who value the existence of human rights protection obligations also in relation to the same non-state actors<sup>91</sup>, and those who, on the other, prefer a traditionally statist approach that is able to establish the responsibility of state by virtue of progressive recognition of positive obligations. This result is achieved either on the basis of factual attribution criteria enunciation such as control, or on the basis of consideration of due diligence obligations that also enhance the influence that may be exercised from time to time on non-state actors<sup>92</sup>. Thus, if part of the doctrine is engaged in the promotion and search for a normative reference context on which to base the responsibility of non-state actors for the violation of human rights, other authors

<sup>88</sup>A. CLAPHAM, *Human rights obligations of non state actors*, Oxford University Press, Oxford, 2010.

<sup>89</sup>If it is true that traditionally the question about extraterritorial application of the treaty has come to the fore in the control of foreign territories, and studied in relation to these hypotheses (in accordance with the conception of control of a territory as a privileged category of exercise of jurisdiction extraterritorial in the meaning that this has assumed in the practice of human rights), it is believed that an equally relevant approach to the extraterritorial application of ESC Agreement is that which investigates the relevance of state obligation to protect human rights from the work of non-state actors, such as international financial institutions and multinational corporations. It should also be noted that, in the areas in question, the question on extraterritorial applicability of the Pact is rather, compared to what is seen in the context of bilateral development cooperation, especially in the need to identify the theoretical paradigms through which to impute responsibility to state for the actions of private actor, and therefore on the physiognomy of the concept of control as it is suitable to bring back the unlawful conduct of these entities to the state. For further details see: S. NARULA, *International Financial Institutions, Transnational Corporations and Duties of States*, New York University Public Law and Legal Theory Working Papers, 201, Paper 298. W. VANDENHOLE, *Challenging territoriality in human rights law: building for a plural and diverse duty bearer regime*, ed. Routledge, London & New York, 2015.

<sup>90</sup>M. DARROW, L. ARBOUR, *The pillar of glass: human rights in the development operations of the United Nations*, in *American Journal of International Law*, 103 (3), 2009, pp. 446, 463ss. W. VANDENHOLE (a cura di), *Challenging territoriality in human rights law: building blocks for a plural and diverse duty bearer regime*, op. cit., pp. 446ss. P. HILPOLD, *The responsibility to protect (R2P)? A new paradigm of international law?*, Martinus Nijhoff Publishers, The Hague, 2014. M.B. PEDERSEN, D. KINLEY, *Principled engagement: negotiating human rights in repressive states*, ed. Routledge, London & New York, 2016. B. MASON MEIER, L.O. GOSTIN, *Human rights in global health. Rights-based governance for a globalizing world*, oxford University Press, Oxford, 2018. C. TOMUSCHAT, *Human rights: between idealism and realism*, Oxford University Press, Oxford, 2014.

<sup>91</sup>W. VANDENHOLE (a cura di), *Challenging territoriality in human rights law: building blocks for a plural and diverse duty bearer regime*, op. cit., pp. 154ss.

<sup>92</sup>A. NOLAN, *Addressing economic and social rights violations by non state actors through the role of the state: a comparison of regional approaches to the obligation to protect*, in *Human Rights Law Review*, 9 (2), 2009, pp. 226ss. C. TOMUSCHAT, *Human rights. Between idealism and realism*, Oxford University Press, Oxford, 2014. E. BREMS, E. DESMET, *Integrated human rights in practice: rewriting human rights decisions*, Edward Elgar Publishers, 2017. E. SCHMID, *Taking economic, social and cultural rights seriously in international criminal law*, Cambridge University Press, Cambridge, 2015. E. RIEDEL, G. GIACCA, C. GOLAY, *Economic, social and cultural rights: contemporary issues and challenges*, Oxford University Press, Oxford, 2014. C. BREEN, *Economic and social rights and the maintenance of international peace and security*, ed. Routledge, London & New York, 2017.

emphasize the relationship between these actors and contracting parties on the basis of positive obligations of protection and parallel enhancement of the normative paradigm of due diligence.

Having said that, let's see if, and according to what parameters, the supervisory bodies responsible for safeguarding the obligations contained in the treaty under consideration have conceived the responsibility of the same States for the protection of human rights in financial institutions or international organizations. In this regard, in the practice of UN monitoring bodies there is an almost generalized consensus in the sense that states would continue to be burdened with the obligation to respect human rights in their participation in international financial institutions and organizations. With this in mind, respect for human rights in the activities undertaken within multilateral institutions would be characterized as a dual obligation, first of all imposing the obligation to operate within the organization in accordance with the treaties for the protection of human rights and secondly, positive prevention and diligence duties in order to undertake all the necessary actions to ensure that the institution acts in line with the respect of the same treaties.

### **11 Extraterritorial obligations of states for the protection of human rights in economic cooperation activities across the border. CESCER practice.**

Economic activities transnationalization due to globalization and free market promotion policies has led to an ever increasing influence on the work of financial institutions and international organizations in third states<sup>93</sup>.

The increased role of these transnational institutions through the promotion of macroeconomic reforms in developing countries has a significant impact on states ability to freely pursue their economic policy objectives and, consequently, on their ability to fulfill their obligations under respect, protection and implementation of economic, social and cultural rights of their population. Think of the multiple faces effects on the enjoyment of development finance policies on socio-economic rights subject to cross-compliance with third states, for example in the framework of structural adjustment programs or Poverty Reduction Strategy Papers promoted by International Monetary Fund. But think again, to the above hypotheses of funding programs for the construction of major works promoted by World Bank, due to the well-known phenomena of villagization and land grabbing, that is, the forced transfer of thousands of people from inhabited territories. The phenomena described above impose the question of what parameters ICESCR contracting parties are burdened with the obligation to protect economic, social and cultural rights of individuals located beyond their territorial sovereignty in the context of participation in these transnational institutions and if, and under what circumstances, the violation of these obligations entails commission's responsibility on international human rights violation.

International financial institutions and organizations are evidently formed by states that strongly address and determine policies and strategies aimed, among other things, at promoting the economy and the well-being of developing states.

In particular, financial institutions are subject to implementation procedures and performance of their programs on the basis of voting procedures in which significant importance is attributed to the economically more developed countries, which have a decisive influence in the preparation and implementation of programs and projects by themselves. Thus, for example, the voting power over the implementation of institutions programs is allocated among the different actors on the basis of economic influence exercised within the organization, according to the logic of weighted voting, and this clearly benefits the economically stronger countries. It is also clear that states exercise a very high degree of control over policies carried out in developing countries through non-state actors<sup>94</sup>.

What we intend to explore here is therefore the role of states within the same institutions, and in particular, according to what criteria they can be held responsible for the possible violation of human rights committed in third states through multilateral institutions.

If it is clear that a state cannot be immediately responsible for the mere participation in these institutions, what is particularly relevant is to verify and understand the nature and characteristics of positive obligations to avoid the commission of an international offense in

<sup>93</sup> BREEN, Economic and social rights and the maintenance of international peace and security, op. cit.

<sup>94</sup>C. RYNGAERT, Contribution to ESF exploratory workshop on transnational Human Rights Obligations in the Field of Economic, Social and Cultural Rights, 2008, Working Paper, pp. 2.

human rights<sup>95</sup>. Otherwise, a survey of this kind aims to identify regulatory standards to be applied in the assessment of the conformity of state's conduct in relation to its duties arising from the accession to human rights treaties in the context of participation in multilateral institutions.

CESCR has on several occasions shown that state responsibility for the protection of human rights also extends to participation in international financial organizations and institutions, referring to the obligation to positively influence the work of institutions in accordance with the respect of rights protected in ICESCR<sup>96</sup>.

In particular, the supervisory body has paid attention to the role of states in formulation and elaboration of international financial institutions policies, both in general comments<sup>97</sup> and in states periodic reports, helping to outline the characteristics of their respective conduct obligations.

The need of states to operate in accordance with the respect, protection and implementation of economic, social and cultural rights within international institutions was further emphasized in subsequent General Comments and in several concluding remarks adopted against the states belonging to World Bank and International Monetary Fund<sup>98</sup>.

In line with what was said in General Comment n. 19 concerning the protection of social security right, it was underlined that ICESCR contracting parties:

“[...] should ensure that their actions as members of international organizations take due account of the right to social security. Accordingly, states parties that are members of international financial institutions, notably International Monetary Fund, World Bank, and regional development banks, should take steps to ensure that social security right is taken into account in their lending policies, credit agreements and other international measures. States parties should ensure that the policies and practices of international and regional financial institutions<sup>97</sup>, in particular those concerning their role in structural adjustment and in the design and implementation of social security systems, promote and do not interfere with social security right”<sup>99</sup>.

In even more specific terms, and using a more incisive formulation, in health right general comment, CESCR notes that: “states parties have to respect the enjoyment of health right in other countries, and to prevent third parties from violating the right in other countries, if they are able to influence these third parties by way of legal or political means, in accordance with the Charter of the United Nations and applicable international law. States parties have an obligation to ensure that their actions as members of international organizations take due account of the health right. Accordingly, states parties which are members of international financial institutions, notably International Monetary Fund, World Bank and regional development banks, should pay greater attention to the protection of health right in influencing lending policies, credit agreements and international measures of these institutions”<sup>100</sup>.

<sup>95</sup>A.S. BARROS, C. RYNGAERT, The position of Member States in (autonomous) institutional decision making: implications for the establishment of responsibility, in *International Organizations Law Review*, 11, 2014, pp. 538ss. A.S. BARROS, C. RYNGAERT, J. WOUTERS, *International organizations and member State responsibility: critical perspectives*, ed. Brill, The Hague, 2016. M. NOORTMANN, A. REINISCH, C. RYNGAERT, *Non-state actors in international law*, Hart Publishing, Oxford & Oregon, Portland, 2015, pp. 378ss.

<sup>96</sup>“In relation to the rights recognized in the Covenant, the treaty specific document should indicate: mechanisms in place to ensure that a state party's obligations under the Covenant are fully taken into account in its actions as a member of international organizations and international financial institutions, as well as when negotiating and ratifying international agreements, in order to ensure that economic, social and cultural rights, particularly of the most disadvantaged and marginalized groups, are not undermined (...)”.

<sup>97</sup>CESER, Guidelines on treaty specific documents to be submitted by states parties under articles 16 and 17 of the international covenant on economic, social and cultural rights, UN Doc. E/C.12/2008/2, 24 March 2009, par. 3.

<sup>98</sup>See, General Comment No. 2, “(...) states parties to the Covenant, as well as the relevant United Nations agencies, should thus make a particular effort to ensure that such protection is, to the maximum extent possible, built in to programmes and policies designed to promote adjustment. Such an approach, which is sometimes referred to as “adjustment with a human face” or as promoting “the human dimension of development” requires that the goal of protecting the rights of the poor and vulnerable should become a basic objective of economic adjustment (...)”. CESER, General Comment 2, *International Technical Assistance Measures*, cit., par. 8.

<sup>99</sup>The right to education, UN Doc. E/C.12/1999/10, 8 December 1999, par. 56. CESER, General Comment 19 *The right to social security*, cit., par. 58.

<sup>100</sup>CESER, General Comment 14 *The right to the highest attainable standard of health*, cit. Par. 39, “(...) states parties should ensure that their actions as members of international organizations take due account of the right to water. Accordingly, states parties that are members of international financial institutions, notably International Monetary Fund, World Bank, and regional development banks, should take steps to ensure that the right to water is taken into account in their lending policies, credit agreements and other international measures (...)”. CESER, General Comment 15, *The right to water*, cit., par. 36. See also:

Moreover, as anticipated, indications about states duties in the context of participation activities in international organizations and financial institutions are further found in numerous concluding observations issued after the submission of periodic reports by member states<sup>101</sup>.

In this regard, CESCR shows that it considers this obligation incumbent to the Treaty. The control body is thus addressed at the same time as the developed countries, charged with the constraint of positively influencing the work of institutions of which they are parties and developing countries, burdened by the obligation to take all necessary measures to protect the population from the prejudicial effects deriving from the signing of international agreements with international financial institutions<sup>102</sup>.

Thus, for example, in the concluding remarks made against Japan, CESCR invited the state party, as a member of international financial institutions, and in particular World Bank and International Monetary Fund, “[...] to do all it can to ensure that the policies and decisions of those organizations are in conformity with states parties obligations to the Covenant, in particular the obligations contained in articles 2 (1), 11, 15, 22 and 23 concerning international assistance and cooperation”<sup>103</sup>.

For what concerns developing countries, control body addressed, among others, Zambia, recommending “(...) that Zambia’s obligations under the Covenant be taken into account in all aspects of its negotiations with international financial institutions, such as International Monetary Fund and World Bank, so as to ensure that rights enshrined in the Covenant are duly protected, for all Zambians, and, in particular for the most disadvantaged and marginalized groups of society”<sup>104</sup>.

It is interesting to note, however, how CESCR has returned to enhancing extraterritorial obligations of contracting parties relating to operations carried out within international financial institutions, in the concluding remarks made in respect of France, Great Britain and Sweden, during the fifty-eighth session of works held in June 2016. In particular, called to comment on the report submitted by France on the implementation of ICESCR, CESCR renewed its call to state party “à prendre toutes les mesures possibles afin de s’assurer que les décisions et les politiques adoptés au sein des organisations internationales dont il est membre soient conformes aux obligations au titre du Pacte”<sup>105</sup>.

Once again, however, while recognizing the responsibility of contracting parties for the respect and implementation of rights protected by ICESCR in the context of participation in international organizations and institutions, the control body failed to specify more clearly the characteristics of such an obligation of prevention and diligence.

On the other hand, the characteristics of this obligation are clearer in the observations made to Great Britain. In these CESCR invites state party to adopt human rights based approach in the context of multilateral development cooperation policies conducted in third countries including: (a) Undertaking a systematic and independent human rights impact assessment prior to decision making on development cooperation projects; (b) Establishing an effective monitoring mechanism to regularly assess the human rights impact of its policies and

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General Comment 13 to the right of education: “states 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”. CESER, General Comment particularly important for states to use their influence to ensure that violations do not result from the programmes and policies of 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. Member States of such organizations, individually or through the governing bodies, as well as the secretariat and nongovernmental organizations should encourage and generalize the trend of several such organizations to revise their policies and programmes to take into account issues of economic, social and cultural rights, especially when these policies and programmes are implemented in countries that lack the resources to resist the pressure brought by international institutions on their decision making affecting economic, social and cultural rights (...)” Maastricht Guidelines, on violations of economic, social and cultural rights, Utrecht, 1998, Guideline No.19.

<sup>101</sup>Doc. E/C.12/1/Add.43, 23 May 2000, par. 20. Concluding Observations Japan, UN Doc.E/C.12/1/Add.67, 24 September 2001.

<sup>102</sup>M. SEPULVEDA, Obligations of international assistance and cooperation in an optional Protocol to the International Covenant on economic, social and cultural Rights, in Netherlands Quarterly of Human Rights, 24 (2), 2006, pp. 283ss. CESER, Concluding Observations Bulgaria, UN Doc. E/C.12/1/Add.37, 8 December 1999, par. 24; Concluding Observations Argentina UN Doc. E/C.12/1/Add.38, 8 December 1999, par. 28.

<sup>103</sup>CESER, Concluding Observations Japan, UN Doc. E/C.12/1/Add.67, cit., par. 37.

<sup>104</sup>CESER, Concluding Observations Zambia, UN Doc. E/C.12/1/Add.106, 23 June 2005, par. 36.

<sup>105</sup>CESER, Concluding observations France, UN Doc. E/C.12/FRA/CO/4, 24 June 2016, par.11. See also: Concluding observations United Kingdom, UN Doc. E/C.12/GBR/CO/6, 24 June 2016, par.14; Concluding observations Sweden, UN Doc. E/C.12/SWE/CO/6, 24 June 2016, par.11.

projects in the receiving countries and to take remedial measures when required; (c) Ensuring that there is an accessible complaint mechanism for violations of economic, social and cultural rights in the receiving countries committed in the framework of development cooperation projects<sup>106</sup>.

Finally, it is possible to point out that states responsibility for their work in international financial institutions has been repeatedly recognized by the majority of Special Rapporteurs appointed by the Human Rights Council in the analysis concerning the respect and protection of economic, social and cultural rights from time to time monitored. Among the many, due to the importance accorded to the extraterritorial obligations of states under ICESCR, one can recall the considerations of several special rapporteurs, including Ziegler and Halvar, who stress states responsibility for the decisions taken within international financial organizations and institutions detrimental to the right of food to citizens located in third countries<sup>107</sup>.

As can be seen from CESCR practice, fundamental importance in this context once again assumes the broad interpretation of general obligation referred to in article 2 (1) ICESCR which, as repeatedly mentioned, requires states to realization of rights enunciated in it, both individually and through international assistance and cooperation. And indeed, the provisions on international assistance and cooperation contained in the treaty have been considered likely to impose obligations of prevention and diligence also for multilateral development cooperation activities undertaken within international institutions, whose effects are reverberating on the protection of rights of individuals in third states.

In view of the uniformity of views by the supervisory bodies regarding states responsibility in multilateral cooperation operations, it is necessary to question the concrete nature of obligations arising from ICESCR in case of transactions conducted across the border. In other words, what does the obligation "to take steps" or "to do all it can" consist of for the contracting parties in order not to violate economic, social and cultural rights of individuals located in third states, always the scope of participation in multilateral cooperation projects developed within international financial organizations and institutions?

What is the nature of obligation of due diligence in practice to be exercised on non-state actors to act in accordance with the respect of human rights conventions to which states are parties? On the basis of what criteria is it possible to attribute the conduct of non-state actors to state that exercises significant power within the organization? To what extent can we ultimately assume that states can incur international responsibility for the violation of economic, social and cultural rights in third states for policies and programs undertaken in the sense of financial institutions?

What is the nature of due diligence in practice to be exercised on non-state actors to act in accordance with the respect of human rights conventions to which states are parties? On the basis of what criteria is it possible to attribute the conduct of non-state actors to the state that exercises significant power within the organization? To what extent can we ultimately assume that states can incur international responsibility for the violation of economic, social and cultural rights in third states for policies and programs undertaken in the sense of financial institutions?

## **12 Progressive recognition of positive obligations towards non-state actors for the protection of economic, social and cultural rights in development cooperation operations**

Recognized the potential extraterritorial applicability of ICESCR in multilateral cooperation operations, scholars have begun to question the extent of state obligations in the framework of activities of international institutions, and in particular on the circumstances under which states can be held responsible for the Commission for an international human rights offense through international financial organizations and institutions.

The existence of positive obligations on the part of states towards private actors, aimed at avoiding the commission of human rights abuses in development cooperation operations, is recognized by several authors, and this again on the basis of interpretation in an extensive sense the general obligation referred to in article 2 (1) ICESCR<sup>108</sup>.

<sup>106</sup>CESER, Concluding observations United Kingdom, UN Doc. E/C.12/GBR/CO/6, cit., par.15.

<sup>107</sup>CESER, Report of the Special Rapporteur on the right to food, Jean Ziegler, UN Doc, E/CN.4/2006/44 16 March 2006, par. 3945. CESER, Report of the Special Rapporteur on the right to food, Hilal Elver, Access to justice and the right to food: the way forward, UN Doc. A/HRC/28/65, 12 January 2014, par. 3840.

<sup>108</sup>A.S. BARROS, C. RYNGAERT, J. WOUTERS, International organizations and member State responsibility: critical



As regards the characteristics of State's positive obligation to influence the behavior of private actors, some authors believe, for example, that the obligation to "do it all" enunciated by CESCR to ensure that institutions operate according to the constraints deriving from the treaty it would imply not only the obligation to refrain from financially supporting projects or programs that violate human rights in third states, but at the same time an active role in the implementation of rights deriving from the treaty in cooperation programs conducted beyond state territory, and this on the basis, in fact, of the positive evaluation of the obligation of assistance and international cooperation referred to in article 2 (1) ICESCR<sup>109</sup>.

For example, such an obligation would entail, according to Sepulveda, the need for the state to take action to prevent the conclusion of international programs and agreements that reinforce discrimination between individuals and groups, contrary to Treaty provisions, or which involve the promotion of projects likely to lead to forced expropriation and relocation in the absence of appropriate remedies and compensation mechanisms for disadvantaged groups<sup>110</sup>.

The preventive obligation to protect individuals located in third states from the work of transnational institutions could then, according to others, impose on the state to vote contrary to the approval of projects able to call into question the enjoyment of economic, social and cultural rights of the populations concerned<sup>111</sup>.

In this regard, the mere vote expressed within the organization would be for this reason suitable for attributing the responsibility to contracting parties for the organization, and this on the basis of the control exercised by the state on the organization in the relevant decision-making processes.

The responsibility of the state for the mere approval in an international organization of a resolution likely to lead to the violation of human rights is however called into question on the other side of the doctrine. In particular, according to an opinion to which we think we can join, the conduct of state within the organization could not be assessed solely and exclusively in relation to the vote expressed on the single resolution, but should rather be considered in the light of a wider range of elements, such as the reasons given by the state to support the position expressed within the organization or the failure to comply with positive obligations for the prior assessment of the detrimental effects on the enjoyment of cooperation projects carried out across the border.

Applying these principles to the cases of multilateral economic cooperation undertaken within international financial organizations or institutions, state responsibility for the damaging effects of a cooperation program conducted in third states could not arise by the mere approval of a resolution, or by virtue of the single vote expressed within the institution itself. It is rather necessary to take into consideration the overall demeanor held by the state during the whole phase of approval, implementation and execution of a development cooperation project carried out across the territory or whose effects are able to occur across the border.

Such a position is obviously connected with the broader duty of the state to put into place preventive mechanisms for assessing the potential effects of cooperation projects on the enjoyment of human rights of target populations, but also to monitor respect for human rights in all phases relating to the implementation of the aforementioned projects. This also appears to be consistent with the broad appeal made by the Maastricht principles to the valorisation of due diligence obligations according to which states would be burdened with the duty "(...) to take all reasonable steps to ensure that, in its decision making processes, the

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perspectives, op. cit.

<sup>109</sup>With regard to the negative obligation not to interfere with the enjoyment of economic, social and cultural rights of individuals located across the border in the context of participation in international organizations, it is possible to recall, as seen elsewhere in this work, further examples of practices for the granting of export subsidies towards the member states of an international organization, measures capable of creating a significant advantage for the latter for the sale of their products in developing countries markets. The obligation for states to act within international institutions in compliance with the economic, social and cultural rights set forth in the Covenant is also relevant, including for what concerns the imposition of multilateral sanctions adopted in international organizations; measures which, as mentioned by the Committee, should always take into account the respect of the minimum essential content of the economic, social and cultural rights of the populations of states affected by such coercive instruments.

<sup>110</sup>M. SEPULVEDA, Obligations of international assistance and cooperation in an Optional Protocol, op. cit., pp. 284ss.

<sup>111</sup>A.P.M. COOMANS, Application of the International Covenant on Economic, Social and Cultural Rights in the Framework of International organizations, in A. VON BOGDANDY, R. WOLFRUM, Max Planck Yearbook of United Nations law, 11, 2007, pp. 360ss. M. KALTENBORN, Social rights and international development: global legal standards for the post development Agenda 2015, Oxford University Press, Oxford, 2014. M. MILANOVIC, Extraterritorial application of human rights treaties: law, principles and policy, Oxford University Press, Oxford, 2011.

international organization acts in accordance with the preexisting human rights obligations of the state concerned”<sup>112</sup>.

In line with what has been said, contracting parties could thus be held accountable for the foreseeable effects of the cooperation policies subsequently translated into manifest violations of economic, social and cultural rights of the populations receiving cooperation projects.

It is interesting to note, from this perspective, how the recent principles of Maastricht refer to state obligation to prevent and avoid the damage potentially deriving from international economic cooperation activities. And indeed, in the attempt to delineate more specifically the characteristics of this obligation, the principles in question provide that states “must desist from acts and omission that create a real risk of nullifying or impairing the enjoyment of economic, social and cultural rights extraterritorially. States responsibility is engaged where such nullification or impairment is a foreseeable result of their conduct. Uncertainty about potential impacts does not constitute justification for such conduct”<sup>113</sup>.

The basic idea is that ICESCR states parties hold significant power over transnational institutions, such that they would be able to positively influence their actions in the sense of preventing violations of human rights in individuals of third states. From what has been said, it would thus seem that a state could be held accountable for manifestly failing to take all necessary measures to assess the effects on the enjoyment of human rights in third states produced by the implementation of multilateral development cooperation projects conducted through international institutions<sup>114</sup>.

States obligation to put in place impact assessment mechanisms for projects that are likely to negatively affect the enjoyment of human rights in third states is also one of the key issues pursued by non-governmental organizations, which have been involved for almost a decade in advocacy activities carried out in the United Nations, aimed at ensuring the respect of socio-economic and cultural rights in the respective multilateral development cooperation programs through participation in international financial institutions.

It should be noted, however, that significant problems arise in these contexts, especially as regards the possibility of identifying a causal link between economic activities carried out by the states and generalized violations of economic, social and cultural rights of individuals located in third states. As noted with the exception of the known phenomena of forced evasion and land grabbing as a result of economic activities undertaken in third countries, the effects of economic development cooperation policies do not always appear appreciable in terms of an immediate causal relationship between the behavior of states and related detrimental effects on the enjoyment of human rights of individuals located across the border. Think again of the many times cited effects of export subsidies policies or the signing of commercial and development agreements. Moreover, in the field of cooperation that has just been studied, the identification of precise positive obligations of conduct makes the assessment of state responsibility rather complicated. The difficulties are evidently linked to the impossibility of the exact identification of the primary rule in concrete violated in relation to the non-fulfillment of the duty of care. Whilst it is true that the provisions of article 2 (1) on international assistance and cooperation appear to be in the background likely to impose due diligence obligations, the existing international practice on multilateral development

<sup>112</sup>Principle 15. The extraterritorial obligations of states in the framework of participation in international financial organizations and institutions have been supported as anticipated, as well as in general comments and final remarks addressed to states parties to the Treaty, also in the Maastricht Principles on the extraterritorial obligations of member states in the field of economic, social and cultural rights, adopted in 2011. While aware of the soft law nature of the principles under examination, they represent today the broadest elaboration conducted by several scholars, including Special Rapporteurs, Independent Experts, Committee members on social and cultural economic rights, aimed at specifying the nature of obligations to protect the economic, social and cultural rights in a transnational context.

<sup>113</sup>From this point of view the suggestions of Khalfan and Seiderman seem interesting, according to which states obligations in the context of participation in international organizations and institutions would impose a series of positive duties, including opposing within the organization any policies and programmes that may foreseeably impair the enjoyment of human rights; proposing due diligence measures to prevent such interference, for example, instructing the staff of the organization that all policies recommended to governments are to be consistent with international human rights standards; developing or revising relevant performance standards, to ensure that the organization only supports projects that comply with human rights standards (...). O. DE SCHUTTER, A. EIDE, A. KHALFAN, M. ORELLANA, M. SALOMON, I. SEIDERMAN, Commentary to the Maastricht principles on extraterritorial obligations of States in the area of economic, social and cultural rights, op. cit., pp. 30ss.

<sup>114</sup>The non-governmental organization FIAN presented in 2001 the first parallel report to the CESER for the scrutiny of extraterritorial obligations of states in the assessment of Germany conduct for development cooperation projects in third states. This was followed by a wide awareness campaign by several organizations for the promotion of states obligations in the context of multilateral development cooperation conducted through International Financial Institutions.

cooperation conducted in international institutions provide no more concrete indications than, as mentioned, a general duty to prevent the damaging effects on human rights of development cooperation programs. States responsibility can therefore only be assessed in relation to the circumstances of the case, and on the basis of a reasonableness approach that concretely assesses the best effort standard concretely payable to the parties who act within international institutions.

Examples include the construction of gas pipeline in Chad and Cameroon supported by World Bank and international donors, including Germany. In Chioxy case relating to the construction of hydroelectric plant in Guatemala, projects sadly known to have caused a series of generalized violations of economic, social and cultural rights of populations concerned, including massacres of entire communities, forced displacements, subtraction of territories from the ancestral populations<sup>115</sup>.

Moreover, some states engaged in development cooperation programs in third states have recently wanted to incorporate and consider human rights the legitimacy of international development cooperation strategies carried out bilaterally or through organizations such as European Union<sup>116</sup>.

### **13. Positive obligations and state responsibility for the work of non-state actors. The acceptance of decisive influence criteria and due diligence**

Once it is established that states appear in the abstract to respect economic, social and cultural rights for cooperation operations conducted in financial institutions and organizations, we briefly discuss the issue of states responsibility for the commission of an international offense in human rights issues in the aforementioned contexts.

Pursuant to the liability rules contained in the draft articles of ILC, states are held accountable for the conduct of non-state actors in the hypothesis of acts carried out by de facto bodies, or in the cases provided for in article 8 of the project, i.e. when private individuals act according to instructions, or subject to the direction or control of the same states. The responsibility for multilateral cooperation activities undertaken within international organizations or institutions thus inevitably tends to resolve the possibility of attributing the behavior of non-state actors to the contracting parties according to the aforementioned rules.

And indeed, the problem of extraterritorial application of the treaty implies not only evaluating the hypothesis of aid, assistance, direction or coercion of the financing state with respect to the offense committed by the organization, but also the need to identify the exact legal boundaries and theoretical paradigms through which the state is responsible for private actor's actions. As we have seen elsewhere in this paper, international jurisprudence outside ICESCR accepts a very restrictive notion of control for the attribution of non-state actors works to the state. At the same time, however, more recent practice, although once again related to other systems of protection, enhances and reinterprets the concept of control for the purposes of extraterritorial applicability of the treaties as suitable to impose obligations to positively influence the actions of not state actors.

The attribution of unlawful conduct in the context of participation in multilateral cooperation within international institutions can therefore only depend once again on the configuration of control exercised by the contracting parties on non-state actor, and on the correlative meaning to be attributed to this notion.

Finally, it should be recalled that further hypotheses of state responsibility in the context of participation in international institutions, more difficult to identify the conditions to which they are subject, are provided for by the draft articles on the responsibility of international organizations approved by the International Law Commission in 2011, in relation to cases in which states responsibility is highlighted as a result of the unlawful conduct held by the organization in the cases of aid, assistance, direction and coercion governed by articles 58, 59, 60<sup>117</sup>.

The obligation to comply with pre-existing human rights obligations in the context of states participation in international organizations and the correlative responsibility for non-

<sup>115</sup>A.P.M. COOMANS, R. KÜNNEMANN, Cases and concepts on extraterritorial obligations, op. cit., pp. 194ss.

<sup>116</sup>See in particular: Human Rights Manual on Implementation of the Human Rights Based Approach in Austrian Development Cooperation e il Development Cooperation Act (DAC ACT) which subordinates the achievement of the objectives of multilateral policies for cooperation on progress and respect for the rule of law and human rights. Entwicklungszusammenarbeitsgesetz inklusive EZAGesetz Novelle 2003, Federal Law Gazette Vol I 49/2002.

<sup>117</sup>G. NOLTE, Treaties and subsequent practice, op. cit.

compliance with these obligations is also referred to in article 61 of Draft Articles on the Responsibility of International Organizations, which deals specifically with the hypothesis of state international responsibility for the unlawful conduct perpetrated through the international organization and aimed at circumventing its international obligations.

Pursuant to article 61, entitled Circumvention of international obligations of a state member of an international organization: "a state member of an international organization incurs international responsibility if, by taking advantage of the fact that the organization has competence in relation to the subject matter of one of state's international obligations, it circumvents that obligation by causing the organization to commit an act that, if committed by the state, would have constituted a breach of the obligation [...]"<sup>118</sup>.

In order for these hypotheses to occur, however, certain conditions that are particularly difficult to prove in the field under examination and which would seem to occur only rarely, must be fulfilled. In particular, in order for the state to be held accountable for an offense committed by the organization, it must not only have acted with the will to circumvent its international obligations through participation in the organization, but it will be further necessary to ascertain the existence a significant link between its illicit conduct and that of the organization, in the sense that the act of the latter must have been deliberately caused by the state<sup>119</sup>.

In addition to the lack of confirmation in the current international practice of the relevance of such hypotheses, this option does not appear to be particularly functional for extending states responsibility for participation in multilateral cooperation projects in third states. In fact, it requires proof that the behavior of non-state actor has been completely caused by the state.

Therefore, a more functional paradigm seems to us ultimately that of attributing the behavior of the private actor to the state on the basis of reinterpretation of the concept of control, that is, responsibility for omitted prevention or for not having exercised the necessary influence in order to prevent the commission of an illegal human rights law.

It remains to be seen whether CDESCR called upon to decide in the future on the basis of the new procedures envisaged by the new protocol will consider it relevant to exploit and apply the criteria of decisive influence and due diligence on incidents that occurred in the context of development cooperation operations conducted beyond border.

#### **14 Territorial control overcoming as a privileged regulatory paradigm for ICESCR extraterritorial application.**

Transnational implications of socio-economic processes, the increased state interdependence and deep transformations induced by the processes of "international law globalization" has however and more recently led scholars to pay renewed attention to the effects produced by the proliferation of subjects, sources, jurisdictions and regulatory regimes on the fulfillment of international obligations relating to human rights and their spatial reach<sup>120</sup>.

In this regard, it appeared useful and necessary to retrace the doctrinal and jurisprudential paths concerning the classic cases of extension of human rights protection, starting from the study of "jurisdiction" and the related developments. The problem of human rights protection across the border has been, as we know, traditionally read in light of the content (or content) attributable to the category of jurisdiction in international law and associated with the fundamental importance it assumes for the interpretation of Treaties in question.

On the basis of these considerations, the research inevitably started from the observation of the absence of express clauses of territorial delimitation of the rights protected in ICESCR and the meaning of this textual omission, with the aim of highlighting the scope aspiration universal status that can be found in the relevant provisions on "assistance and cooperation" obligations.

In this framework, the objective of the survey was to analyze and understand the nature of state obligations deriving from ICESCR's forecasts, and this through the help of rules and principles related to the interpretation of treaties and the analysis of the relevant international

<sup>118</sup>G. NOLTE, *Treaties and subsequent practice*, op. cit.

<sup>119</sup>Draft Articles on Responsibility of International Organizations with Commentaries, Report of the International Law Commission on the Work of its 63rd session, 2011, UN Doc A/66/10, Commentary of art. 61, par. 2.

<sup>120</sup>P.H.P. BEKKER R. DOLZER, M. WAIBEL (a cura di), *Making transnational law work in the global economy. Essays in honour of Detlev Vagts*, Cambridge University Press, Cambridge, 2010.

practice on the subject, "practice" both internal and external to Onus system and the treaty itself, and not easy to systematize and read.

As we have seen, CESCR established under ICESCR conventional regime considered that international obligations arising from the Treaty are likely to extend beyond the territory of states parties in a series of heterogeneous scenarios and contexts. The monitoring body has expressed, in fact, on the recognition of positive commitments deriving from ICESCR also in relation to cases other than the classic hypotheses of extraterritorial jurisdiction identifiable with the control of a foreign territory. This happened with regard to the impact of economic sanctions on the enjoyment of economic, social and cultural rights; the effects of trade and investment policies in third countries, as well as bilateral and multilateral development cooperation activities carried out in international financial institutions. In the various fields considered here, the obligation to ensure respect for and protection of human rights would also derive, so to speak, from the "power", influence or ability of state party to significantly affect the enjoyment of human rights of individuals located across borders and possibly subject to the jurisdiction of third states.

The most important interpretative developments in the field of economic, social and cultural rights would thus appear to indicate the progressive attempt of monitoring and control bodies to "induce" states to adopt measures to prevent possible negative consequences of their activities, and this with particular reference to development cooperation cases.

In the various areas analyzed, there are indeed indications in favor of a reinterpretation of provisions on "international assistance and cooperation" in the sense of making the obligations of due diligence on the part of states deriving from the containment of transnational economic activities effects. From this it would seem to achieve emancipation from territorial control as the only paradigm available for the (extraterritorial) application of ICESCR.

That said, CESCR practice and other protection systems does not provide clear and precise indications on the nature and concrete extent of diligent behaviors from time to time attributable to state party for the protection of economic, social and cultural rights abroad. As shown in the proposed analysis, the responses of international jurisprudence and bodies monitoring international standards regarding the "extraterritoriality" of economic, social and cultural rights do not always appear conclusive, also due to the fragmented nature of elements that can be obtained from the international practice, and, with specific reference to ICESCR, the recent institutionalization of control mechanisms within CESCR.

It is therefore not clear once and for all whether, at present, international human rights law imposes, in this specific context, on states to ensure that economic activities that take place under their control or jurisdiction do not harm the rights of individuals in third countries, nor are any indications useful for identifying a general criterion in order to verify whether the state has acted diligently in conducting economic activities with potential extraterritorial effects.

The initial question concerning the applicability of ICESCR in an extraterritorial perspective ultimately results in the need to identify in concrete terms the degree of diligence due by states parties in the light of the peculiar nature of the obligations related to the protection of economic, social and cultural rights in a transnational context<sup>121</sup>.

What emerges is an overall picture that shows how the whole system of international protection of human rights, guided by the solidarity idea typical of a developmental human rights law, however, failed to effectively address the structural causes of an international economic order capable of perpetuating injustices, discrimination and social inequality.

The objective of promoting an international economic system favorable to the realization of economic, social and cultural rights has traditionally been concentrated on the fight against poverty through solidarity models of development aid, rather, precisely, on the valorization of international abstention obligations or prevention, aimed at avoiding the commission of illegal human rights (even in third states). This can be seen, among other things, by the efforts of those scholars who are questioning today on the issue of states responsibility outside their territories in order to identify more functional regulatory standards and ensure that, in principle, policies and instruments of socio-economic cooperation do not translate into violations (direct or indirect) of human rights in third countries.

The theory of extraterritorial application of human rights is undoubtedly one of the interpretative paradigms most used by the doctrine in order to regulate and mitigate the negative effects of transnational socio-economic processes.

<sup>121</sup>B. RAJAGOPAL, *International law from below. Development, social movements and third world resistance*, Cambridge University Press, Cambridge 2003.

However, even in light of the first results of a research on available practice, it is to be questioned whether the theories favorable to the extraterritorial application of human rights treaties are at present sufficient to regulate the transnational aspects of state economic policies (often very complex and likely to call into mind full domestic practice) to prevent and discourage violations of fundamental rights to the detriment of subjects located across the border. According to some authors, and in more general terms, an adequate response to the model of economic coercion and exploitation typical of current international economic relations would require a real program of reform of international economic institutions<sup>122</sup>.

In other words, the theory of extraterritorial protection of economic, social and cultural rights would not be sufficient on its own to contain the effects of global socio-economic processes.

In order to investigate the nature and fill ICESCR provisions with regard to international assistance and cooperation obligations and make them effectively applicable in a transnational context, other authors then refer to regulatory paradigms originally borrowed from different sectors of international law, such as the precautionary principle, all possible legal foundations for the transnational protection of socio-economic rights<sup>123</sup>.

The recognition of states obligations extension in a transnational perspective proceeds thus through the application to the discipline of human rights of theories typical of public international law elaborated in other contexts. Think again for an example of the possible applicability of global commons theory or the potentialities of common interests doctrinal approach in international law<sup>124</sup>.

Other authors are still mainly referring, as has been mentioned, to the operation of rules on states responsibility codified by the International Law Commission of 2001, enhancing the regulatory paradigms of aid, assistance, direction and coercion to establish contracting parties responsibility to economic, social and cultural rights violation in extraterritorial areas<sup>125</sup>. The plurality and heterogeneity of approaches matured ultimately moves from different assumptions in the pursuit of a common objective, that of identifying theoretical models, operative proposals and normative bases suitable for mitigating the negative effects and externalities of socio-economic processes of transnational nature that call into violations of international standards for the protection of economic, social and cultural rights.

It seems to us, firstly, useful to point out that the elaboration of a theory of positive obligations for the protection of economic, social and cultural rights is desirable and necessary to better understand the nature and extent of the concrete obligations arising from ICESCR, and therefore of the conduct of respect, protection and implementation of the related rights in an extraterritorial context.

This appears fundamental in order to identify which behaviors (active or omissive) can be said to be susceptible of highlighting states parties responsibility for the violation of economic, social and cultural rights in third states. This is especially true in view of an evolution of CESC activities that, due to the recent approval of the Optional Protocol to ICESCR, will probably be called in the near future to interpret the notion of jurisdiction contained in the Treaty as a prerequisite for the presentation of individual communications.

The extraterritorial application of ICESCR could therefore come into play if we understand the notion of international assistance and cooperation as set out in the treaty which is suitable to include forms or types of susceptible conduct to produce detrimental effects on the enjoyment of economic, social and cultural rights in third states. It is likely that, as shown in the evolution of CESC practice in the direction of a widening the obligation of assistance and cooperation, the concept of jurisdiction, as a precondition for the applicability of ICESCR in an extra-territorial perspective, will also be considered suitable to include situations other than purely territorial control.

<sup>122</sup>T.W. POGGE, *World poverty and human rights: cosmopolitan responsibilities and reforms*, Cambridge University Press, 2008.

<sup>123</sup>O. DE SCHUTTER, A. EIDE, A. KHALFAN, M. ORELLANA, M. SALOMON, I. SEIDERMAN, *Commentary to the Maastricht principles on extraterritorial obligations of States in the area of economic, social and cultural rights*, op. cit., pp. 108ss.

<sup>124</sup>BENDEK, DE FEYTER, KETTEMANN, VOIGT, *The Common Interest in International Law*, Oxford, Antwerp, 2014.

<sup>125</sup>R. MC CORQUODALE, P. SIMONS, *Responsibility beyond borders: state responsibility for extraterritorial violations by corporations of international human rights law*, in *The Modern Law Review*, 70 (4), 2007, pp. 598ss. C. CHINKIN, F. BAETENS, *Sovereignty, statehood and state responsibility*, Cambridge University Press, Cambridge, 2015. I. BANTEKAS, L. OETE, *International human rights law and practice*, Cambridge University Press, Cambridge, 2013, pp. 686ss.

## Concluding remarks.

At the end of the survey made so far, it is important to note that the responsibility for the violation of human rights of a socio-economic nature in an extraterritorial context appears more difficult to identify than the visa for the protection of first generation rights. The obvious problems relating to the identification of the causal link between the conduct (active or omitted) imputable to a state party and the enjoyment of socio-economic rights of individuals located in third states cannot be denied. This appears intimately connected with the same positive nature of ICESCR's international obligations, a circumstance which inevitably reflects on the ascertainment of responsibility for the commission of an international offense, and which assumes the character of responsibility for omission, failure to comply with obligations of conduct or of diligence or, finally, of the guilt for a behavior that could be considered due.

The commission of an international human rights violation of a socio-economic nature is also more complicated to ascertain for the plurality of actors involved in the violations in question, and for the correlative problems of allocation and distribution of responsibility among the latter. A further element of evident differentiation with respect to the protection of civil and political rights in an extraterritorial context is the need, with regard to second generation rights, of the adoption of more extensive "jurisdictional paradigms" in order to attribute responsibility to member states. Parties for the commission of an international human rights violation occurred across the border. The protection of socio-economic rights in the current international economic panorama cannot but impose the overcoming of the classical criteria of territorial control as a privileged model for the extension of conventional obligations beyond the territory of the contracting parties to the treaties. As anticipated at the beginning of this work, most of the violations of human rights in the field of socio-economic rights, regardless of the physical presence of a state on the territory of others, requires the enhancement of broader criteria for the identification of a jurisdictional link between the same state and individuals located beyond its sphere of sovereignty. In this regard, the due diligence criterion, authoritatively supported in doctrine, and identifiable in prevention and precautionary obligations, reveals itself in the abstract the normative paradigm that is more functional to a more extensive protection of human rights of individuals located in third states.

The case studies analyzed in the field of economic, social and cultural rights, also due to its very nature of recommendation, do not however define appropriately the characteristics of these duties of care, as well as the actual conduct likely to lead to the violation of economic, social and cultural rights over the border. Despite the fragmented nature of the results obtained, it seems to us, however, to highlight, following the research carried out so far, the tendency towards gradual development in the practice of guidelines that indicate a progressive emancipation of responsibility for the violation of socio-economic human rights by traditional forms territorial control. In the scenarios described, and limited to the specific profiles of the proposed survey, the prerequisite for an extraterritorial application of ICESCR tends rather to be realized starting from the valorisation of prevention and due diligence obligations for the promotion and respect of human rights in the activities completed or having effects abroad.

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