

Is There a Legal Obligation to Cooperate Internationally for Development?¹

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Summary

*Resources for the implementation of economic, social and cultural rights in the Convention on the Rights of the Child (CRC) may be acquired through international cooperation. This submission argues that the references to international cooperation in the CRC do not amount to a **general** legal obligation to provide development assistance – which would amount to an extraterritorial obligation to fulfil. However, legal obligations to respect and protect economic, social and cultural rights of children in third countries do apply. Moreover, some **specific** obligations of fulfilment for donor countries can be identified, such as, amongst others, the allocation of 0,7 per cent of GDP to development assistance, and the adoption of a rights-based approach to development cooperation, in which children's rights are mainstreamed.*

Introduction

The preamble and article 4 of the CRC, among other provisions, refer to international cooperation for the realization of economic, social and cultural rights. Whether this reference amounts to a *legal* obligation, in particular for States in the North, to respect, protect and fulfil economic, social and cultural rights also extraterritorially, and particularly in the South, is a matter of debate. The answer to this question is not only of scholarly relevance, but also and mainly of practical importance: individual and collective actions of Northern States in the field of for example trade, agriculture or development cooperation may have tremendous effects on the availability of resources and on the enjoyment of human rights by individuals in the South. Export subsidies for agricultural products lead to dumping of these products in Southern and third markets, to the detriment of small local farmers. The imposition of user fees for education or health care as a condition for development assistance has impacted negatively on the right to education and health of children and adults in many developing countries.

In the debate on the existence, the nature and the extent of extraterritorial obligations, disproportionate attention has been paid to the extraterritorial obligation to fulfil (*i.e.* to provide development assistance, through the transfer of resources from North to South), while extraterritorial obligations to respect and to protect have been relatively neglected. The extraterritorial obligation to fulfil is politically the most contentious one and legally the most difficult one to prove.² The latter extraterritorial obligations, *i.e.* to respect and to protect, can be argued to be already part of hard law. The strong focus on the extraterritorial obligation to fulfil has arisen from the conflation of international cooperation with international *development* assistance and cooperation. While international cooperation includes development cooperation, it is a much broader term. The term 'international cooperation for development' is used here to cover not only the obligation to fulfil (development cooperation) but also the obligations to respect and to protect.

¹ This submission is based on the article, 'Economic, Social and Cultural Rights in the CRC: Is There a Legal Obligation to Cooperate Internationally for Development?', to be published in *The International Journal of Children's Rights* 2007.

² Moreover, it is generally considered to be a secondary or subsidiary obligation. This obligation only applies if the domestic State for reasons beyond its control fails to fulfil economic, social and cultural rights, notwithstanding the use of the maximum available resources. See W. Vandenhoele, 'EU Obligations for Development: Extraterritorial Obligations Under the ICESCR' in M.E. Salomon, A. Tostensen and W. Vandenhoele (eds.), *Casting The Net Wider: Human Rights, Development and New Duty-Bearers*, Antwerp, Intersentia, 2007, forthcoming (November 2007).

The argument central to this submission is that there is no *general* legal obligation under the CRC to cooperate internationally for development, nor to provide development assistance commensurate with need for the realisation of economic, social and cultural rights of children in developing countries. Nevertheless, there is a shared responsibility for development, and States parties are not only to implement the CRC within their own jurisdiction, but are also to contribute to global implementation, through international cooperation. In its concluding observations, the CRC Committee has largely neglected extraterritorial obligations to respect and to protect economic, social and cultural rights of children in developing countries.³ Inspiration for a better understanding of these obligations can be sought in the decisions of the ICESCR Committee.

1. The Convention on the Rights of the Child and its Two Optional Protocols

Quite a number of articles of the CRC relate to international cooperation, i.e. articles 4, 7 (2), 11 (2), 17 (b), 21 (e), 22 (2), 23 (4), 24 (4), 27 (4), 28 (3), 34, 35 and 45. The meaning of the term differs however, in that it sometimes clearly does not intend to refer to cooperation for development, sometimes may or may not encompass cooperation for development, and in still other instances most likely has cooperation for development at its core. To the latter category belong the references to international cooperation in the final but one preambular paragraph, art. 4 (general obligation), art. 23(4) (disability), art. 24(4) (health) and art. 28(3) (education).⁴

The Optional Protocol to the CRC on the sale of children, child prostitution and child pornography (OP-SC) refers in its article 10 to international cooperation, inter alia ‘in order to address the root causes, such as poverty and underdevelopment, contributing to the vulnerability of children to the sale of children, child prostitution, child pornography and child sex tourism’ (Art. 10(3) OP-SC). In accordance with art. 10(4) OP-SC, States parties in a position to do so are to provide financial, technical or other assistance through existing multilateral, regional, bilateral or other programmes.

The Optional Protocol to the CRC on the Involvement of Children in Armed Conflict (OP-AC) contains one reference to international cooperation and one to technical cooperation and financial assistance. In its preamble, the need ‘to strengthen international cooperation in the implementation of the (...) Protocol, as well as the physical and psychosocial rehabilitation and social reintegration of children who are victims of armed conflict’ is highlighted. Implementation of the OP-AC is to occur ‘including through technical cooperation and financial assistance’ (Article 7 OP-AC). States parties in a position to do so are to provide such assistance through existing multilateral, regional, bilateral or other programmes or through a voluntary fund.

Whether, and if so, which legal obligations for States parties to respect, to protect and to fulfil the rights of children in the South arise from the references to international cooperation, will be addressed from three perspectives: that of the drafters of the CRC, that of the CRC Committee and that of other instruments which refer explicitly to international cooperation in a development context – in particular the ICESCR and the Disability Convention.

³ The CRC Committee has emphasized some specific obligations under the CRC with regard to development cooperation: donor countries are to adopt a rights-based approach to development, and to mainstream children’s rights therein, and they should meet as quickly as possible the internationally agreed target of spending 0.7 per cent of their gross domestic product on official development assistance.

⁴ Procedural article 45 CRC too refers to international cooperation. Art. 45 allows the CRC Committee to seek expert advice from the United Nations Children’s Fund (UNICEF) and the specialized agencies, and to point out to inter alia this organ and these agencies a country’s need for technical advice or assistance.

2. Travaux Préparatoires

References to international cooperation and to the particular needs of developing countries gradually trickled into the text of the CRC: first with regard to general measures of implementation, subsequently in the provisions on the disabled child and on the rights to health and education, and finally in the preamble. The reference to international cooperation was never the subject of huge controversy as a matter of principle. Nor have declarations or reservations been made on international cooperation. This offers additional evidence that the references to international cooperation were not objected to by any of the States parties. Moreover, the repeated references to 'international cooperation' and 'the needs of developing countries' in a significant number of provisions testify to the uncontested nature.

The absence of objection in principle to inclusion of references to international cooperation in the text of the CRC does not mean in itself that a *general and undifferentiated* legal obligation to cooperate internationally for development (in particular with regard to children) can be read into the CRC. Rather, a literal reading of the text of article 4 learns that all States parties undertake to take all kinds of measures, and with regard to economic, social and cultural rights, where needed, within the framework of international cooperation. Taking into account the needs of developing countries, States also undertake to promote 'in the spirit of international cooperation' the exchange of information in the field of preventive health care and treatment of disabled children, and to promote and encourage international cooperation in relation to the rights to health and education. While the final aim in the field of health is to achieve progressively the full realization of the right to the highest attainable standard of health, it is less couched in human rights language in the field of education, where the objective of international cooperation is to contribute to the elimination of illiteracy and to facilitate access to scientific and technical knowledge and modern teaching methods. On the other hand, the travaux préparatoires contain strong indications of the fact that States considered their *specific* undertakings to promote and encourage international cooperation for development with regard to the exchange of information on preventive health care and treatment of disabled children, the right to the highest attainable standard of health and the right to education, to be *binding* obligations.

No specific group(s) of duty-bearers is identified in the CRC with regard to international cooperation for development. The operationalization of the extraterritorial obligations seems to be entrusted primarily to the United Nations, i.e. UNICEF, the specialised agencies and other UN organs (see article 45 CRC). In the OP-SC, the duty-bearers are more clearly identified.

The OP-SC clearly testifies to the recognition of a shared responsibility for development, in that the strengthening of international cooperation for addressing the root causes of the exploitation of children (i.e. poverty and underdevelopment) is to be promoted. Although a strongly worded obligation is conspicuous by its absence ('to promote the strengthening'), the fact that Northern States eventually accepted this obligation to be included, and in the operative part of the Protocol, is highly significant. Moreover, the specific obligation incumbent on States 'in a position to do so', aiming obviously mainly at Northern States, is to 'provide financial, technical and other assistance through existing multilateral, regional, bilateral or other programmes.'

A reference to international cooperation in the OP-AC has been included in the preamble only. In addition, an article was inserted on technical cooperation and financial assistance. States 'in a position to do so' rather loosely commit themselves to financial assistance for the implementation of the Protocol. This differentiation of responsibility and the concomitant identification of duty-bearers for obligations of international cooperation for development are highly important and relevant. Regrettably, these provisions are so vaguely worded that it is difficult to deduce any specific legal obligation therefrom.

3. Interpretation by the CRC Committee

The CRC Committee's starting point, as clarified in its general comment on general measures of implementation, is that there is a shared responsibility for the implementation of the CRC: it is a cooperative exercise for all States. This shared responsibility is based on the articles 55 and 56 UN Charter, and on political commitments at global meetings to international development cooperation and the elimination of poverty.

The CRC Committee has also shed some light on the *division* of responsibility. Developing States are actively to seek international cooperation if their own resources are insufficient. In the Committee's concluding observations, they have been urged quite consistently to look for international cooperation and assistance, in relation both to economic, social and cultural rights (which article 4 CRC is limited to) and to a lesser extent also to civil and political rights. Developing countries have been called upon also to consider their obligations under the Convention in all aspects of their negotiations with international financial institutions and other donors or when concluding free trade agreements, to ensure that the economic, social and cultural rights of children, particularly children belonging to the most vulnerable groups, are well observed. It seems only fair to impose such obligations on developing States if there is a legitimate expectation both on behalf of the Committee and of developing countries that calls for international cooperation and assistance will be received and reacted upon positively.

A corresponding obligation for donor countries to observe (i.e. to respect, protect and fulfil) the economic, social and cultural rights of children in their relations with developing countries – be it through (agricultural) trade, aid or otherwise – has been framed indeed: as asserted in the CRC Committee's general comment on general measures of implementation, developed States' obligations for implementation of the CRC are not limited to their own jurisdiction, but also apply extraterritorially. This obligation is to be fulfilled through international cooperation for development.

The Committee has refrained from establishing a *general* duty of providing development cooperation, commensurate to ability on the side of donor countries, and to need, e.g., on the side of countries in the South. In its general comments on HIV/AIDS and on the aims of education, instead of recognizing a general obligation to provide development cooperation, the Committee has argued that *if* States provide development cooperation, child rights should feature prominently therein. In its concluding observations, the Committee has resorted to a similar approach. This comes hardly as a surprise, for an obligation to provide development cooperation would amount to an obligation to fulfil. This obligation to fulfil, and a fortiori its sub-obligation to provide, inevitably requires the mobilization of financial resources, and may therefore be most sensitive to read a legally binding extraterritorial obligation into.

The CRC Committee has nevertheless identified *specific* obligations for donor countries in relation to development cooperation. The recommendations to use the CRC as a framework for development cooperation and to mainstream a child rights perspective in all development programs and projects could easily be considered to flow from an obligation to respect, to protect and possibly to fulfil the rights of children in third countries. Quite remarkably, the Committee has frequently made recommendations on strengthening activities in the area of international cooperation and assistance, and on increasing the budget allocation for development cooperation, which mainly relate to the obligation to *fulfil-provide*. In justification and support of its recommendations on ODA and a prioritisation of social spending, the Committee has invoked States' political commitments – such as the ODA target of 0.7 per cent of GDP; the objectives of the Copenhagen 20/20 Initiative; and the recommendations of United Nations organs and specialized agencies.

4. Comparable Provisions, Divergent Interpretations?

The International Covenant on Economic, Social and Cultural Rights (1966)

The ICESCR contains also explicit references to international assistance and cooperation for the realization of the rights contained in the Covenant. Article 2 ICESCR, which enshrines the general obligation to take steps in order to achieve progressively the full realization of the rights in the Covenant, refers to international assistance and cooperation. Article 11 too, dealing with the right to an adequate standard of living, including the right to food, mentions international cooperation. Finally, procedural articles 22 and 23 of the Covenant refer to international measures and international action.

In its concluding observations, the ICESCR Committee has implicitly recognized the existence of extraterritorial obligations under the Covenant by paying attention to some aspects thereof. It has thus encouraged States parties, as a member of international organizations, including international financial institutions, such as the International Monetary Fund and the World Bank, to do all they can to ensure that the policies and decisions of those organizations are in conformity with the obligations of States parties under the Covenant, in particular with the obligation contained in articles 2.1, 11.2, 15.4 and 23 concerning international assistance and cooperation. It has also urged donor countries to spend at least 0.7 per cent of their GDP on development assistance, or welcomed that they were doing so. In its recent concluding observations on Norway, it asked for information on measures taken to ensure compliance with Covenant obligations in its international development cooperation. In some of its general comments, it has more explicitly emphasized the existence of extraterritorial obligations. In its general comment on the obligations of States parties (para. 14), it argued that in accordance with Articles 55 and 56 of the Charter of the United Nations, with well-established principles of international law, and with the provisions of the Covenant itself, international cooperation for development and thus for the realization of economic, social and cultural rights was an *obligation* of all States. It added that it was particularly incumbent upon those States which are in a position to assist others in this regard.

With regard to the extraterritorial obligation to *respect*, the Committee has pointed out that States 'should take steps to respect the enjoyment of the right to food in other countries', and 'have to respect the enjoyment of the right to health in other countries'. International cooperation requires States to refrain from actions that interfere, directly or indirectly, with the enjoyment of the right to water in other countries. Any activities undertaken within a State's jurisdiction should not deprive another country of the ability to realize the right to water for persons in its jurisdiction. International agencies should scrupulously avoid involvement in projects which, for example, involve the use of forced labour in contravention of international standards, or promote or reinforce discrimination against individuals or groups contrary to the provisions of the Covenant, or involve large-scale evictions or displacement of persons without the provision of all appropriate protection and compensation. In relation to the right to adequate housing, international financial institutions promoting measures of structural adjustment should ensure that such measures do not compromise the enjoyment of the right to adequate housing. The World Bank and other agencies are moreover required to fully respect the World Bank and OECD guidelines on relocation and/or resettlement, insofar as these guidelines reflect the obligations contained in the Covenant. The international financial institutions are to pay greater attention to economic, social and cultural rights in their lending policies, credit agreements, international measures to deal with the debt crisis, structural adjustments and development projects. Moreover, States are to refrain at all times from embargoes or similar measures: food, medicines and medical equipment, and water should never be used as an instrument of political and economic pressure.⁵

⁵ A similar argument has been made with regard to the right to health (ICESCR Committee, 2000, para. 41) and the right to water (ICESCR Committee, 2002, para. 32).

With regard to the obligation to *protect*, the ICESCR Committee has emphasized that States are to prevent their own citizens and companies from violating for example the right to water of individuals and communities in other countries. Where possible, States have to take steps to influence third parties to respect the right to water, through legal or political means. States, as members of international organizations, are under the obligation to pay greater attention to the protection of economic, social and cultural rights, for example by influencing the lending policies, credit agreements and international measures of these institutions. Agreements concerning trade liberalization e.g. should not curtail or inhibit a country's capacity to ensure the full realization of the right to water.

Finally, the Committee has also identified some *fulfilment* obligations, which require positive action. The obligation to fulfil is composed of obligations to facilitate, to promote and to provide. The obligation to facilitate entails active measures that enable and assist individuals and communities to enjoy a right. An extraterritorial obligation to fulfil-facilitate with regard to the right to food implies, e.g., that food aid should be organized in ways that facilitate the return to food self-reliance of the beneficiaries. Appropriate UN programmes and agencies should assist in drafting framework legislation for the implementation of a national strategy concerning the right to food, and in reviewing sectoral legislation.

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

The domestic obligation to provide is understood as an obligation for the domestic State to realize a right 'whenever an individual or group is unable, for reasons beyond their control, to enjoy an (economic, social or cultural) right by the means at their disposal'. The extraterritorial obligation to fulfil can be understood in the same way. The ICESCR Committee has for example identified the following fulfil obligations for donor countries or the international community at large:

- States parties, both recipients and providers, should ensure that a substantial proportion of financing is devoted to creating conditions leading to a higher number of persons being adequately housed; States are to take monitoring measures with regard to the right to adequate food in order to implement their obligations under articles 2(1) and 23 of the ICESCR;
- where a State party is clearly lacking in the financial resources and/or expertise required to work out and adopt a detailed plan of action for primary education, the international community has a clear obligation to assist;
- States and international organizations have a joint and individual responsibility to cooperate in providing disaster relief and humanitarian assistance in times of emergency. In disaster relief and emergency assistance, priority is to be given to Covenant rights.

In conclusion, the ICESCR Committee clearly has read extraterritorial obligations into the Covenant. While it has identified a number of fulfilment obligations for States parties, it has equally elaborated on the obligations to respect and to protect economic, social and cultural rights in third countries. Particular attention has been paid to the obligation of member States to international organizations to protect economic, social and cultural rights in the measures taken by these organizations with regard to developing countries.

The Convention on the Rights of Persons with Disabilities

During the drafting negotiations on the Disability Convention, much attention has been paid to international cooperation. Northern States, and in particular the EU, have gradually adopted a more constructive approach to the issue, although at the price of excluding an explicit reference to international cooperation *for development*.

The language used in the CRC for inclusion of a reference to international cooperation, in particular with regard to the realisation of economic, social and cultural rights, has been favoured over the language used in the ICESCR, allegedly for it would better reflect the concept of international cooperation. The Disability Convention goes nevertheless beyond the text of the CRC. The inclusion of a stand-alone article on international cooperation (art. 32) is an important step forward towards explicit recognition of extraterritorial obligations. This can in turn reinforce a extraterritorial obligations conducive interpretation of the CRC (and the ICESCR).

The by now unchallenged nature of the extraterritorial obligation to respect is illustrated by the broad consensus, beyond the North-South divide, on disability mainstreaming in international cooperation for development. Donor countries accept that in the framework of development cooperation they are at least to abstain from violating the rights of persons with disabilities in the South.

Conclusion: Is There a Legal Obligation in the CRC to Cooperate Internationally for Development?

References to international cooperation and to the particular needs of developing countries gradually trickled into the text of the CRC during the drafting process. The reference to international cooperation was never the subject of huge controversy as a matter of principle. The CRC Committee has rightly emphasized that there is a *shared* responsibility for the implementation of the CRC.

However, no *general and undifferentiated* legal obligation to cooperate internationally for development (in particular with regard to children) can be deducted from the text of the CRC. The shared responsibility for development pertains mainly to the exchange of information on preventive health care and treatment of disabled children, the right to the highest attainable standard of health, and the right to education, and is phrased in rather weak terms. The CRC Committee has further clarified the scope of extraterritorial obligations under the CRC by identifying specific obligations for donor countries in relation to development cooperation, such as allocating 0.7 per cent of GDP to development assistance and mainstreaming a child rights perspective in all development programs and projects. Quite remarkably, the CRC Committee has mainly focused on an extraterritorial obligation to *fulfil-provide*, which is because of its direct link with the transfer of resources from North to South politically the most sensitive and disputed one. The practice of the ICESCR Committee indicates that a much broader range of extraterritorial obligations could be pointed out to States parties. In light of the negotiations on the Disability Convention it can be concluded that the extraterritorial State obligation to respect now goes by and large unchallenged. While the extraterritorial obligations to respect and to protect do not require a transfer of resources from North to South, they may make an important contribution to the availability of resources in the South, e.g. by excluding detrimental trade or agricultural policies.

Annex. Recommendations

1. More attention should be paid to extraterritorial obligations, which can make an important contribution to the resources available for the realisation of the economic, social and cultural rights of children.
2. Extraterritorial obligations to respect and to protect are as important as the extraterritorial obligation to fulfil, given their potential impact on the availability of resources.
3. The binding obligation to spend 0.7 % of GDP on development assistance should be further explored and better abided by, in light of the numerous political commitments made over the past decades.