

## **0. Introduction**

Resolution 12/9 of Human Rights Council requests non-governmental organizations “to mainstream the right of peoples and individuals to international solidarity in their activities” and “to cooperate with the independent expert in his mandate” (par. 7); also requests independent expert “to seek views and contributions from non-governmental organizations in the discharge of his mandate” (par. 8). This side event tends to be an opportunity to exchange points of view at theoretical as well as operative level.

From a legal point of view the debate on ‘solidarity’ in international law is a very difficult one. Firstly, there is no unequivocal definition of the notion of solidarity in international law; Secondly, there is no consensus about its legal status; Thirdly, came up the question to whom solidarity is owed: to other State, to another population, or to the community, or to individuals?; Fourthly, it is no easy to establish the relationship of solidarity to other principles (reciprocity, cooperation, equity, social justice...)

While some scholars recognize an emerging character of the solidarity principle in international law; others, on the contrary, believe solidarity is a guideline, a political concept and a useful political tool but not a legal principle in international law. In any case, it looks clear that “the principle of solidarity performs a combination of functions depending on the degree of interpenetration in various branches of international law”.

For example, in the UN law on the maintenance of international peace and security and international humanitarian law (the obligation to ensure respect) solidarity operates as an instrument to achieve common objectives through the imposition of common obligations. In international environmental law, international development law and to some extent in international trade law (through the GSP system) solidarity is instrumental in achieving common objectives through differentiated obligations. In international disaster law and, for instance, in Articles 49 and 50 of the UN Charter solidarity is used for actions to benefit particular States.

The first part of my intervention will deal with the notion of solidarity, attempting to give a working definition of what it means in the context of international human rights law (I). The notion of “extraterritorial state obligations” in the area of ESC rights will be then introduced as a legal expression of solidarity (II).

### **I. The notion of solidarity in international human rights law**

References to the notion of solidarity in international documents and instruments are still rather rare and most often the notion of solidarity is used without any accompanying definition. In this context, two resolutions of the UN General Assembly – namely resolutions 56/151 of 19 December 2001 and 57/213 of 18 December 2002, both entitled “Promotion of a democratic and equitable international order” – are worth mentioning. They state that solidarity is

“a fundamental value, by virtue of which global challenges must be managed in a way that distributes costs and burdens fairly, in accordance with basic principles of equity and social justice, and ensures that those who suffer or benefit the least receive help from those who benefit the most”.

The independent expert on human rights and international solidarity has defined international solidarity as

“the union of interests or purpose among the countries of the world and social cohesion between them, based upon the dependence of States and other international actors on each other, in order to preserve the order and very survival of international society, and in order to achieve collective goals that require international cooperation and joint action” (A/HRC/4/8).

Taking into account these definitions, it is possible to identify some core elements of the notion of international solidarity for the purpose of this contribution:

1) Solidarity implies “some kind of *unity*” between members of a community (i. e. international community) formed on the basis of *shared values*. We find this idea in the *Preamble* of the UDHR,

Whereas recognition of the inherent dignity and of the equal and inalienable rights of all *members of the human family* is the foundation of freedom, justice and peace in the world,

2) Solidarity means an obligation to provide help to one another in order to advance *common objective*. It refers to the recognition of a *common bond* between those helping each other. Article 1 of UDHR states that “[a]ll human beings (...) should act towards one another in a spirit of brotherhood”. Also, Article 29 refers to duties each person has towards the community.

3) Solidarity is based on the recognition of the *equality* of the partners involved, despite any form of economic or other asymmetry.

4) Solidarity goes beyond reciprocity in its traditional meaning, in the sense that the partners owe the same amount of help to each other or should contribute equally to common task.

5) Solidarity is not limited to the actions of States; the term “global solidarity” encompasses the relationship of solidarity between States and other actors, such as international organizations and civil society. Also is possible to add the intergenerational dimension that includes solidarity with future generations. In that sense, global solidarity refers to “unity of all human beings” (humanity).

In sum, we think that international solidarity must not be consider only an occasional action in favour of those who are occasionally in needing, be they persons, groups or peoples (because of natural disasters, wars etc). Rather, it must be consider a conception of human relations among persons, groups, peoples and States. It is the expression of a fundamental moral principle found in virtually all major religions and cultures: "treat others as you would like to be treated".

## **II. Extraterritorial State obligations in the area of ESC rights as a legal expression of international solidarity**

According to the UN Millennium Summit Declaration “the central challenge we face today is to ensure that globalization becomes a positive force for all the world’s people (...) Thus, only through broad and sustained efforts to create a shared future, based

upon our common humanity in all its diversity, can globalization be made fully *inclusive and equitable*”. Only the principle of solidarity in connexion with the principle of subsidiarity can make possible a process of globalization “fully inclusive and equitable”.

The dynamics of globalization, characterized by increasing financial and trade liberalization, deregulation, reduction of barriers to foreign investment and privatization (the so-called Washington Consensus), is reducing dramatically the role of the State. But at the same time, State is the principal protector of human rights and fundamental freedoms; what it wants to say that compete to the State the principal responsibility of respecting them and of making them respect, and that the international community only intervenes subsidiarily, that is, in the measure in which the State fails in the performance of that basic responsibility” – this is the principle of subsidiarity in international human rights law -.

In this context, and relating to ESC rights it is necessary to take in account other two facts:

Firstly, there are many developing countries that are not in position to fulfil basic ESC rights of its citizens; they often lack the financial resources and the technical capacities to effectively meet their ESC rights obligations.

Secondly, States are involved in more international activities than ever before. External activities of States such as trade and trade policies, agricultural policies, development cooperation, participation in International Organizations... may influence the ability of other States, especially developing States, to realise the basic ESC rights on their population. So, national governments are not always able to protect their citizens from the impacts of decisions taken in other countries.

*How it is possible to response to this situation from the point of view of international solidarity?*

### **A) International cooperation**

Independent Expert refers to international cooperation as a core component of international solidarity (p. 9). Really, UN Charter (art. 1.3, 55 and 56) imposes legal duties both on the UN and on its Member States to cooperate internationally for the promotion and protection of human rights. They constitute the legal and conceptual foundation for the development of International Law of Cooperation and International Human Rights Law after 1945, and have marked a significant change in the structure of International Law, that has progressively passed from a law of coexistence to a law of cooperation.

The role of international cooperation in the enjoyment of human rights has also been emphasized by the UDHR, especially in the field of ESC rights. Article 22 refers to “national efforts and international cooperation” as necessary for the realization of these rights.

The principle treaties in the domain of ESC rights (ICESCR, CRC and DC) include a considerable number of references to international assistance and international

cooperation for their realization. Article 2.1 of Covenant mentions explicitly international assistance and cooperation but the reference is general, vague and imprecise.

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

The Committee on ESC rights has pointed out in its General Comment n° 3 that “in order for a State party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources it must demonstrate that every effort has been made to use *all resources* that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations” (para. 10) The Committee has also noted that the phrase “to the maximum of its available resources” was intended by the drafters of the Covenant to refer to both the resources existing within a State and those available from the international community through international cooperation and assistance. Moreover, the essential role of such cooperation in facilitating the full realization of the relevant rights is further underlined by the specific provisions contained in articles 11, 15, 22 and 23” (para. 13). But these references remain vague and imprecise, in need of much more specification and further clarification.

Much more precise is article 11 in the context of the right to an adequate standard of living, including adequate food, clothing and housing. Paragraph 1 of this provision mentions “the *essential importance* of international cooperation based on free consent” (emphasis added) for the realization of these rights. A much higher degree of specification can be found in paragraph 2, in the framework of the right to be free from hunger. Apart from a general reference to international co-operation, it emphasises the need of “specific programmes” for the realization of the right to food. Finally, article 23 makes an indicative enumeration of the types of international action that may help to achieve ESC rights.

## **B) Extraterritorial obligations (international obligations).**

But, we consider international solidarity exceeds a mere obligation to cooperate in a particular domain. It demands a new change in the structure of International Human Rights Law, passing also from the law of cooperation to law of solidarity. While state`s obligations to respect, protect and fulfil human rights are often seen as being related to persons under their jurisdiction (nationals or foreigners), in times of global interdependence is necessary to recognize that human rights are a *share responsibility* between all members of the international community (States and non-states actors).

Unlike treaties dealing with civil and political rights, the ICESCR does not contain a jurisdiction clause. Therefore, the realization of ESC rights is not restricted to persons within the territory and under the jurisdiction of a State party. Moreover, several provisions of the Covenant envisage international obligations (extraterritorial obligations)

The *Maastricht Guidelines on Violations of ESC rights* have underlined that “[l]ike civil and political rights ESC rights “impose three different types of obligations on States: the

obligations to respect, protect and fulfil” (para. 6). This tripartite scheme can also be applied in order to determine the content and scope of international obligations (extraterritorial obligations) in the context of ICESCR.

(a) The *international obligation to respect* requires that States parties refrain from interfering directly or indirectly with the enjoyment of ESC rights in other countries. The ComESCR has affirmed on several occasions this duty of States parties to the Covenant.

For example, in the context of the right to food, the Committee, has explicitly underlined that “States parties should take steps to *respect the enjoyment of the right to food in other countries*” (emphasis added). Specifically, “States parties should refrain at all times from food embargoes or similar measures which endanger conditions for food production and access to food in other countries. Food should never be used as an instrument of political and economic pressure” The same in the context of the right to the highest attainable standard of health and the right to water .

(b) The *international obligation to protect* requires States parties to prevent third parties from interfering in any way with the enjoyment of ESC rights. The ComESCR has clarified that third parties include “individuals, groups, corporations and other entities as well as agents acting under their authority”. Therefore, the international obligation to protect refers to the responsibility of a States parties for the conduct of non-State actors who act extraterritorially or whose conduct has extraterritorial effect.

For example, in the context of the right to health and the right to water .

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

“The obligations of States to protect economic, social and cultural rights extend also to their participation in international organizations, where they act collectively. It is particularly important for States to use their influence to ensure that violations do not result from the programmes and policies of the organizations of which they are members. It is crucial for the elimination of violations of economic, social and cultural rights for international organizations, including international financial institutions, to correct their policies and practices so that they do not result in deprivation of economic, social and cultural rights...” (para. 19).

(c) The *international obligation to fulfil* requires States parties to adopt the necessary measures aimed at enabling the full realization of ESC rights in other countries. According to the ComESCR, the obligation to fulfil can be disaggregated into the obligations to *facilitate, promote and provide*.

(i) The *obligation to fulfil-facilitate* requires States parties to take positive measures to assist individuals and communities to enjoy their ESC rights.

This obligation to fulfil-facilitate has been specifically identified by the ComESCR in the context of the right to education, right to food and right to health.

The *obligation to fulfil-promote* obliges States parties to take steps to ensure that there is appropriate education and awareness concerning ESC rights. Although the Committee has not elaborated on this obligation in its international dimension yet, “it is safe to say that this level would require that international assistance and cooperation programmes

aim to increase the awareness of Covenant rights in the recipient country and empower people to identify and claim their rights”.

Undoubtedly, the most controversial and disputed international obligation is the *obligation to fulfil-provide*, which requires positive action and the provision of technical and economic assistance on the part of those States that are in a position to do so. Although there is still today much resistance to accept this international obligation to fulfil-provide as a pure legal obligation by developed States, “nevertheless, specific aspects may already be legally binding”.

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

Moreover, the Committee wishes to emphasise that it is particularly incumbent on States parties and other actors in a position to assist, to provide ‘international assistance and cooperation, especially economic and technical’ which enable developing countries to fulfil the so-called “minimum core obligations”.

## **Conclusion**

The principle of universality of human rights is the cornerstone of international human rights law. This principle, as first emphasized in the UDHR in 1948, has been reiterated in numerous international human rights conventions, declarations, and resolutions. Also, according to article 28 “[e]veryone is entitled to a social and international order in which the rights and freedoms set forth in th[e] Declaration can be fully realized”. This article is the origin of the third generation of human rights (rights of solidarity), in particular with regard to the right to development, and implies to remove the structural obstacles, both internal and international, that impede the full realization of all human rights (so-called *structural approach to human rights*). Without a better understanding of the principle of solidarity in international human rights law this “universal right” will remain only an aspiration.

***Main concern***

The main concern is the absence of any consensus among members of the Human Rights Council on this topic. Resolutions 12/9, 9/2, 7/5 and 6/3 (“Human Rights and International Solidarity”) have been adopted with the opposition of developed countries (included members of the European Union). So the efforts must be oriented to achieve this consensus in this organ which reflects the dynamics of international community and the opposite interests of its members.

Thank you very much.