

A CISDL LEGAL BRIEF



INTERNATIONAL HUMAN RIGHTS OBLIGATIONS AND LEVELS OF FINANCING FOR DEVELOPMENT

For the United Nations International Conference on Financing for Development
Monterrey, Mexico, 21 March, 2002

International legal regimes on human rights and development financing cannot exist in isolation. How are they related and what is the applicable law?

A critical challenge for the international community is to address intersections between international law and policy in the economic, social and environmental fields. Key policy decisions in the fields of human rights, international aid and debt, trade and investment have generally not been treated in an integrated manner.

States are legally bound in relation to overall levels of financing for development. Such legal obligations form the basis for ensuring that expectations are met, to reduce arbitrary decision making and to form the basis for mutual accountability between and within states. What is the content of such obligations? How does a human rights perspective link issues of financing to the practical realisation of human rights for all?

Executive Summary and Recommendations

This brief¹ outlines state obligations – under the *International Covenant on Economic, Social and Cultural Rights (ICESCR)* and other instruments – to provide for the realisation of economic, social and cultural rights at the national level, to the maximum of their available resources, and with particular focus on the most vulnerable communities. States are legally obliged to ensure that at least ‘core obligations’ corresponding to the most basic needs are immediately realised. International obligations also exist to guarantee respect for such rights in other countries, and to implement (individually and collectively) an international anti-poverty strategy that takes ‘core obligations’ into account in developing countries.

This legal brief also addresses the status and implications of the right to development, and concludes by addressing two complex issues: whether trade and investment liberalisation can serve to meet states’ obligations under the ICESCR; and the extent to which international obligations in relation to economic, social and cultural rights are conditional upon compliance by recipient states with these rights.

The CISDL advises states, IGOs and NGOs to implement the Monterrey Consensus in a manner consistent with their obligations under human rights law, including to:

- acknowledge human rights obligations in their domestic and international financial policies;
- develop the capacity of state and IGO officials, and of NGO officers in the content of human rights at the national and international level;

¹ The Centre for International Sustainable Development Law (CISDL), based in Montreal, Canada, is a new legal institution that examines areas of intersection between environmental, social and economic law. This brief was prepared by CISDL Commission Director Ashfaq Khalfan of Kenya, and CISDL Commission Director Marie-Claire Cordonier Segger of Canada. The CISDL gratefully acknowledges the review and co-authorship of Markus Gehring of Germany and Caroline Dommen of Switzerland, CISDL Commission members and Jeff King, CISDL Associate. The CISDL Commission is grateful for the review and comments of Peter Leuprecht of McGill University and Philip Alston of New York University, members of the CISDL International Advisory Board, as well as Mario Gomez of Harvard University and Adelle Blackett of McGill University. Responsibility for the final views in this brief rests solely with the CISDL Commission.

- integrate human rights into financial decision making by states and IGOs, thereby aiming to meet the Millennium Development Goals well before the 2015 deadline, and further progress made before this date.

Economic, Social and Cultural rights

Economic, social and cultural rights include the right to adequate food, shelter, education, work and an adequate standard of living. All states have committed to the realisation of these rights by ratifying relevant treaties, such as the *UN Charter*, the *International Covenant on Economic, Social and Cultural Rights (ICESCR)*, the *Convention on the Rights of the Child*, the *International Convention on the Elimination of All Forms of Racial Discrimination* and the *Convention on the Elimination of All Forms of Discrimination Against Women*. The core aspect of these treaties is best reflected in the *ICESCR* in which states commit: “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 realisation of the rights recognised in the present Covenant, including particularly the adoption of legislative measures.”²

The *Universal Declaration on Human Rights (UDHR)*, which provides for civil, political, economic, social and cultural rights, includes the provision: “Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.”³ The *UDHR* carries more legal weight than ordinary General Assembly resolutions, and has been said to form part of international customary law binding on all states.⁴ Similarly, under the *United Nations Charter*, member states commit to take joint and separate action in co-operation with the UN Organisation to promote higher standards of living, full employment, conditions of economic and social progress and development, and the observance of human rights and fundamental freedoms for all.⁵ Having received near-universal acceptance, the commitments in the UN Charter and the *UDHR* indicate that a legal obligation, however imprecise, exists for all members of the United Nations.⁶

Human rights obligations on levels of development financing at the domestic level

Each state party to the *ICESCR* is required to realise economic, social and cultural rights progressively.⁷ They are bound to move expeditiously towards the realization of the rights,⁸ and are required to use what resources are available in an equitable and effective manner.⁹ Certain rights must be realised immediately: that there must not be discrimination in implementation of the rights; and that steps must be taken immediately with a view to the progressive realisation of these rights. These steps should be deliberate, concrete and targeted as clearly as

² *International Covenant on Economic, Social and Cultural Rights (ICESCR)*, 19 December 1966, 993 U.N.T.S. 3, Art. 2 (1).

³ *Universal Declaration of Human Rights*, Dec. 10, 1948, G.A. Res. 217 A, UN GAOR, 3d Sess., pt. I, Resolutions, at 71, UN Doc. A/810 (1948), Art. 28.

⁴ Because it interprets the UN Charter, it has been treated by most states as a standard-setting mechanism, and it has been treated by the International Court of Justice as international custom. See A. Eide & G. Alfredsson, “Introduction” in A. Eide & G. Alfredsson, eds. *The Universal Declaration of Human Rights: A Common Standard of Achievement* (The Hague: Martinus Nijhoff, 1999) at xxx-xxxii.

⁵ *Charter of the United Nations*, 26 June 1945, Articles 55 & 56. In the *Millennium Declaration*, Art. 2 states: “We recognize that, in addition to our separate responsibilities to our individual societies, we have a collective responsibility to uphold the principles of human dignity, equality and equity at the global level.”

⁶ According to Rosas, writing in 1995, “That there are some rights and obligations at this level, too, cannot be denied, but what specific impact they can have on the policies of States and international institutions is yet to be determined.” A. Rosas, “The Right to Development” in A. Eide, C. Krause & A. Rosas, eds. *Economic, Social and Cultural Rights: A Textbook*, 1st ed., (Dordrecht: Martinus Nijhoff, 1995) at 251.

⁷ *ICESCR*, *supra* note 2, Article 2.1. A similar formulation on economic, social and cultural rights, albeit broader, exists in the *Universal Declaration on Human Rights*, *supra* note 3, which states in Article 22: “Persons are entitled to realization of their economic and social rights “through national effort and international co-operation and in accordance with the organization and resources of each State.”

⁸ Committee on Economic, Social and Cultural Rights, *General Comment No.14*, UN ESCOR, 2000, UN Doc. E/C.12/2000/4, at para.31. See also the Limburg Principles on the Implementation of the Covenant on Economic, Social and Cultural Rights, (1987), U.N. Doc. E/CN.4/1987/17, Annex, (1987) 9 Human Rights Quarterly at para. 21. The *Limburg Principles* were developed by a number of leading experts in the field of international economic, social and cultural rights.

⁹ *Limburg Principles*, *ibid.*, at para. 23 & 27.

possible towards meeting the obligations recognised in the Covenant.¹⁰ Other immediate obligations include the duty to *respect* these rights by not taking any action to prevent their realisation by individuals and groups, and to *protect* these rights by taking measures to ensure that individuals are not deprived of their rights.¹¹ Finally, the *ICESCR* further requires that available resources be appropriately targeted to benefit the poor, particularly the most vulnerable groups.¹²

In addition, according to the Committee on Economic, Social and Cultural Rights (CESCR), the United Nations ECOSOC body of independent experts that monitors the Covenant:

“[A] minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party. Thus, for example, a State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary care, of basic shelter and housing or of the most basic forms of education is *prima facie* failing to discharge its obligations under the *ICESCR*... 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.¹³”

Core human rights obligations create national obligations for all States, and international responsibilities for developed States, as well as others that are "in a position to assist."¹⁴ However, the possible absence of resources, including international assistance does not excuse the state from its domestic obligations. Even in cases of severe resource constraints, “the vulnerable members of society can and indeed must be protected by the adoption of relatively low-cost targeted programmes.”¹⁵ Such vulnerable groups include those excluded on the basis of race, gender, age, disability and other such characteristics, as well as the poor in general.

Although the above analysis focuses mainly on resource mobilization for realising economic, social and cultural rights,¹⁶ the indivisible nature of human rights must be kept in mind. As pointed out by the CESCR, the provision of the rights to food, health, and education, for example, requires the fulfilment of civil and political rights (for example the right to free expression), and of the rights to political participation and decision-making, and non-

¹⁰ Committee on Economic, Social and Cultural Rights, *General Comment No.3*, UN ESCOR, 1990, UN Doc. E /1991/23, paras. 1 & 2. Some of these are also included in a non-progressive form in other treaties. The right to life, as set out in Article 59 of the *International Covenant on Civil and Political Rights (ICCPR)*, requires positive measures which, according to the Human Rights Committee, should include measures to eliminate epidemics. See *General Comment No. 6*, UN GAOR, 1982, Supp. No. 40, UN Doc. A/37/40 at para. 5. The Human Rights Committee is the body of independent experts, established under the *ICCPR*, to monitor its implementation.

¹¹ Committee on Economic, Social and Cultural Rights, *General Comment No.12*, UN ESCOR, 1999, UN Doc. E/C.12/1999/5 at para.15.

¹² CESCR, *General Comment No.3*, *supra* note 10 at para. 12.

¹³ *General Comment No.3*, *ibid.* at para. 10. See also the list of obligations in *General Comment No. 14*, *supra* note 8 at para. 43-44. In this comment, at para. 47, the CESCR has stated that such core obligations are ‘non-derogable’ and that a state party cannot, under any circumstances whatsoever, justify its non-compliance with core obligations

¹⁴ Committee on Economic, Social and Cultural Rights, *Poverty and the International Covenant on Economic, Social and Cultural Rights*, UN ESCOR, 2001, UN Doc. E/C.12/2001/10. See also text accompanying note 25.

¹⁵ *CESCR, General Comment No.3*, *supra* note 10 at para. 12. The Committee also cites the UNDP *Human Development Report 1990* which indicates, at page 4, that the most basic needs can be widely protected even in times of recession or adjustment by, for example, transferring resources from curative medical facilities to primary health care programmes, from highly trained doctors to paramedical personnel, from tertiary education to primary and secondary education, and from subsidies for vocal and powerful groups to subsidies for weaker and less articulate groups.

¹⁶ Naturally the funding of civil and political rights, as set out in the *International Covenant on Civil and Political Rights*, would be of key importance from the point of view of indivisibility, and is linked to the effective implementation of the the *ICESCR*, see the *CESCR Poverty Statement*, *supra* note 14 at paras. 10-12.

discrimination.¹⁷ A human rights approach would also require the need for sustainability be taken into account, given the impact of environmental degradation and pollution on the right to food and health.¹⁸

International obligations in relation to economic, social and cultural rights

According to the Committee on Economic, Social and Cultural Rights (CESCR), “international cooperation for development and thus for the realization of economic, social and cultural rights is an obligation of all States. It is particularly incumbent upon those States that are in a position to assist others in this regard.”¹⁹ However, while the existence of some legal obligation in relation to international cooperation is therefore clear, the particular content of this obligation requires further analysis.²⁰

International obligations, although different from domestic obligations, may similarly be classified according to obligations *to respect*, *to protect* and *to fulfil* economic, social and cultural rights. The latter aspect, ‘to fulfil’ is controversial. It is difficult to show that these clauses create a legally binding obligation upon any particular state to provide any particular form of assistance to another.²¹ Nevertheless, in certain circumstances, it may be possible to identify obligations to cooperate internationally that would appear to be mandatory.²² For example, it has been suggested that a state could be viewed as not complying with its *ICESCR* obligations if the amount of aid it provided to other countries declined over a number of years.²³ Finally, the text of the *ICESCR* clearly mandates international cooperation to ensure an equitable distribution of world food supplies in relation to need.²⁴

The CESCR’s statement on poverty and the *ICESCR* elaborates on this notion by adding the concept of an ‘international minimum threshold’:

“When grouped together, the core obligations establish an international minimum threshold that all developmental policies should be designed to respect. In accordance with General Comment No. 14, it is particularly incumbent on all those who can assist, to help developing countries respect this international minimum threshold. If a national or international anti-poverty strategy does not reflect this minimum threshold, it is inconsistent with the legally binding obligations of the State party.”²⁵

¹⁷ *CESCR Poverty Statement*, *supra* note 14 at paras. 10-12.

¹⁸ According to the CESCR, the notion of sustainability is intrinsically linked to the right to food, or food security, implying that food must be accessible for both future and present generations. General Comment, No. 12, *supra* note 11, at para. 7.

¹⁹ Gen Comment No. 3, *supra* note 10 at para. 14. This commitment exists in Articles 2 (1), 11, 15, 22 & 23 of the *ICESCR*.

²⁰ M. Craven, *The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development* (Oxford: Clarendon, 1995) at 147 & 149.

²¹ See Craven, *ibid* at 149, and P. Alston & G. Quinn, “The Nature and Scope of States Parties’ Obligations under the International Covenant on Economic, Social and Cultural Rights” (1987) 9 *Human Rights Quarterly* 156 at 186-191. The countries that negotiated the *Covenant* stated that developing countries could not claim aid as a legal right, which is relevant as a supplementary means of interpreting the terms of the *Covenant*. However, other factors are relevant. Under the Vienna Convention on the Law of Treaties, the *ICESCR* should be interpreted in good faith with regard to its ordinary meaning, the object and purpose, the preparatory work and the relevant practice. *Limburg Principles*, *supra* note 15 at para. 4. *Vienna Convention on the Law of Treaties*, 23 May 1969, 8 I.L.M. 679 (entered into force: 27 January 1980). The Vienna Convention, at Articles 31-33, also permits account to be taken of any relevant rules of international law applicable in relations between the parties (such rules could include the *Charter* and the *UDHR*), and any subsequent practice in its application that establishes the agreement of the parties regarding its interpretation.

²² P. Alston & G. Quinn, *ibid* at 191.

²³ Craven also suggest that standards could be set by the CESCR with reference to the resources required to meet the challenge of global poverty, *supra* note 20 at 150.

²⁴ Article 11.2 requires that states “individually and through international co-operation, [undertake] the measures, including specific programmes, which are needed ... to ensure an equitable distribution of world food supplies in relation to need.”

²⁵ *CESCR Poverty Statement*, *supra* note 14 at para. 20. Minimum core obligations in the domestic context were explained as necessary since: “If the *Covenant* were to be read in such a way as not to establish such a minimum core obligation, it would be largely deprived of its *raison d’être*.” (in General Comment No. 3, *supra* note 10 at para. 10). An analogical argument may apply at the international level. Unless international obligations do not exist to compensate for the inability of a domestic party to meet its core obligations, references to international cooperation in the *ICESCR* would be of little relevance in light of the *ICESCR*’s purpose, which is to ensure the realisation of economic, social and cultural rights for all in accordance with the commitments in the *UN Charter* and the *UDHR*. Preambulatory paragraph 3 of the *ICESCR* states, “Recognizing that, in accordance with the Universal Declaration of

This suggests a process to delineate the extent of international obligations relative to domestic obligations. If international anti-poverty strategies must 'enable' developing countries to meet their core obligations, international responsibilities would correspond to the resources that developing countries – mainly the lesser developing countries – require in addition to their available domestic resources in order to meet such core obligations. The *ICESCR* does not place any particular obligation on any one country to provide aid to another, nor does it require any particular policy choice. However, it does require that the state parties to the Covenant individually and collectively take necessary actions consistent with the Covenant to ensure, as stated in the *UDHR*, that international co-operation and assistance be directed towards the establishment of a social and international order in which the rights and freedoms set forth in the *ICESCR* can be fully realised.²⁶

In assessing the implications of the 'core obligations approach,' the international programme found the *Millennium Declaration* is of relevance. The commitments in the *Millennium Declaration*, to be realised by 2015, include: a commitment to halve the number of people in absolute poverty and hunger, to halve the number of people who cannot access safe drinking water, to provide basic education for all and reverse the spread of major diseases.²⁷ Obligations to eliminate absolute poverty, hunger and to provide basic education and safe drinking water, for example, could all be described as 'minimum core obligations.' Under the *ICESCR*, such obligations should be immediately addressed, and should not be delayed. In spite of their limitations, the Millennium Development Goals are useful as a starting point. The Zedillo Report has estimated that meeting these targets would require (together with appropriate economic policies) roughly on the order of an additional US \$50 billion investment in human needs (and capacities) over current spending.²⁸

An inter-related obligation is the requirement that – in the same manner as domestic resources – international assistance (aid and/or debt relief) corresponding to *ICESCR* obligations be targeted towards the most vulnerable populations.²⁹ This obligation is of significant concern since it has been estimated that historically and presently, international assistance is not focused on the most needy states, and the most needy populations within them.³⁰ The obligation upon developed countries is particularly clear since failures to target aid may not be excused by claiming a 'lack of available resources.'

In contrast to obligations to fulfil economic, social and cultural rights, duties to respect and protect the rights of persons in other countries are probably the most easily justified aspects of international obligations. International lending institutions are required to respect the economic, social and cultural rights in the context of their imposition of structural adjustment programmes.³¹ Similarly, it has been suggested that states have a duty to ensure that all bodies subject to their control respect the enjoyment of rights in other countries. This would apply to the voting of states in international organisations and the regulation of multinational companies based in their countries.³²

Human Rights, the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights, as well as his civil and political rights." See note 21 on the relevance of the 'object and purpose' of a treaty in its interpretation.

²⁶ As stated in the *Limburg Principles*, *supra* note 8 at para. 30.

²⁷ G.A. Res. 55/2 at para. 19.

²⁸ The panel notes that this estimate does not include increased costs of servicing distant populations, potential synergies in public spending and possible improvements in efficiency. It further states that the \$50 billion estimate is given only to indicate the magnitude of the financing requirements, "but there is no doubt that the figure is substantial." See *Report of the High-Level Panel on Financing for Development to the Secretary General*, 26 June 2001, U.N. Doc. A/55/1000 at 68-72.

²⁹ The CESCR has stressed, for example in the context of the right to housing, that international assistance should be focused on the most disadvantaged groups. *General Comment No. 4: The Right to Adequate Shelter*, E/1992/23-E/C.12/1991/4.annex III at para. 19. The *Limburg Principles*, *supra* note 8, state; "international cooperation must be directed towards the establishment of a social and economic order in which the rights and freedoms in the Covenant can be fully realized (cf. Art. 28, *UDHR*)."

³⁰ In 1995, it was estimated that twice as much overseas development assistance (ODA) per capita went to countries including the wealthiest 40% of people in the developing world as opposed to the poorest 40%. Less than 7% of bilateral ODA was directed to human development concerns - primary health care, basic education, safe drinking water, etc. M. Ul-Haq, *Reflections on Human Development*, (New York: Oxford, 1995) at 35.

³¹ Committee on Economic, Social and Cultural Rights, *General Comment No.2*, UN ESCOR, 1990, UN Doc. E/1990/23, at para. 9.

³² Craven, *supra* note 20 at 148. In relation to membership in international organisations, see *General Comment No. 2, ibid.*

In addition, the obligations under the *ICESCR* would require that measures be urgently taken to remove global structural obstacles, such as unsustainable foreign debt.³³ For example, the right to food requires that international lending agencies pay attention to the right to food in their lending and credit agreements, and in international measures to address the debt crisis.³⁴

The Right to Development

The right to development gives further support to the domestic and international human rights listed in the above two sections. The General Assembly *Declaration on the Right to Development* includes the combination of civil, political, economic, social and cultural rights taken together indivisibly.³⁵ It re-affirms these rights as an applicable part of general international law, and not just binding on the parties. It has also been seen as a means to extend the effective implementation of existing standards of human rights.³⁶ The Declaration includes an obligation to provide for the participation of all people in development, and the fair distribution of the benefits resulting from development on the basis of equality of opportunity for all.³⁷ The Declaration recognises that "States have the duty to cooperate with each other in ensuring development and eliminating obstacles to development."³⁸ Other important elements of the Declaration may include an *implicit* duty upon developed states to provide development assistance to developing states.³⁹

The precise meaning and legal status of the right to development, as set out in the *Declaration on the Right to Development*, is not completely clear. A General Assembly resolution on its own does not become part of customary international law, binding on states. Such a development would require a consistent and general recognition by states that a principle is binding as a matter of law. It is questionable whether the right to development, as contained in the *Declaration on the Right to Development* is now a principle of customary law.⁴⁰ Nevertheless, it is in the process of becoming international law. The right to development has been repeatedly recognised in various United Nations Declarations, although there is disagreement over its content.⁴¹ In addition, since the *Declaration on the Right to Development* was formulated with reference to the United Nations Charter and the International Covenants, it may potentially be seen as a logical implication of those treaties.⁴²

One may also argue that the 'right to development' exists in instruments besides the *Declaration on the Rights to Development*. Equitable development, within and between states, is necessarily required to realise many of the

³³ Poverty Statement, *supra* note 14 at para. 21. In addition, *General Comment No.2*, of the Committee on Economic, Social and Cultural Rights, *supra* note 31, refers to the possible need for debt relief initiatives. Debt repayments have at times amounted to between 69% to 200% of their combined health, education and social expenditure, as has been the case of Zambia, as stated in Commission on Human Rights, *Joint Report by the Independent Expert on Structural Adjustment Programmes and the Special Rapporteur on Foreign Debt*, UN ESCOR, 2000, UN Doc. E/CN.4/2000/51 at para 17.

³⁴ *General Comment 12*, *supra* note 11 at para. 41. It should be noted that there would be a duty to protect economic, social and cultural rights in relation to debts held by private banks that could be seen as illegitimate. See A. Khalfan, J. King & B. Thomas, *Advancing the Odious Debt Doctrine: Legal Aspects* (Montreal: CISDL, 2002), online: <www.cisd.org>.

³⁵ GA Res. 41/128, UN GAOR, 1986. Arts. 1 (1) & 6.2. The right is also recognised by the *African Charter on Human and Peoples' Rights*, 27 June 1981, 21 I.L.M. 59 (1982) (entered into force 21 October 1986), Art. 22 and is therefore binding on parties to it.

³⁶ I. Brownlie, *The Human Right to Development* (London: Commonwealth Secretariate, 1989) at 14-15.

³⁷ *Declaration on the Right to Development*, *supra* note 35, Arts. 2 (3) and 8. This Declaration was adopted by a vote of 146 for and one against (the United States) and eight abstentions (most of these were donor countries).

³⁸ *Declaration on the Right to Development*, *ibid*, Art. 3.3. There has been concern as to who the rights-holder is. International Court Justice Bedjaoui has clarified that the state is the primary subject – but that the individual is the ultimate beneficiary, cited in Brownlie, *supra* note 36 at 16. In addition, since the *Declaration* refers to the *ICESCR*, states would be bound to engage in development for the benefit of their citizens in accordance with human rights principles.

³⁹ Brownlie, *ibid* at 9.

⁴⁰ Rosas, *supra* note 6 at at 251.

⁴¹ The right was re-affirmed by consensus at the 1993 World Conference on Human Rights in the *Vienna Declaration and Programme of Action*, U.N. Doc. A/CONF.157/23, para. I/10. The right, adapted to include the rights of future generations, is also recognised in Principle 3 of the *Rio Declaration on Environment and Development*, 14 June 1992, U.N. Doc. A/CONF.151/26, 31 I.L.M. 874.

⁴² This would be analogous to the principle of effective and implied powers in the law of treaties Brownlie, *supra* note 36 at 14-15.

human rights recognised in treaty law, such as the *ICESCR* and in established customary law.⁴³ As such, it may be stated that there is a legally binding right to development, which would include some of the provisions in the *Declaration on the Rights to Development*.

Tangled issues: Trade Liberalisation and Investment Inflows as a means to achieve economic, social and cultural rights?

Human rights obligations do not normally prescribe any particular method for their realization.⁴⁴ Therefore, an examination of development financing to achieve human rights should not preclude the evaluation of trade and investment inflows as a means to realize economic, social and cultural rights, nor should it necessarily advocate them. According to the Committee on Economic, Social and Cultural Rights, it is imperative that measures be urgently taken to remove global structural obstacles to the realization of rights, such as the widening gap between rich and poor, and the absence of an equitable multilateral trade, investment and financial system.⁴⁵

It may be argued that, if trade liberalisation is appropriately structured it can play a key role generating resources that may help generate employment, and provide developing countries with the resources to fund the fulfilment of economic, social and cultural rights. However, it is generally agreed that such liberalisation has not yet led to an equitable distribution of resources.⁴⁶ In relation to agriculture, for example, developed countries have maintained high tariffs on agricultural products. In addition, overall agricultural subsidies in the OECD rose from US\$ 182 billion in 1995 to \$300 billion in 1998.⁴⁷

Therefore a relevant question is whether trade and investment liberalisation is an adequate alternative to overseas aid and debt relief as a means of realising economic, social and cultural rights. In addition, given that many economic, social and cultural rights obligations are immediate, states cannot claim to be meeting these obligations by relying on anticipated or future gains that would result from trade. In addition, although there is disagreement on the overall benefits of trade, it is generally accepted that there will be short-term costs related to economic restructuring as states engage in liberalization.⁴⁸ Indeed, the experience of the Newly Industrialised Countries has shown that investments in health care and education were a prerequisite for such states to benefit from trade liberalisation.⁴⁹ It is therefore necessary that failures to realise minimum core obligations be addressed through a variety of international measures, including appropriately structured trade liberalisation, targeted international assistance and debt relief.⁵⁰

Are international obligations conditional upon compliance by recipient states with economic, social and cultural rights obligations?

A key issue is whether the international community's obligations to cooperate for the realisation of human rights are nullified if a recipient state is misusing resources, engaging in officially sanctioned corruption or neglecting vulnerable populations. There is no simple answer to this long-standing issue. Two major concerns in this regard are the effects of withholding assistance and the need to ensure that those evaluating the human rights

⁴³ A similar point is made by the CESCR in *General Comment No. 3*, *supra* note 10 at para. 14.

⁴⁴ According to the CESCR, "the rights recognized in the Covenant are susceptible of realization within the context of a wide variety of economic and political systems, provided that the interdependence and indivisibility of the two sets of human rights is respected" *General Comment No. 3*, *supra* note 10 at para. 8.

⁴⁵ *CESCR Poverty Statement*, *supra* note 14 at para. 21.

⁴⁶ See, for example, G. Soros, *On Globalization* (New York: Public Affairs, 2002), *Economist*, "Argentina's Collapse" March 2, 2002, at 26-28.

⁴⁷ W. Bello, "High Stakes for the 1999 Review of the Agreement on Agriculture," 2 BRIDGES BETWEEN TRADE AND SUSTAINABLE DEVELOPMENT (June 1998) at 2.

⁴⁸ In addition, it is not a given that trade liberalisation will bring about improvement in all situations. Some developing states will be negatively affected by competition from countries where producers are financed, enjoy greater institutional support for training workers, have ready access to technological innovation, and can depend on integrated marketing systems for distributing their merchandise. D. Barkin, "Wealth, Poverty and Sustainable Development" in J. Harris, *Rethinking Sustainability: Power, Knowledge and Institutions* (Ann Arbor, University of Michigan, 2000) at 89.

⁴⁹ A. Sen, *Development as Freedom* (New York: Alfred Knopf, 1999).

⁵⁰ Indeed, the WTO Doha Declaration recognises that the trade regime should consider issues of external indebtedness of developing countries. World Trade Organization, *Ministerial Declaration, 14 November 2001, Doha*, WT/MIN (01)/DEC/W/1, at para. 36.

performance of other states are themselves accountable, and to avoid conflicts of interest in such evaluation.⁵¹ On the first issue, a response consistent with the purposes of human rights law is to attempt to channel such assistance directly to the affected populations (when such action is demonstrably necessary),⁵² rather than simply withholding it.

In relation to the second issue of accountability of the donor states, it is necessary to examine cooperative and mutually agreed approaches. Recent developments include the use of Poverty Reduction Strategy Papers, which are required to be developed transparently and with the broad participation of civil society. The aim is to ensure that debt relief is directly used for poverty reduction.⁵³ However, a legitimate concern is that the evaluation of these papers by the IFIs and by individual donor states (in relation to bilateral assistance) is not independent. Certain elements of the Cotonou Agreement between the European Union and the African, Caribbean and Pacific nations, which mitigate unilateral decision-making by donor states may be helpful in this regard. The Cotonou Agreement explicitly recognizes respect for human rights. The performance of ACP states of their obligations under the Agreement is monitored by a Council comprised of Ministers of all the EU and ACP parties.⁵⁴ In addition to the above models, human rights institutions composed of independent experts play a useful role in ensuring an environment that is less politicised and better geared towards the effective realisation of human rights.⁵⁵

The Centre for International Sustainable Development Law (CISDL) commission is based in the McGill University Faculty of Law (founded in Montreal, Canada, in 1849), works in cooperation with the McGill School of the Environment, the Université de Montreal Faculty of Law, and the Université de Québec à Montreal, with guidance from the three Montreal-based multilateral environmental accords (the NAFTA Commission for Environmental Cooperation, the UNEP Biodiversity Convention, and the Montreal Protocol multilateral fund). Its mission is to promote sustainable societies and the protection of ecosystems by advancing the understanding, development and implementation of international sustainable development law.

Commission Directors: Marie-Claire Cordonier Segger /Ashfaq Khalfan, mcsegger@cisdl.org | akhalfan@cisdl.org
 Centre for International Sustainable Development Law, 3661 Peel St. Montreal, Quebec H3A 1X1 Canada
 Tel: 001 514 398 8918 / Fax 001 514 398 8197 www.cisdl.org

⁵¹ K. Tomasevski has critiqued the use of sanctions in response to human rights violations (normally civil and political) as often being inconsistent, relying on legal fictions of trickle-up effects, carried out for appearances sake and often benefitting the sanctioning state, in *Responding to Human Rights Violations 1946-1999* (The Hague: Martinus Nijhoff, 2000).

⁵² A concern is that diverting assistance to non-governmental organisations, or to individual government departments, would further weaken the ability of states to address structural poverty. Such action should therefore not be taken as a matter of policy, but rather as an exceptional measure in clearly necessary circumstances.

⁵³ *Joint Report by the Independent Expert on Structural Adjustment Programmes and the Special Rapporteur on Foreign Debt*, *supra* note 33 at para. 7. The report critiques the enhanced HIPC programme for excluding many least developed countries, for the maintenance of economic restructuring programmes, for limiting the participation of UN bodies only to the IFIs and for using a definition of 'debt sustainability' that is not related to the levels of need within the country, at paras. 9-12.

⁵⁴ Where sanctions are proposed, the Agreement specifies a dialogue process over a periods of three months, after which disputes over the application of the Agreement may be taken to an internationalised arbitration. Both parties agree on an arbitrator, failing which the arbitrator is appointed by the President of the Permanent Court of Arbitration, *Cotonou Agreement*, Arts. 9 & 96-97.

⁵⁵ More recently, however, there have been efforts to begin a dialogue between the World Bank and the Committee on Economic, Social and Cultural Rights, on the issue of PRSPs.