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**INTERNATIONAL DEVELOPMENT COOPERATION —
MORAL DUTY OR LEGAL OBLIGATION?**

In the 21st century the management of progressive global development requires the active participation of all members of international community. To preserve peace and security, to combat poverty, deprivation and backwardness, to increase choices and opportunities, to ensure respect for all human rights, to facilitate environmental stability it is necessary to cooperate. Positive international action can only be achieved through cooperation [1, p. 32].

The analysis of states« practices evidences that international community does cooperate in order to support development. However, while there are no doubts that states have a strong moral duty to cooperate in respond to the development issues, especially growing world poverty, it is still unclear whether joint states« activities in the development efforts are required by international legal norms. In other words — whether states are legally obliged to cooperate in ensuring global development?

Different aspects of international development cooperation were touched on in works of M. van Reisen (modern development cooperation policy); A. Mold, T. Hauschild, K. Schilder, O. Stokke, P. Hoebink, M. Kaltenborn (European development cooperation); D. Dijkzeul (development policies and activities of the international organizations), A. Sen, S. Marks, A. Sengupta (human rights and development process) and other development scholars and practitioners, as well as international lawyers and policymakers.

The present article is aiming to establish that international development cooperation is not merely a policy objective or matter of good will on the part of the more developed members of the international community, but rather a matter of binding obligations under international law.

To become a regulatory element of the international law system the rule should result from the legally binding norms of conduct for the subjects of international law, usually fixed in international treaties and customs.

The normative content of international development cooperation relies heavily on the UN Charter. Article 1 of the UN Charter stipulates that one of the purposes of the organization is to achieve «international cooperation in solving international problems of an economic, social, cultural, or humanitarian character and in promoting and encouraging respect for human rights and for fundamental freedoms for all» [2]. This purpose is specified in article 55, where among the objectives of the UN is listed «to promote economic and social progress and development» [2]. Article 56 reinforces this provision by stating: «All Members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in article 55» [2].

«All Members pledge themselves» means that all UN Members are obliged to take certain actions to achieve the objectives set out in article 55 [3, p. 99]. Thus, taken together, articles 55 and 56 affirm that states are obliged to take joint and separate action in addressing the problem of development [4, p. 243].

There is an opinion, though, that these provisions of the UN Charter do not create legal obligations for states since the duty to cooperate that is manifested in articles 55 and 56, is «rather abstract and permits a relatively wide margin of discretion regarding its practical interpretation and application» [5, p. 342]. According to Hans Kelsen, article 56 is «one of the most obscure provisions of the Charter ... This is not true obligation... Legally article 56 is meaningless and redundant» [3, p. 99–100]. G. J. H. van Hoof believed that article 56 «employs the weak term 'should' and, moreover, it refers only to cooperation without further specifying in what way(s) this cooperation is to take place. Consequently, even if read in conjunction with the fourth principle of the 1970 Declaration, article 56 of Charter remains a rather vague and open-ended provision» [4, p. 243].

It might be noted, in response to this criticism that the options for international cooperation are as numerous as are the problems they are designed to solve. Thus, listing them all in the UN Charter was just impossible. There are numerous decisions of the UN General Assembly and Economic and Social Council that refer to article 56 and, accordingly, to obligation of international cooperation. UN Members are free to decide what joint or separate actions are appropriate under article 56 [3, p. 99]. But this does not mean that the obligation to cooperate is an abstract and indefinite. Moreover, it is absolutely clear what is the purpose of cooperation between states — to achieve the objectives listed in article 55 of the UN Charter [6, p. 322].

Thus, it can be said that there is a rule in UN Charter which obliges states to cooperate with each other in order to achieve certain results listed

in the UN Charter, including the promotion of conditions of economic and social progress and development. The obligation of international cooperation is not one of the manifestations of the general or abstract duties of states (for example, the duty of friendly relations). It is a concrete obligation which is binding under international treaty, namely article 56 of the UN Charter, in conjunction with article 55.

This view is shared by many reputable international law scholars. Louis B. Sohn wrote, «[w]hile these provisions are general, nevertheless they have the force of positive international law and create basic duties which all Members must fulfill in good faith» [7, p. 18]. Arjun Sengupta was saying «the case of international cooperation could be further strengthened by referring... to article 55 and 56 of the Charter», adding that «because the Charter has a special status as the foundation of the present international system, this pledge is a commitment to international cooperation by all states within the United Nations» [8, p. 4]. Wil D. Verwey wrote that «[i]n case of article 56 of the UN Charter, there is a clear commitment to do something for achievement of purposes mentioned in article 55; there is certainly no right to do nothing...» [9, p. 21]. Even G. J. H. van Hoof, who criticized article 56 of its vagueness, noted that «... it is difficult to uphold that article 56 does not contain any obligation at all. No treaty provision, particularly not provisions of the UN Charter, can be supposed to be devoid of any binding element» [4, p. 243]. Modifying the Wil D. Verwey's idea, he concluded that article 56 entails a «duty not to do nothing» [4, p. 243].

In addition to articles 55 and 56 of the UN Charter, the obligation of development cooperation can be traced to the International Covenant on Economic, Social and Cultural Rights (ICESCR), article 2 (1) of which stipulates «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» [10]. Interpreting this provision Committee on Economic, Social and Cultural Rights — the body of independent experts that monitors implementation of the ICESCR by States parties — determined «... in accordance with articles 55 and 56 of the Charter of the United Nations, with well-established principles of international law, and with the provisions of the Covenant itself, international cooperation for development and thus for the realization of economic, social and cultural rights is an obligation of all States» [11]. Two conclusions come from this statement: firstly, international cooperation for development is identical to the realization of economic, social and cultural rights; secondly, cooperation for development — is the obligation of all states.

ICESCR article 11 (1,2), which is focused on the rights to an adequate

standard of living, to the continuous improvement of living conditions and right to be free from hunger, also contains provisions about cooperation, namely it directs states parties to take steps through international cooperation to achieve this rights [10]. A significant role of international cooperation in ensuring the full realization of economic, social and cultural rights also outlined in articles 15 (4) (on international cooperation and contacts in the field of science and culture), 22 (on international measures to contribute to the effective implementation of the ICESCR) and 23 (on other forms of international action, that include the conclusion of conventions, adoption of recommendations, furnishing of technical assistance and the holding of regional meetings and technical meetings for the purpose of consultation and study organized in conjunction with the government concerned) [10].

As is the case with the UN Charter, the nature of the commitments that ICESCR seeks to create is somewhat obscure [12, p. 443]. Naturally, this gives cause for doubts as to the fact that international cooperation can be seen as a legal obligation under the ICESCR.

States' attitudes towards the obligation of international development cooperation, arising from the ICESCR, can be observed in the process of negotiations about an Optional Protocol to the ICESCR (providing for a complaints procedure). The question of the duty of international cooperation has been raised by number of delegations at the first session of the Open-Ended Working Group on an Optional Protocol to the ICESCR in the context that lack of resources may be an obstacle to poor countries to implement their binding obligations and that an optional protocol might give rise to complaints against them [13]. During subsequent sessions of the Open-Ended Working Group states' positions divided: one group of states (United Kingdom, the Czech Republic, Canada, France and Portugal) believed that international cooperation (particularly in regard of the obligation to provide development assistance) was an important moral obligation but not a legal entitlement. Several delegations (mostly representatives of African Group) have come up with the contrary position stressing that article 2 (1) recognizes a legal obligation of international assistance which should be reflected in the text of an Optional Protocol [14] and that the trust fund should be established to assist states to implement their obligations enshrined in the ICESCR [15].

It should be noted, that Optional Protocol to the ICESCR, adopted by the General Assembly Resolution on 5 March 2009, doesn't impose on states the obligation to cooperate in development (however, without prejudice to the obligations of each state-party to ICESCR to fulfill its obligations under the Covenant) [16, p. 7].

There is no consensus about ICESCR article 2 (1) among the development «theorists» as well. Beate Rudolf, while expressing an opinion about the provisions of the ICESCR on international cooperation,

in particular, article 2 (1), considers that the provisions of ICESCR do not create an obligation to cooperate, because the states can not bring claims against each other. «Although the ICESCR assumes that «international cooperation for development and thus for the realization of economic, social and cultural rights is an obligation of all States,» it rightly does not speak of a corresponding claims-right by other states, as the Covenant does not set up a structure of reciprocal rights and duties between states» [17, p. 110].

We rather tend to agree with Stephen Marks, who is inclined to attach much more value to the duty «to take steps, individually and through international assistance and cooperation», enshrined in article 2 (1), considering that it provides «a legal basis for the reciprocal obligations between and among states parties to the ICESCR» [18, p. 72]. Marks argues that «the full realization of ICESCR rights cannot be attained in a piecemeal fashion, but only through a policy that is deliberately designed to achieve all the rights, progressively and in accordance with available resources ... These are the legal obligations of each of the states parties ... not only to alter its internal policy but also to act through international cooperation toward the same end» [18, p. 72].

References to obligations of international cooperation for economic, social and cultural rights realization (and, thus, for development) appear throughout the Convention on the Rights of the Child (1989), which is the most widely ratified human rights treaty [19, p. 77]. It explicitly prescribes that: «States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention. With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation» (article 4) [20]. The requirement of international cooperation is reiterated in article 24 (4) on the right to health and in article 28 (3) on the right to education. Both articles include the requirement that «particular account shall be taken of the needs of developing countries» [20].

The most recent support and approval of obligation of international cooperation in development were expressed by the adoption of the Convention on the Rights of Persons with Disabilities (2006) [21]. Its provisions provide that, in the words of the Convention, «all those in a position to assist» [22] have not only a role but also a duty to ensure «that international cooperation, including international development programmes, is inclusive of and accessible to persons with disabilities» (article 32) [10].

Thus, analysis of multilateral international treaties showed that they not only contain certain obligations that states undertake in order to develop (and fulfill economic, social and cultural rights), but also impose on states obligation to cooperate with each other in this regard.

Turning to the international customary law, to say that there is a customary norm, which requires states to cooperate in development, it is necessary to establish whether there is a relevant practice (*usus*) and, importantly, whether it is supported by *opinio juris*. Necessity of two elements (actual practice and *opinio juris*) in customary law was more than once underlined by International court of Justice (ICJ). Even the constant and consistent practice is not necessarily supported by *opinio juris* and therefore creates a custom.

Providing of development assistance to developing countries, primarily through Official Development Assistance (ODA), is the most obvious and common practice of international development cooperation. But does this practice create an international custom? Developed countries may be willing to provide development assistance, but do not act because of legal persuasion. States that are leaders by the amount of development aid, such as Sweden, Norway, Luxembourg, Denmark, deny that they are legally obliged to do so. However, Edward Kwakwa suggests that «[s]pecific practice ... could lead one to infer a certain degree of *opinio juris*. It could be argued that the developed countries involved grant development assistance because they deem it right to do so. This may not necessarily imply *opinio juris*, but it does not detract from the psychological element involved» [12, p. 448]. This is based on Oscar Schachter's idea of so-called «intra-generational» equity, which entails that at the bare minimum everyone is entitled to the «necessities of life: food, shelter, health care, education, and the essential infrastructure for social organization... It is scarcely startling to find that a similar principle has been advanced on the international level...» [23, p. 16]. Prof. Schachter suggested that intra-generational equity had become a de-facto legal norm: «What is striking is not so much its espousal by the large majority of poor and handicapped countries but that the governments on the other side, to whom the demands for resources are addressed, have also by and large agreed that the need is a legitimate and sufficient ground for preferential distribution ... It is undeniable that the fulfillment of the needs of the poor and disadvantaged countries has been recognized as a normative principle which is central to the idea of equity and distributive justice... This agreement is evidenced ... by their concurrence in many international resolutions and by their own policy statements [and] more convincingly, by a continuing series of actions to grant assistance and preferences to those countries in need ...» [23, p. 8].

Practice of development cooperation can also be seen in the states' membership in relevant international organizations. For example, the activities of the UN «represent the essential consensus of state practice, and one defining element of customary international law» [24, p. 92]. Given that the activities of international organizations are based on their charters, which are nothing like international agreements, the presence of *opinio juris*, and, consequently, the customary rules, leaves no doubt.

Let's not forget the role of international organizations« acts in the formation of customary norms. They help to form, fix, interpret and enforce customary rules. But whether these acts, especially UN General Assembly resolutions, can express the *opinio juris*? ICJ held that *opinio juris* can derive from states« attitude to certain resolutions of the UN General Assembly. In Advisory Opinion on the legality of the threat or use of nuclear weapons Court stated: «The Court notes that General Assembly resolutions, even if they are not binding, may sometimes have normative value. They can, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris*. To establish whether this is true of a given General Assembly resolution, it is necessary to look at its content and the conditions of its adoption; it is also necessary to see whether an *opinio juris* exists as to its normative character. Or a series of resolutions may show the gradual evolution of the *opinio juris* required for the establishment of a new rule» [25, p. 97]. Adoption of a resolution by consensus clearly indicates UN member states positive attitude towards its provisions and thus evidence the presence of *opinio juris*.

Thus, the consent of states to be bound by the obligation of international cooperation is reiterated in acts of international organizations and high-level conferences of world leaders, especially Declarations, adopted by UN General Assembly as a forum, representing the majority of existing states. The most prominent of these Declarations are the Universal Declaration of Human Rights (1948), Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States (1970), the Declaration on the Right to Development (1986), Vienna Declaration and Programme of Action (1993), Millennium Declaration (2000).

All the above allows to suggest that there are not only international treaty norms, but also international customary norms that oblige states to cooperate for development. The latter were established both by practice of development assistance and states« willingness to adopt resolutions (primarily within UN General Assembly), which prove and clarify the content of customary norms.

Thus, the main international legal instruments, ranging from the UN Charter to international customary law, imply the obligation of states to cooperate with each other for the achievement of development. So, the answer to the question put at the beginning of the article is positive — international development cooperation is not only moral duty, but a legal obligation of all states.

However, in all fairness it should be admitted that the provisions of abovementioned international legal instruments that concerns the obligation of development cooperation are of a general nature and do not define precisely states« duties in the field. As a result, international development cooperation remains a general principle with no legal

mechanism of implementation. Thus, international community of states has a lot of job to do in the field of enhancement of the obligation to cooperate in ensuring development.

The most logical response to such a «gap» would be the adoption of a multilateral international treaty to transform development cooperation from a mere moral duty into a valid legal obligation, making it possible to hold states accountable for non-compliance. However, at the present moment states are far from this.

Moreover, let us not forget that progressive global development cannot be achieved only through the legal obligation to cooperate. It also depends on socio-political, ideological, economic, i.e. non-legal factors, including moral duties. For example, the existence of international legal norm that prohibits acts of aggression does not mean the end of the wars. That is the nature of international law. Therefore, it is wrong to expect and demand from development cooperation «performers» to act beyond their strength or interests. Otherwise cooperation in ensuring development will become a fiction, an idea, deliberately doomed to failure.

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S u m m a r y

***Yakubovska N. O. International development cooperation — moral duty or legal obligation?* — Article.**

The article finds the answer to the question whether under international law states are obliged to cooperate in development. The analysis of the texts of relevant multilateral treaties and state«s practice has confirmed that states obligation to cooperate in the development stems from the UN Charter, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Rights of the Child, the Convention on the Rights of Persons with Disabilities, as well as customary international law. It was concluded that the provisions of the relevant international legal instruments are of a general nature and do not define precisely states« duties in the field of development cooperation.

Keywords: international cooperation, development, international law, obligations of states.

А н о т а ц і я

***Якубовська Н. О. Міжнародне співробітництво в цілях розвитку — моральний борг чи юридичний обов'язок?* — Стаття.**

Статтю присвячено пошуку відповіді на питання, чи зобов'язані держави згідно з міжнародним правом співробітничати в цілях розвитку. У статті проведений аналіз текстів відповідних багатосторонніх міжнародних договорів і практики держав. Підтверджено, що обов'язок держав співробітничати в цілях розвитку впливає зі Статуту ООН, Міжнародного пакту про економічні, соціальні і культурні права, Конвенції про права дитини, Конвенції про права інвалідів, а також звичаєвих норм міжнародного права. Зроблено висновок, що положення відповідних міжнародно-правових актів носять загальний характер і не визначають конкретні обов'язки держав у сфері співробітництва в цілях розвитку.

Ключові слова: міжнародне співробітництво, розвиток, міжнародне право, обов'язки держав.

А н н о т а ц и я

***Якубовская Н. А. Международное сотрудничество в целях развития — моральный долг или юридическая обязанность?* — Статья.**

Статья посвящена поиску ответа на вопрос, обязаны ли государства в соответствии с международным правом сотрудничать в целях развития. В статье проведен анализ текстов соответствующих многосторонних международных договоров и практики государств. Подтверждено, что обязанность государств сотрудничать в целях развития вытекает из Устава ООН, Международного пакта об экономических, социальных и культурных правах, Конвенции о правах ребенка, Конвенции о правах инвалидов, а также обычных норм международного права. Сделан вывод о том, что положения соответствующих международно-правовых актов носят общий характер и не определяют конкретные обязанности государств в сфере сотрудничества в целях развития.

Ключевые слова: международное сотрудничество, развитие, международное право, обязанности государств.