The Duty to Cooperate in International Law

Annotated Bibliography

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International human rights law (incl. right to development)

Skogly, Sigrun (2022) Global Human Rights Obligations, in Mark Gibney, Gamze Erdem Türkelli, Markus Krajewski & Wouter Vandenhole (eds) The Routledge Handbook on Extraterritorial Human Rights Obligations (Routledge: Abingdon), 25 – 39

This chapter addresses the basis for and content of global obligations in international law, including the duty to cooperate to realize human rights. Skogly locates the primary legal foundation for global obligations in the UN Charter, as further interpreted in the Universal Declaration on Human Rights (UDHR). Earlier arguments on the merely aspirational nature of the UN Charter's human rights provisions are rebutted on the basis of subsequent developments in international human rights law and the UN system, as well as the ICJ's *Namibia* advisory opinion. In particular, Skogly highlights the recognition of global obligations in a range of human rights treaties, declarations and soft law instruments, as well as UN member states' acceptance of the Human Rights Council's Universal Peer Review Mechanism, as examples of state practice in this sense. She considers that some states' hesitance to expressly accept global obligations does not negate the binding nature of the human rights obligations flowing from the Charter, or states' established practice of promoting human rights via UN procedures and mechanisms.

On the duty to cooperate more specifically, Skogly considers that this binds states via their obligations to fulfil the UN Charter in good faith, as international cooperation is the means by which Charter obligations are fulfilled in a global setting. This is further evidenced by numerous UN human rights treaties' recognition of a requirement to cooperate internationally to realize human rights, as well as reiteration of this principle in soft law instruments adopted by the UN General Assembly in connection with the Millenium Declaration and Agenda 2030. Regarding the addressees of the duty to cooperate, UN treaty bodies view the duty as incumbent on all UN member states, with differentiated duties to offer and seek assistance accruing respectively to states able to provide assistance and those requiring it. This differentiation may be further elaborated and operationalized with reference to the principle of common but differentiated responsibilities (CBDR), which is drawn from international environmental law but has also been identified as relevant to global human rights obligations. This could also further accountability for negative outcomes of cooperation or failure to cooperate, which is not provided for by current causation-based models of human rights responsibility.

With regard to the content of the duty to cooperate, Skogly points out that international assistance is only one component of this broader overarching duty, which cuts across all areas of international cooperation and has the realization of human rights (as required in the UN Charter and interpreted in the UDHR) as its objective. The duty to cooperate is one of both means and result: in order to fulfil UN Charter obligations, all forms of international cooperation must be conducted in accordance with, and aim at the fulfilment of, human rights. This further concretized with reference to the Maastricht Principles' elaboration of global obligations to respect, protect and fulfil human rights through cooperation, which has been confirmed on certain points by CESCR (e.g. regarding a duty on states to cooperate internationally to regulate non-state actors' activities to prevent impairment of ESCR, and to address structural causes of human rights violations internationally).

Wewerinke- Singh, Margaretha (2021) Pandemics, Planetary Health and Human Rights: Rethinking the Duty to Cooperate in the Face of Compound Global Crises, in Erika de Wet, Kathrin Maria Scherr, and Rüdiger Wolfrum (eds) Max Planck Yearbook of United Nations Law Online, Vol. 24, No. 1, 399-425.

This article explores the role of the principle of solidarity and the duty to cooperate to realize human rights in responding to global compound crises such as climate change and the COVID-19 pandemic. Although international solidarity and cooperation have been identified as key elements of an effective response, questions remain about their legal bases and status; the level and manner of differentiation of responsibilities; and how potential conflicts between competing obligations may be resolved.

Approaching these questions from the perspective of international human rights law – while paying attention to its interrelationship with international environmental law – Wewerinke-Singh finds that the principle of solidarity is most clearly expressed via the differentiation of environmental obligations according to the common but differentiated responsibilities and respective capabilities (CBDRRC) of states, as well as obligations of cooperation and assistance rooted in the UN Charter. It is noted that the latter are not new or emerging in the field of human rights, but rather underarticulated. In the context of COVID-19 and climate change, however, Wewerinke-Singh points to CESCR's General Comment 14 as a particularly important articulation of a range of 'international obligations' arising from the right to health, including references to the collective responsibility of states to address transmittable diseases, and particular responsibilities on economically developed states to assist others in this regard. Similar references in CESCR general comments on a range of other themes are also highlighted. It is also confirmed that CESCR has linked these responsibilities to UN Charter obligations, and that it considers the latter to be differentiated. Emerging state practice is also said to support the notion that the CBDRRC principle also informs the differentiation of states' international human rights obligations in relation to environmental issues. The existence of differentiated global obligations under international human rights and environmental law is therefore viewed as broadly accepted.

As for the content of these obligations, these are deemed to be both procedural and substantive. Wewerinke-Singh notes the lack of specificity regarding the level of financial and resource transfers required by the duty to cooperate, as well as the rights-holders and duty-bearers. However, this is not viewed as precluding enforceability of the duty to cooperate. It is argued that both high- and low-income states could be held responsible for failing to work towards creating a system for implementing duties of cooperation and assistance, while high-income states may be considered in breach of the duty to cooperate where their development assistance falls below 0.7% of GDP, or where their economic and other policies harm the interests of developing states and the rights of their populations. Low-income states could also be found in breach where they have failed to seek resources internationally. Additionally, an important limitation noted on the duty to cooperate is that it does not entitle any state to act within another state's lawful jurisdiction without the latter's consent or acquiescence.

In the context of compound crises, the objectives of the Paris Agreement are put forward as an example of global goals with which states must align their policies and actions in order to discharge their duty to cooperate. This could concretely translate, for example, into duties on states to adopt evidence-based policies aligned with these goals (including in the context of pandemic recovery plans), as well as safeguard policies to prevent human rights violations in

the context of energy/extraction projects aimed at meeting climate goals. In terms of pandemic recovery, high-income states may also arguably have an obligation to support this in low-income countries to prevent people falling into extreme poverty, based on their capacities; low-income countries, on the other hand, must proactively seek resources to this end where domestic resources fall short. As for the climate crisis, the well-established principle of CBDRRC entrenched in the UN Framework Convention on Climate Change and the Convention on Biological Diversity could also guide the clarification of states' duties of cooperation and assistance in the context of avoiding, minimizing and addressing climate-related loss and damage, which can be viewed as an essential part of states' obligations to provide remedies for human rights violations arising from climate change.

Pribytkova, Elena (2020) What Global Human Rights Obligations Do We Have?, Chicago Journal of International Law, vol. 20, no. 2, Winter 2020, p. 384-449

This article aims to conceptualize the normative basis, status, nature, scope and content of global obligations to realize human rights, particularly those elements which have not been extensively mapped in the Maastricht Principles. The latter are deemed to include the scope of global obligations proper, which do not flow from the causation of damage (as opposed to remedial extraterritorial obligations); the global obligations of intergovernmental organizations, non-state actors and individuals; and the potential for global obligations of result as well as conduct.

With regard to the global obligations of state, intergovernmental and non-state actors, it is highlighted that their content and scope will depend on the actors' nature (including their individual or collective nature), the purpose of their creation (in the case of collective actors), as well as their role (e.g. whether are they acting directly, via a collective organization, and/or via regulation). It is also necessary to distinguish between corporate obligations (incumbent on a collective as a whole) and shared obligations. While there is deemed to be no consensus on the status of positive global obligations, the importance of cooperation with and by global actors other than states is highlighted in certain human rights treaties and soft law declarations. In terms of customary international law, *opinio juris* in favour of duties of cooperation to realize human rights on states and other global actors has been expressed in instruments such as the UDHR and the Millenium Development Goals; however, this has not found sufficient expression in state practice, as developed states and other global actors have expressed reluctance towards binding assistance obligations, as well as practice in line with these. Uncertainty is also expressed regarding the *jus cogens* nature of obligations relating to realization of core ESC rights. Current legal instruments also do not provide for direct obligations on or accountability of intergovernmental organizations and non-state actors. However, it is suggested that states are currently under obligations to take due account of core ESC rights in their activities as members of intergovernmental organizations, as well as to regulate and influence the conduct of non-state actors and individuals. Regarding individuals, the state and global civil society are identified as the main avenues for them to realize their rights and to act on the global level.

On the duty to cooperate to realize human rights specifically, this is viewed as incorporating both an obligation of conduct (i.e. cooperation) and of result (i.e. realization of socio-economic rights necessary for a decent standard of living and creation of just global structures towards this purpose), in contrast to prevailing interpretations which mainly focus on the conduct aspect.

Diller, Janelle M. (2018) Economic, Social and Cultural Human Rights: The Journey towards Peremptory Norms in International Law, Nordic Journal of Human Rights, Vol. 36, No. 1, 19-37

Noting a systemic disconnect between ESC rights and the economic and financial decisions required for their realization, this article outlines the role of the duty to cooperate to realize human rights in assuring the "customary core" of ESC rights, including via economic, financial and development policies and actions.

Diller affirms that, as a complement to an emerging consensus about states' customary negative duty to respect ESC rights when their actions have an impact outside their territory, a positive "duty of rights-oriented international cooperation operates as an affirmative peremptory norm to help prioritise core ESC rights in economic and financial cooperation within the international community of states, non-state actors and international organisations". This duty is said to be derived from the broader obligation of international cooperation which is enshrined in the UN Charter and recognized as a general principle of international law. Starting with ILO member states' commitment to cooperate to realize core ESC rights via labour policies, Diller outlines the importance of states' commitments and practice as members of UN specialized agencies (including in the areas of health, education, work and social security), as well as via international financial institutions in certain contexts (e.g. lending states' support for safeguard policies) in evidencing the emerging customary nature of such a duty of rights-based cooperation.

Diller proposes three avenues to further enhance international cooperation to fulfil core ESC rights: firstly, through promoting a common system-wide approach to the core content of ESC rights (with CESCR playing a leading role in normative alignment among treaty bodies, specialized agencies, and other fora); secondly, through developing the coordination of responsibility for extraterritorial ESC impacts (among states and vis-à-vis non-state actors) as an aspect of the duty to cooperate to realize ESC rights, with existing pluralistic governance arrangements (e.g. Maritime Labour Convention) as models; thirdly, greater recognition and operationalization of the responsibility of international organizations and their members for their impacts on national efforts and international cooperation to realize ESC rights globally (particularly, for failures to protect core ESC rights from interference, or for restrictive interpretations of institutional privileges and immunities).

Arts, Karin and Atabongawung Tamo (2016) The Right to Development in International Law: New Momentum Thirty Years Down the Line?, Netherlands International Law Review (63), 221–249

This article examines the role of the duty to cooperate in implementing the Declaration on the Right to Development, as well as the nature and content of the duty to cooperate in this regard. It identifies the duty to engage actively in international cooperation and assistance for development as a core implementation obligation in the Declaration, which is interdependent with and indivisible from national implementation obligations. However, duties to "formulate appropriate international development policies" and to "provide effective international cooperation" are considered to be among the most controversial elements of the Declaration, particularly for 'developed' states. Nevertheless, the view is advanced that the duty of cooperation to realize the aims of the Declaration is not a novelty, but in fact rooted in UN Charter obligations and reflected in numerous UN human rights treaties. The latter are deemed to constitute "a solid and concrete legal basis and a reason for further operationalizing

international cooperation for development", with the treaty bodies already having made contributions in this sense by referring to the duty to cooperate (including the duty on developing states to seek assistance) in various general comments. The article recommends that this elaboration and operationalization of the duty to cooperate be furthered in the context of state treaty reporting procedures (i.e. via more frequent and explicit enquiries about international cooperation provided or received), as well as through processes relating to the Sustainable Development Goals (SDGs), which are conceptualized as a collective effort based on solidarity. At the inter-regional level, the ACP-EU agreements are further highlighted as examples of operationalization of the duty to cooperate aligned with the Declaration, as they integrate a comprehensive understanding of development; specific rights and obligations regarding resource transfers (on a contractual basis); and a central role for human rights.

International environmental law (incl. water law)

Tanzi, Attila M. (2020) The inter-relationship between no harm, equitable and reasonable utilisation and cooperation under international water law, International Environmental Agreements: Politics, Law and Economics, Vol. 20, 619–629

This article sets out the interrelationship between the customary principles of cooperation, no-harm and equitable and reasonable utilization in international water law (as codified in the UNECE Water Convention and UN Watercourse Convention). It contextualizes these principles as the three main non-hierarchical pillars of an integrated 'community interest' approach to international water law adopted by the PCIJ and ICJ.

With particular regard to the principle of cooperation (viewed here as a procedural principle), Tanzi holds that this relates to the substantive principles of no-harm and equitable and reasonable utilization via the underlying community of interest principle, whereby transboundary waters are considered to be a shared natural resource. Cooperation is essential in order to harmonize states' exercise of their rights of utilization and duties to refrain from harm, which apply to the watercourse as a whole and vis-à-vis all other states concerned. A recognized customary obligation arising from the principle of cooperation include "the obligation to undertake a transboundary environmental impact assessment of a given activity and to share it with the potentially affected co-riparians". Furthermore, co-riparian states with reasonable grounds to believe that a certain planned activity could cause them significant harm have the right to consult and negotiate with the planning state, which must then suspend the activity pending consultations – however, the potentially affected states do not retain an indefinite veto (without prejudice to their rights under international water law).

This balancing of interests via the principle of cooperation is usually left to the states concerned, as all are deemed to have a common interest in optimally developing and protecting the shared resource. However, under the UNECE Convention, cooperation is furthered by an obligation to conclude transboundary agreements setting up joint bodies for further consultation and agreement on the use and protection of shared watercourses. Furthermore, a duty of equitable participation within the framework of these cooperation arrangements goes beyond a procedural duty to cooperate, as it obliges states to follow an integrated approach to water through both joint and collective action to ensure its protection, control and development. Indeed, it is further asserted that cooperation is not an end in itself, but that the activities it relates to must also comply with the principles of no-harm and equitable and reasonable utilization. It is also

confirmed that even where cooperation is not possible owing to a lack of good faith by one or more co-riparian states, the no-harm principle remains binding on states individually.

Craik, Neil (2020) The Duty to Cooperate in the Customary Law of Environmental Impact Assessment, International & Comparative Law Quarterly, Vol. 69, 239–259

This article examines the customary obligation to conduct environmental impact assessments (EIAs), which is established in numerous multilateral treaties and the practice of international organizations, and confirmed by the ICJ, ITLOS and the ILC. With particular reference to the elaboration of this obligation by the ICJ, Craik holds that this analysis is incomplete as it does not address the role of EIAs in implementing the customary duty to cooperate in international environmental law. The latter is triggered by the risk of significant transboundary environmental harm, and entails an "obligation to inform other States and to seek their perspectives on an activity that has the potential to affect their interests". It is submitted that the content of the EIA obligation cannot be understood in isolation from the general rules it seeks to implement, including the duty to cooperate, and that neglecting the latter results in a hollowing-out of the EIA obligation.

In support of this argument, the article firstly examines the duty to cooperate in the context of transboundary harm more closely. It is confirmed that the duty to cooperate is instrumental to preventing harm, but also arises from the duty to warn other states against negative effects on their interests and the need to manage shared resources jointly. As such, the duty to cooperate is distinguished from the duty to prevent harm (due diligence) by emphasizing the former's other-regarding approach to transboundary harm as a shared problem relating to a common interest, rather than a delineation of states' respective prerogatives within their sovereign domains. Secondly, the article examines the implications of the duty to cooperate for the EIA obligation, and finds that these include the potential to refine and reconsider certain elements of EIA procedures, including states' obligations in case of disagreement over the triggering of the EIA obligation, the timing of notification, the duty to justify decisions regarding planned activities, and remedies for breach of the EIA obligation. An important limitation on the current understanding of duty to cooperate is also highlighted: namely, that it remains state-centric and does not address whether consultation duties extend to the population of the affected state or other areas. However, it is concluded that paying due attention to the duty to cooperate in EIA obligations "provides more specific procedural protections to give effect to both harm prevention and due respect of affected State interests".

Meshel, Tamar (2018) Unmasking the Substance behind the Process: Why the Duty to Cooperate in International Water Law is Really Substantive Principle, Denver Journal of International Law and Policy, Vol. 47, No. 1, 29-50

This article examines the role of the customary duty to cooperate in international water law in the settlement of disputes, which has been rather limited by the traditional view of this duty as a procedural principle regulating states' interactions in the management of shared freshwater resources. It is submitted that the duty to cooperate, as a complement to the no significant harm principle, imposes specific obligations on states in the dispute settlement process.

Firstly, the article traces the development of the duty to cooperate in international water law, as well as affirming its origins in the general duty to cooperate in international law as expressed in the UN Charter. It is found that overall, the duty to cooperate in international water law gives

rise to procedural obligations regarding both the management of shared freshwater resources (e.g. duties to negotiate transboundary agreements and exchange data and information) and the settlement of disputes in this regard (e.g. obligations of notification and consultation regarding modifications of water use, as well as the EIA obligation).

The latter set of obligations are said to inform the due diligence component of the no-harm principle; furthermore, they exist independently in the UN Watercourses Convention, under which they can be invoked even in the absence of harm. In this vein, the ICJ's Pulp Mills decision distinguished substantive and procedural obligations and set a lower threshold for triggering the latter; however, in the subsequent San Juan River case, the Court's approach to the thresholds for these obligations was rather less consistent. The author submits that the Pulp Millls approach is preferable as it "reflects the general significance of the duty to cooperate in international law, and is more conducive to achieving cooperation in the resolution of disputes". According to the author, this approach would entail that the procedural obligations under the duty to cooperate "would not only inform the due diligence standard that states are required to comply with once there is a 'risk of significant harm,' but they would also require states to cooperate when a new measure is planned even if no such risk arises, so long as the planned measure might have an 'adverse effect.'" Detaching obligations on the duty to cooperate from the notion of harm also facilitates the establishment of state responsibility for failures to cooperate, and shifts the duty of cooperation towards a positive obligation to protect water resources.

In the context of the dispute resolution process, the author notes that specific obligations stemming from the duty to cooperate are recognized to a limited extent in international water law; however, these have been more extensively addressed in maritime delimitation cases under UNCLOS. Two interrelated UNCLOS obligations stemming from the duty to cooperate are deemed particularly instructive for the settlement of freshwater disputes, i.e.: "the obligation to make every effort to enter into provisional arrangements until a final delimitation is agreed upon", and "the obligation not to jeopardize or hamper the reaching of such final delimitation agreement."

Voigt, Christina & Ferreira, Felipe (2016) 'Dynamic Differentiation': The Principles of CBDR-RC, Progression and Highest Possible Ambition in the Paris Agreement, Transnational Environmental Law, Vol. 5, No. 2, 285–303

This article frames the CBDRRC principle - as first expressed in the Rio Declaration and further developed in the UNFCCC, Kyoto Protocol and Paris Agreement - as "an obligation on all states to cooperate towards environmental integrity", based on the latter being deemed a common concern of humankind, while taking into account the greater responsibility of developed states based on their greater contribution to climate change and their economic and technological capacities. It traces how the development of the CBDRRC principle has led to the institutionalization of stronger procedural and substantive obligations on developed states in the realm of climate change mitigation, adaptation, financing and transparency (including "obligations to provide implementation assistance, finance, technology and know-how to developing countries"), coupled with a corresponding flexibility and asymmetry of obligations for developing states. States' perception of equitable outcomes of this arrangement is deemed important in terms of fostering more effective cooperation – in this sense, it is highlighted how the introduction of a more nuanced and dynamic concept of differentiation in the Paris Agreement was key to ensuring that "distributive fairness remained part of the international

climate change agenda", in light of bottom-up cooperation via nationally determined contributions and increasingly fluid commitments. The Paris Agreement's introduction of the concepts of "highest possible ambition" and progression also set standards for the evolution of the level of efforts required from parties over time, including in the realm of cooperation. With regard to the latter, it is concluded that the differentiation system in the Paris Agreement has the potential to enhance ambition and collective action among states, rather than creating divisions and functioning as "merely a burden-sharing concept".

Young, Margaret A. & Rioseco Sullivan, Sebastian (2015) Evolution through the Duty to Cooperate: Implications of the Whaling Case at the International Court of Justice, Melbourne Journal of International Law Vol. 16, no. 2, 311-343

Using the ICJ *Whaling* judgment as a central case study, this article analyzes the trend at various international courts and tribunals of giving treaty provisions a contemporary, updated interpretation in light of institutional arrangements and procedures specific to a treaty regime, and particularly the duty on states to cooperate within these frameworks. This is contrasted with the approach of examining subsequent agreement and practice within the broader system of international law via an approach of systemic integration, as foreseen in the Vienna Convention on the Law of Treaties.

With regard to the *Whaling* judgment, the authors find that despite largely limiting its interpretative analysis to the parameters of the international whaling regime, the Court nevertheless contributed to the evolution of the latter by formulating objective standards of conduct for states under the International Whaling Convention (in particular, in determining whether the killing of whales is reasonable in relation to scientific research objectives), as well as confirming states' duty to give due regard to resolutions and guidelines of the International Whaling Commission in their conduct. The latter duty was deemed to arise from states parties' duty to cooperate with the Commission and the Scientific Committee to allow them to play a monitoring role in an international system of management and conservation of whale stocks. While the Court focused closely on the context of the international whaling regime in setting out this duty to cooperate, it was nevertheless viewed as a manifestation of the foundational duty to cooperate in environmental and shared-resource regimes under international law.

The authors consider that the Court's use of the duty to cooperate in interpreting treaty obligations is important to ensure states' participation in the development of international law, as well as giving a specific role to international organizations in this process. They trace similar developments in relation to other institutionalized shared-resource or environmental commons regimes (i.e. UNCLOS; bilateral river and dam management arrangements; and the UNFCCC conferences of parties), and conclude that interpretation of norms from these regimes in light of a duty to cooperate may strengthen substantive and procedural obligations on states. This may have important implications for the roles of states, international organizations, and other actors. For states, these include the emergence of a 'global administrative law', which requires states to act in a manner that is "responsive, transparent, procedurally fair and cooperative, even with respect to matters to which it has not formally consented", as well as a more sophisticated understanding of the principle of 'due regard', in line with a concept of 'new sovereignty', which requires ongoing, cooperative problem-solving among states (although this has not yet been elaborated with respect to non-state actors). In this sense, reference is also made to states' duty to justify their divergence from established practices, even when these are non-binding. As for international organizations, extending a duty on states to give due regard to their recommendations (in line with the *Whaling* judgment) greatly enhances their normative

influence outside the bounds of explicit state consent. However, this raises questions about the transparency and accessibility of standard-setting procedures, as already addressed within the WTO and EU. In addition, a further examination of the legitimacy of actors in these processes, including non-state actors, will be required.