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Third State Obligations under the ICESCR: A Case Study of EU Sugar Policy

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Abstract. Obligations incumbent on other states than the domestic state party under the International Covenant on Economic, Social and Cultural Rights (ICESCR) are contested. By way of case study, the third state obligation to respect under the ICESCR is identified and clarified through a human rights assessment of the EU sugar regime. It is submitted that the European Union (EU) member states, all of which are states parties to the ICESCR, are in violation of their third state obligation to respect the right to an adequate standard of living of small sugar producers in the South by support for or condonation of the regime of sugar subsidies for surplus production and export dumping to the South.

1. Introduction

EU subsidies for agriculture have been under increasing criticism in recent years, inter alia, because they often lead to export dumping of agricultural products in the South, which is to the detriment of local farmers. EU sugar policies are a case-in-point. Systemic overproduction of sugar in Europe, mainly due to high European Union subsidies, leads to the export of surpluses at prices below the production cost to countries in the South, which destroys local markets and competes unfairly with more efficient Southern producers in third markets.

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Quite often, the harmful effects of EU dumping in the South are said to highlight the lack of coherence between EU development policies on the one hand and the EU’s agricultural trade policies on the other. The negative impact of agricultural trade policies may thereby neutralise or even outweigh the positive effects flowing from European development co-operation. Agricultural trade relations may shed light on the sincerity of commitments to development and poverty reduction. Moreover, quite a few agricultural subsidies, including the EU sugar subsidies, are or can be argued to be in violation of international trade law.

The question arises whether EU export dumping of sugar to the South also raises issues under international human rights law. If so, it is important to determine whether such a human rights analysis reinforces the negative assessments made of the sugar regime by development economists and practitioners. As to the first question, it is submitted that EU member states, all of which are states parties to the International Covenant on Economic, Social and Cultural Rights, violate their third state obligation to respect economic, social and cultural rights under the said Covenant by endorsing and implementing the EU sugar regime. This human rights perspective helps to clarify the most problematic issues and to expose the incompatibility of the sugar regime with legally binding obligations that the EU member states have accepted by ratifying the ICESCR. A subsequent challenge may well be to identify the most suitable strategies and forums for complaining about the said violations. Due to the lack of a complaints mechanism under the ICESCR, the only avenues available at the UN level seem to be the submission of a shadow report to the Committee for Economic, Social and Cultural Rights or carefully selected complaints to the UN Special Rapporteur on the Right to Food.

First, the current EU sugar regime and recent reforms are briefly outlined. The main elements of criticism in respect of both the current and previous regime are highlighted. Secondly, third state obligations under the ICESCR, i.e. obligations for other states parties than the domestic state party, are examined. The focus will mainly be on the obligation to respect. Thirdly, the key question will be addressed whether the EU member states through the European Common Agricultural Policy (CAP) and its system of subsidies violate their third state obligation to

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1) See e.g. Agriculture and Development: The Case for Policy Coherence (Organisation for Economic Co-operation and Development OECD, Paris, 2005).


3) See e.g. L. Stuart, Truth or Consequences. Why the EU and the USA Must Reform Their Subsidies, or Pay the Price, Oxfam Briefing Paper 81, November 2005.
respect under the ICESCR. This paper is focused on the sugar regime, which is said to be one of the most distorted agricultural subsidy regimes in existence. Finally, possibilities to expose these violations at the UN level will be explored.

This paper is built on the premise that the available economic analyses and data are correct for the author cannot claim any competence in the field of economics. Using the data offered and the analyses made does not necessarily imply that the prescriptions that are made by the authors quoted are also endorsed. For example, although the analysis of the distortive effects of agricultural subsidies is embraced by and large, this does not mean that the plea for full liberalisation of agricultural trade policies is also supported. Secondly, the degree of legal recognition of third state obligations under the ICESCR is still in the process of clarification. However, this potentially contentious nature of third state obligations does not fundamentally weaken the usefulness of the exercise undertaken here. First of all, the third state obligation to respect is the least contentious one. Secondly, the basic aim is to show that fundamental human rights concerns arise from current EU agricultural trade policies. The use of the concept of third state obligations allows for a more precise identification of the most pressing issues. Whether third state obligations are believed to be legally binding or not does not fundamentally alter that analysis, although their precise legal nature determines, to a certain extent, the scope for remedial action.

2. EU Sugar Policy

Agricultural trade regimes of industrial countries are highly distorted in general, and the EU agricultural trade regime is no exception to this rule. The key instruments of the EU agricultural policy have traditionally been quota, import barriers and/or tariffs and export subsidies. The European Common Agricultural Policy is currently going through a major reform, whereby subsidies for production are being replaced by direct payments to farmers (so-called 'single farm payments', in which subsidies are severed from the volume of production).

Agriculture is one of the European Union’s integrated Community policies, with decisions taken by the European Council, which is the EU’s main decision-making body. The European Council is an intergovernmental body that represents the member states. Its meetings are attended by one minister from each of the EU national governments. Which ministers attend which meeting depends on the subject. If the European Council is to discuss agricultural issues, the meeting is attended by the Minister for Agriculture from each EU country and it is known as the ‘Agriculture and Fisheries Council’. In the field of agriculture, the

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Agriculture and Fisheries Council decides by qualified majority on a proposal of the Commission, and in consultation with the European Parliament. Qualified majority means that 232 votes out of 321 are required for adopting legislative acts concerning agriculture. The minority needed to block the adoption of an act is therefore 90 votes.

Pursuant to Article 207(3) of the Treaty Establishing the European Communities (EC), when the Council is acting in its legislative capacity, the results and explanations of votes are made public. It is therefore possible to identify a country's position and voting behaviour, which allows for establishing the co-responsibility of a particular state for a legislative act.

2.1. The Former EU Sugar Regime

The sugar market is one of the most distorted markets in European agriculture. For a long time, it was insulated from agricultural reforms. A partial reform of the EU sugar market entered into force in July 2006, the key issues of which had been decided upon by the European Agricultural Council in November 2005. This reform had become almost inevitable in the aftermath of World Trade Organization (WTO) Panel and Appellate Body rulings in October 2004 and April 2005, in which it was recommended to bring production of sugar more into line with domestic consumption. From a human rights point of view, the major points of criticism on the earlier regime continue to apply to the current regime, however.

The EU mainly produces beet sugar. It is a high-cost producer when compared to major cane producers. In principle, it does not have a comparative advantage on the world market and would therefore be pushed out of the market by low-cost cane producers. Subsidies dramatically change the situation, however. In reality, the EU is an important player on the international market. Each year, an export surplus of 5 million tonnes is generated, making the EU the world's second-largest exporter of sugar. Within the EU, France, Germany and the United Kingdom are the biggest exporters.

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5) Article 37 of the Treaty Establishing the European Community (TEC).
6) The European Parliament's opinion is purely advisory and is not legally binding upon the Council.
7) A qualified majority is a weighted voting system based on the populations of member states (see Article 205 of the TEC, amended by Article 12 of the Act of Accession, OJ L 236/2003, 36).
8) Aksoy and Beghin, supra note 4, p. 9.
10) Ibid., p. 8.
11) Ibid., p. 16.
12) Ibid., p. 15.
A distinction was made under the previous EU sugar regime between ‘A sugar’, ‘B sugar’ and ‘C sugar’ (the latter was also called ‘non-quota sugar’). ‘A sugar’ represented the domestic sugar production. Quotas for production were determined each year by the EU Commission (at approximately 14 million total tonnes). Producers received a guaranteed price (EUR 631/tonne for white sugar in 2005), which was approximately three to four times the world market price. Initially, ‘A sugar’ was intended to ensure self-sufficiency, but in fact a structural surplus of around 1.5 million tonnes was produced every year.13

‘B sugar’ resulted from preferential trade agreements under the ACP14 Sugar Protocol and the Everything But Arms (EBA) initiative. The ACP Sugar Protocol (an annexe to the Cotonou Agreement)15 and Special Preferential Sugar Arrangements allow 18 countries in the South to export up to 1.6 million tonnes of sugar at guaranteed prices on a duty-free basis to the EU.16 The Everything But Arms initiative, which is a unilateral trade concession by the EU to the least developed countries (LDCs), equally provides quota-restricted but duty-free access. For the time being, duty-free access is offered to the LDCs up to a quota limit, which is increased by 15 per cent a year. Full liberalisation (duty- and quota-free access) is guaranteed by 2009.17 The assured access to the EU market allows a number of countries in the South to sell sugar to the EU at a significant premium over world prices.18

Finally, ‘C sugar’ (or ‘non-quota sugar’) could be produced without limit but was not eligible for price support. It represented 20 per cent of domestic quota (‘A sugar’), i.e. 2 to 3 million tonnes a year (this is about half of the total exports).

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13) Aksoy and Beghin, supra note 4, p. 9; Watkins, supra note 9, p. 10.
14) ACP stands for African-Caribbean-Pacific countries.
15) The Cotonou Agreement is a trade and aid treaty between the European Community and its member states on the one hand and the members of the African, Caribbean and Pacific Group of States on the other. This partnership agreement was signed in 2000 and entered into force on 1 April 2003. It has been concluded for 20 years, with a revision every 5 years (Doc. 2000/483/EC, OJ L 317).
16) Watkins, supra note 9, p. 13. It should be noted that ACP quota are unequally distributed: 80 per cent is going to five countries: Mauritius, which holds 38 per cent of EU quota (see Aksoy and Beghin, supra note 9, p. 9), Fiji, Guyana, Swaziland and Jamaica (Watkins, supra note 9, p. 10). Moreover, the least developed countries among the ACP countries are seriously under-represented: only five benefit from the preferential trade agreement (i.e. Madagascar, Malawi, Mozambique, Tanzania and Zambia) and their share represents only four per cent of the total (Watkins, supra note 9, pp. 10, 11).
17) P. Fowler, A Sweeter Future? The Potential for EU Sugar Reform to Contribute to Poverty Reduction in Southern Africa, Oxfam Briefing Paper 70, November 2004, endnote 14. It has been pointed out that the increase of imports from the LDCs was accommodated by transferring quotas from the ACP arrangement (Watkins, supra note 9, p. 32).
18) Watkins, supra note 9, p. 32. See e.g. Mozambique and Ethiopia, where guaranteed sugar export to the EU helps to cover the costs of the investment, development and expansion of the industry (Fowler, supra note 17, p. 5).
19) Fowler, supra note 17, p. 40.
What were the issues from a development perspective? First of all, the domestic EU market was highly protected by import restrictions (save for the preferential trade agreements mentioned above), such as a fixed tariff (import duties of around 324 per cent applied) and a special safeguard (which increased as world prices fell). Therefore, developing countries that did not benefit from the preferential trade agreements under the Sugar Protocol or the EBA initiative faced huge difficulties in exporting sugar to the EU.

Secondly, the EU sugar regime led to a structural surplus (1.5 million tonnes of ‘A sugar’, 1.6 million tonnes of ‘B sugar’) that was dumped on the world market at prices around a quarter of the production cost, with the help of massive export subsidies (approximately EUR 525/tonne). In addition, 2 to 3 million tonnes of ‘C sugar’ was produced. Under EU rules, ‘C sugar’ was either to be stored or to be sold without export subsidies on the international market. This allegedly non-subsidised sugar was still profitable to be produced because of cross-subsidies, whereby subsidies on quota sugar spilled over into non-quota sugar. The high margins of guaranteed prices for quota sugar allowed fixed costs for ‘C sugar’ to be covered by support prices for quota sugar, so that world prices covered marginal costs for the production of ‘C sugar’.

Thirdly, EU subsidies caused serious world price distortions due to both the reduction of import demand and the creation of large export surpluses (both value and volume of exports from competitors were thus reduced). It has been argued that following complete worldwide sugar trade liberalisation, world prices would rise by about 40 per cent, and that following the abolition of EU subsidies, international prices would increase by 20 to 23 per cent. Sugar-cane growers in the South would expand their market share. Because the viability of sugar industries is strongly influenced by world market conditions (one quarter of sugar output is traded internationally), the distortive effect of the EU subsidies

20) Watkins, supra note 9, p. 11.
21) Dumping is said to occur when export prices are below the cost of production.
23) Watkins, supra note 9, p. 6. Export subsidies are to bridge the gap between domestic and world prices (ibid., p. 8).
24) Ibid., pp. 12, 13. See also Fowler, supra note 17, endnotes 22 and 23.
26) Ibid., p. 28.
27) Aksoy and Beghin, supra note 4, p. 9.
29) Ibid., p. 8.
on world prices had a considerable negative impact in the South.\(^{30}\) Also, EU subsidies cost rival exporters substantial amounts of foreign exchange,\(^{31}\) and due to these subsidies, farmers in developing countries were pushed out of local markets,\(^{32}\) whereby direct competition also took place between EU exports and developing country exports in third markets.\(^{33}\)

Fourthly, given the potential of increased agricultural exports for accelerating growth in developing countries, EU sugar policies have been said to hamper poverty reduction.\(^{34}\) Increasing agricultural exports could accelerate growth more than expanding domestic market demand could. This growth in agriculture would have a hugely positive effect on poverty alleviation because the agricultural sector is important for income generation in these countries\(^{35}\) and more than half of the populations in developing countries reside in rural areas, where poverty is much higher than in urban areas.\(^{36}\) Specifically with regard to sugar, it has been argued from a development perspective that rival exporters like Brazil and Thailand have legitimate development interests in the sugar trade as they have large rural populations living in poverty.\(^{37}\)

Fifthly, while preferential market access for some of the ACP countries and the LDCs\(^{38}\) might be considered positive for the countries concerned, it may not always be so unequivocally. Critics have argued that the preferential trade agreements have increased the dependence on sugar of some developing countries, although they are not the most efficient producers. These countries may pay a high price under the newly created regime when hit by serious price cuts. In any event, the ACP Sugar Protocol is thought to be an inefficient mechanism for transferring development finance.\(^{39}\)

\(^{30}\) It is generally accepted that subsidies depress world prices and inhibit entry by inducing surplus production by non-competitive (often large) producers, and that domestic farm subsidies in industrial countries have exacerbated a low-price tendency by fostering production beyond what free markets would demand (Aksoy and Beghin, supra note 4, pp. 3, 4).

\(^{31}\) Specifically with regard to quotas under the EBA Initiative, see also Watkins, supra note 9, pp. 35, 36.

\(^{32}\) BOND, supra note 22, p. 15.

\(^{33}\) Fowler, supra note 17, p. 12. An estimated 36,000 livelihoods in sugar were destroyed in Swaziland, for example, when the export market to South Africa was lost due to EU dumping (Actionaid International, supra note 28, p. 22).

\(^{34}\) Watkins and Fowler have warned, however, for the complex relationship between sugar exports and poverty reduction: there are also, for example, the issues of bad labour conditions on large estates and the environmental impact of sugar production (see Fowler, supra note 17, pp. 21 et seq.; Watkins, supra note 9, p. 31). Nevertheless, the sugar industries’ potential for poverty reduction has not been questioned (Fowler, supra note 17, pp. 21 et seq.).

\(^{35}\) Aksoy and Beghin, supra note 4, p. 3.

\(^{36}\) Ibid., p. 1.

\(^{37}\) Watkins, supra note 9, p. 28.

\(^{38}\) For comments on the selectivity in preferential market access, see supra note 16.

\(^{39}\) Watkins, supra note 9, pp. 39, 40.
Not only from a development but even from a purely economic perspective, the previous EU sugar regime was liable to criticism. Developing economies have a strong comparative advantage in agriculture as they are generally more efficient in sugar production. Partly due to European agricultural subsidies, they did not benefit from this comparative advantage. Moreover, rather than going to local farmers in the poorer parts of Europe, the bulk of European subsidies went to large farmers and processors. European consumers also lost out for the subsidies were paid out of their tax contributions and they paid higher prices for sugar than they would without the Common Agricultural Policy.

Together with WTO rulings on violations of international trade law, all these concerns and criticisms put pressure on the EU to reform its sugar regime. Let us now turn to the recently accomplished partial reform of the EU sugar regime.

2.2. The Current EU Sugar Regime
EU agricultural policy, in general, has been under pressure for reform for some time, mainly in order to move away from structural overproduction. A fundamental reform was formally adopted in September 2003, the implementation of which is now under way. A key element of this reform is the 'single farm payment', whereby subsidies are severed from the volume of production for some agricultural products.

The sugar regime escaped major reforms for a long time. However, growing consensus on the non-sustainability of the EU sugar regime triggered reform, which was initiated in September 2003 with a Commission communication. In July 2005, final reform proposals for the Common Market Organisation for sugar were submitted by the Commission for adoption by the European Council in November 2005. The latter reached a 'general approach' on the sugar reform on 22 November 2005. In January 2006, the European Parliament gave its (advisory) opinion on the reform. Binding legal texts, i.e. regulations, were

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40) Aksoy and Beghin, supra note 4, p. 3.
41) This was brought out by recent research undertaken by the Arkleton Institute for Rural Development Research, University of Aberdeen (see <www.espon.eu/mnp/openproject/website/content/projects/243/277/file_1322/fr-2.1.3_revised_31-03-05.pdf>, visited on 20 December 2006), and also appears from data made available by the United Kingdom (<image.guardian.co.uk/sys-files/Guardian/documents/2005/03/23/CAP.pdf>, visited on 20 December 2006) and Dutch governments (<www2.minlnv.nl/lnv/algemeen/glb/index.html>, visited on 20 December 2006). Information from the Belgian federal and Flemish community government was requested, and eventually provided as well (see, inter alia, <www.birb.be>, visited on 20 December 2006). The European Commission has meanwhile launched a webpage with links to member state websites that provide information on beneficiaries of CAP payments (<ec.europa.eu/agriculture/funding/index_en.htm>, visited on 20 December 2006).

External factors, mainly in the context of the WTO, i.e. the 2001 Doha commitments and WTO Panel and Appellate Body rulings, added pressure to speed up the reforms. On 15 October 2004, a WTO Panel had found that the European Communities had been exporting more than three times the level of quantity commitments they had made and that they had been providing export subsidies to what it considered to be exports of ACP/India-equivalent imports (‘B sugar’) and to exports of ‘C sugar’ in contravention of its commitments in the 1994 Agreement on Agriculture. Under the 1994 Agreement, as part of the Final Act of the Uruguay Round, the European Communities had committed themselves to quantity and budget reductions with regard to export subsidies for sugar. The Panel had recommended to bring all measures implementing or related to the European Communities’ sugar regime found to be inconsistent with the Agreement into conformity with their obligations under that Agreement. It had suggested that, in doing so, the EC consider “measures to bring its production of sugar more into line with domestic consumption whilst fully respecting its international commitments with respect to imports, including its commitments to developing countries.”

In its report of 28 April 2005, the Appellate Body upheld the Panel’s findings that the production of ‘C sugar’ had been receiving export subsidies in the form of transfers of financial resources through cross-subsidisation resulting from the operation of the European Communities’ sugar regime and that, as a consequence, the European Communities had acted inconsistently with their obligations under the Agreement on Agriculture. The Appellate Body also repeated the Panel’s recommendation.

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45) These regulations are to be adopted by a qualified majority.
46) Within the World Trade Organization, the Doha Round of negotiations, initiated in 2001, has been labelled a development round. In the Doha Declaration, the 148 member governments committed themselves to “comprehensive negotiations aimed at: substantial improvements in market access; reductions of, with a view to phasing out, all forms of export subsidies; and substantial reductions in trade-distorting domestic support” (Doha Declaration, para. 13, www.wto.org/English/tratop_e/dispu_e/cases_e/ds265_e.htm, visited on 20 December 2006).
47) European Communities–Export Subsidies on Sugar–Complaint by Australia–Report of the Panel, 15 October 2004, WTO Panel, WTO Doc. 04–4209, paras. 8.1(d), (e) and (f) and 8.3, <www.wto.org/english/tratop_e/dispu_e/cases_e/ds265_e.htm>, visited on 20 December 2006. See also Watkins, supra note 9, p. 16.
49) Export Subsidies on Sugar, supra note 47, para. 8.5.
50) Ibid., para. 8.7.
52) Ibid., para. 347.
The final European Commission proposal consisted of a two-step cut by 39 per cent in the price of white sugar, which was to be compensated partly (up to 60 per cent) through decoupled payments to the farmers; the introduction of one single quota system (merging ‘A sugar’ and ‘B sugar’ quotas); and a voluntary restructuring scheme. No mandatory quota cuts were envisaged during the initial four-year restructuring period. Furthermore, additional quotas for 1 million tonnes were to be made available to ‘C sugar’ producing EU countries. The preferential trade arrangements under the ACP Sugar Protocol and the EBA Initiative remained in place, albeit that they would be affected by the price cuts to the same extent as the domestic producers. An assistance scheme for ACP countries was elaborated. Export subsidies (‘refunds’) continued to exist.

A ‘general approach’ was adopted by the Council in November 2005 and was formalised in regulations in February 2006. This general approach does not differ substantially from the final Commission proposal. It contains a price cut for white sugar with 36 per cent (instead of the proposed 39 per cent); compensation to farmers at a level of slightly more than 64 per cent (instead of the proposed 60 per cent); 100 per cent decoupled payment; additional coupled aid during a transitional period for states that introduce a drastic reduction in their quota sugar (i.e. reductions by more than 50 per cent); a four-year voluntary restructuring scheme for EU sugar factories; merger of ‘A sugar’ and ‘B sugar’ quota into a single quota; an additional quota of 1 million tonnes for ‘C sugar’ producing countries; and accompanying measures for the Sugar Protocol countries affected by the reforms.

In January 2006, the European Parliament, which only has advisory power on this issue, insisted on limiting the price cut to what was necessary to bring it into line with “the dictates of the international trade system”, while it also

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53) In an earlier proposal, limited quota cuts, with a reduction in domestic production (‘A sugar’) quota of 2.8 million tonnes over four years, were envisaged.
suggested—in line with the decision at the 6th WTO Ministerial Conference—that the EU should seek “to abolish export subsidies as soon as possible, and at the latest by 2013.”

Economists have argued that measures of decoupling agricultural support from production (as is the case with the ‘single farm payment’) have only modest effects, and are likely to have the same kind of undesirable effects as other subsidy programmes if they are not time-limited. From a development perspective, Oxfam International has labelled the EU sugar reform debate “a mockery of EU commitments to poverty reduction and sustainable development.” In line with LDCs’ proposals, Oxfam International claims to favour a “pro-development reform strategy for EU sugar policies”, which would include the elimination of export dumping, the expansion of opportunities for LDCs through secured access and targeted aid and transitional arrangements for ACP exporters. Since the reform came into force in July 2006, far less quota than expected has been renounced by sugar producers, so that a surplus production of 4.5 million tonnes is expected for the marketing year 2007–2008. Export dumping is therefore very likely to be continued. The concept of ‘third state obligations’ allows an assessment of EU export dumping of sugar from a human rights perspective.

3. Third State Obligations

Development non-governmental organisations (NGOs) and economists and human rights scholars and experts have claimed that there is a lack of coherence between EU agricultural trade policies on the one hand and its development policy and commitment to poverty reduction on the other. With regard to its sugar policy, in particular, the EU has been called upon by NGOs to display a sense of international responsibility commensurate with its market power and to revise its reform strategy in line with its international development commitments.

60) Aksoy and Beghin, supra note 4, p. 7.
61) Fowler, supra note 17, pp. 5, 6; Watkins, supra note 9, pp. 46, 47.
62) Fowler, supra note 17, p. 6; Watkins, supra note 9, p. 8.
63) Fowler, supra note 17, pp. 34, 35.
66) Fowler, supra note 17, pp. 4–6.
67) Ibid., pp. 1, 6 and 8.
asymmetrical interdependence can be said to also imply “shared responsibility, including the responsibility to put public interest and a commitment to global poverty reduction before private vested interests in the sugar sector.” 69 From a development economy perspective, the argument goes that the EU agricultural trade policies undermine the markets of more efficient sugar producers, mostly developing countries. 70

From a human rights perspective, it is to be asked whether the current EU Common Agricultural Policy and the sugar policy in particular are in violation of the International Covenant on Economic, Social and Cultural Rights. An affirmative response to this question would not only reinforce the negative analysis of the regime already made from an economic, developmental and trade law viewpoint but could also identify the most pressing issues and give guidance on the direction any reform should take. This ‘guidance’ would be hard to ignore as it would in fact be binding on all 25 member states of the European Union, which all happen to be states parties to the ICESCR.

Traditionally, obligations under human rights treaties have been understood to be incumbent only, with some exceptions, on the domestic state party, with regard to individuals under its jurisdiction. However, NGOs, 71 scholars 72 and the

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69 Watkins, supra note 9, p. 49.
70 See Fowler, supra note 17, p. 10.
71 See the publications of the International Council on Human Rights Policy, FoodFirst Information and Action Network (FIAN), Médecins sans Frontières and 3D, Trade–Human Rights–Equitable Economy.
UN\textsuperscript{73} have shown an increasing interest in obligations incumbent on other states than the domestic state party under the ICESCR.

The language is far from uniform, so these obligations have been labelled transnational, external, extraterritorial or international. Here, the concept of third state obligations is preferred as it indicates, from the perspective of the individual, that other states than the domestic state may be (co-)responsible for the non-realisation of economic, social and cultural rights. Third state obligations are thus conceptualised as \textit{human rights} obligations, i.e. resulting from rights of individuals in the South, rather than as inter-state obligations, i.e. obligations of donor countries towards developing countries.\textsuperscript{74} Inter-state obligations run a serious risk of being perverted either through misuse by domestic states in order to renounce their own responsibility\textsuperscript{75} or through political or economic pressure from the more powerful states in the North on domestic states in the South not to invoke the former’s share of responsibility.

Admittedly, the existence of third state obligations under the ICESCR as \textit{legally binding} obligations is still to some extent contentious. Though an overall analysis of the extraterritorial application of the ICESCR is beyond the scope of this paper, in what follows it will be shown that a degree of extraterritoriality of

\footnote{\textsuperscript{73} For the ICESCR Committee, see General Comment No. 3 (1990), \textit{The Nature of States Parties’ Obligations (Art. 2, para. 1, of the Covenant)}, paras. 13, 14; General Comment No. 4 (1991), \textit{The Right to Adequate Housing (Art. 11(1) of the Covenant)}, para. 19; General Comment No. 8 (1997), \textit{The Relationship between Economic Sanctions and Respect for Economic, Social and Cultural Rights}, paras. 7–14; General Comment No. 11 (1999), \textit{Plans of Action for Primary Education (Art. 14)}, para. 9; General Comment No. 12 (1999), \textit{The Right to Adequate Food (art. 11)}, paras. 36–41; General Comment No. 13 (1999), \textit{The Right to Education (Article 13)}, paras. 56 and 60; General Comment No. 14 (2000), \textit{The Right to the Highest Attainable Standard of Health (Article 12)}, paras. 38–42, 45 and 63–65; General Comment No. 15 (2002), \textit{The Right to Water (Arts. 11 and 12)}, para. 30–36, 38 and 60 (all these General Comments can be found in UN Doc. HRI/GEN/1/Rev.7).


\textsuperscript{76} Third state obligations in no way decrease or obliterate the domestic state’s responsibility under the ICESCR. Third state obligations are always complementary—though not necessarily secondary—to domestic state obligations. The obligations to respect and to protect apply simultaneously to the domestic state and any third state. The obligation to fulfil, however, can be argued to be only a secondary obligation for third states, which is only triggered in case the domestic state fails to fulfil a certain right.
humanitarian and human rights law is widely accepted and that at the very least a strong case can be made in favour of a third state obligation to respect economic, social and cultural rights under the ICESCR.

Universal and regional treaties on civil and political rights usually contain a clause by which the human rights responsibilities of the states parties is limited to persons under their jurisdiction. The International Covenant on Civil and Political Rights (ICCPR) holds an even more restrictive provision, in which responsibility is limited to individuals within a state's territory and subject to its jurisdiction. As the European Court of Human Rights (ECrtHR) put it in its famous Bankovic judgment: "from the standpoint of public international law, the jurisdictional competence of a State is primarily territorial." In the case-law of the supervisory bodies to the respective Covenants, exceptions have nevertheless been allowed for in specific circumstances. Even in the case of a very restrictive jurisdiction clause (as in the ICCPR), exceptions have been accepted for strictly territorial jurisdiction proved untenable. The commonly used criterion to establish extraterritorial jurisdiction is whether authority or power or control (over territory and/or persons) is being exercised. This has been accepted to be the case in the event of military occupation of territory, or of support for a local regime that could not survive without a state's support and of the arrest or detention of a person.

It is striking to note that the Inter-American Commission, in deciding a case under the American Declaration of the Rights and Duties of Man (which does not contain a jurisdictional clause), has come to a broader understanding of

76 See Article 1 of the European Convention and Article 1 of the American Convention.
78 In López Burgos v. Uruguay, the Human Rights Committee (HRC) opted for a disjunctive reading of the phrase "within its territory and subject to its jurisdiction", as if the undertaking to respect and to ensure human rights covered both persons within the territory of a state and persons subject to a state's jurisdiction (see HRC, López Burgos v. Uruguay, UN Doc. CCPR/C/13/D/52/1979, para. 12.3). This reading was recently confirmed in the Committee's General Comment No. 31 (General Comment No. 31, Nature of the General Legal Obligation Imposed on States Parties to the Covenant, UN Doc. CCPR/C/21/Rev.1/Add.13, para. 10).
extraterritorial jurisdiction, and has thereby accepted that downing civil planes by military aircrafts brings the individuals in the civil planes under the jurisdiction of the state to which the military aircrafts belong. It has thus introduced the principle that states are responsible for the (extraterritorial) conduct of their agents that adversely affects individuals in another state. Cerna has coined this a ‘cause and effect’ theory of jurisdiction.

The Inter-American Commission’s latter approach has also been prevalent in the interpretation of the four Geneva Conventions and the Genocide Convention, none of which contain a jurisdiction clause. The International Court of Justice (ICJ) has read both a negative and positive extraterritorial obligation in common Article 1 of the Geneva Conventions. The existence of a negative duty was affirmed by the ICJ in the Nicaragua judgment: “[t]he Court considers that there is an obligation on the United States Government, in the terms of Article 1 of the Geneva Conventions, to “respect” the Conventions and even “to ensure respect” for them “in all circumstances”.” It was argued that this rule did not only derive from the Geneva Conventions themselves but also from the general principles of humanitarian law. More recently, a positive extraterritorial obligation was equally identified: “[i]t follows from that provision that every State party to that Convention, whether or not it is a party to a specific conflict, is under an obligation to ensure that the requirements of the instruments in question are complied with.” Similarly, the ICJ has held in the Bosnia case that the rights and obligations enshrined by the 1950 Genocide Convention are rights and obligations erga omnes, and that the obligation each state has to prevent and to punish the crime of genocide is not territorially limited by the Convention. Craven has pointed out that this judgment “does . . . raise the possibility that, absent a jurisdictional clause, human rights treaty obligations may generally be regarded as extending to all acts of state irrespective of where they may be taken as having effect.”

In the absence of a jurisdiction clause in the ICESCR, and consistent with the interpretation given to other legal instruments without such a clause, this treaty may therefore be interpreted as enshrining third state obligations. These third state obligations arise in these cases in which individuals are adversely affected by the acts or omissions of the agents of third states.

Moreover, the ICESCR contains explicit references to international assistance and co-operation for the realisation of the rights contained in the Covenant. Article 2 of the ICESCR, which enshrines the general obligation to take steps in order to achieve progressively the full realisation of the rights in the Covenant, contains a reference to international assistance and co-operation. Article 11 of the ICESCR, dealing with the right to an adequate standard of living, including the right to food, refers to international co-operation also. Finally, procedural Articles 22 and 23 of the Covenant refer to international measures and international action.

Scholars differ in their opinions as to whether or not the drafters envisaged explicitly including third state obligations in the ICESCR. Alston and Quinn believe that on the basis of the preparatory work, no legally binding obligation upon any particular state to provide any particular form of assistance can be concluded. Kamminga and Coomans and Skogly submit that extraterritorial obligations were envisaged by the drafters. Whatever the answer to that question is, for our purposes, the crucial issue is whether nowadays the Covenant can be argued to enshrine third state obligations. For present purposes, i.e. a human rights assessment of EU sugar policy, it is sufficient to establish that this is the case in the specific context of North-South relations, and at least as far as an obligation to respect is concerned.

In the particular context of development in the South, Northern states, while emphasising that developing countries have the primary responsibility for development, have recognised that there is a shared responsibility for development. This can only be understood to mean that responsibility for development is not limited to Southern states and that Northern states also accept some responsibility. Reference can be made, for example, to the Millennium Declaration and Goals. In the 2000 Millennium Declaration, states “recognize that, in addition

87) The ICJ has suggested in passim that the absence of a jurisdictional clause in the ICESCR might be explained by the fact that it guarantees rights “which are essentially territorial” (Wall in the Occupied Palestinian Territory, supra note 84, para 112). This suggestion, which is not substantiated, is difficult to reconcile with the multiple references to international assistance and co-operation in the same Covenant.
88) Alston and Quinn, supra note 72, p. 191.
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."90 It was also accepted that “[r]esponsibility for managing world-
wide economic and social development . . . must be shared among the nations of
the world and should be exercised multilaterally."91 In the 2005 World Summit
Outcome, shared responsibility was again qualified as one of the world’s com-
mon fundamental values.92 In order to achieve the internationally agreed devel-
opment goals, the need for a partnership between developing and developed
countries was recognised.93

This commitment to development has also been undertaken in explicit
human rights language, mainly in the work done on the right to development.94
In the 1986 Declaration on the Right to Development, states accepted that they
have a duty “to co-operate with each other in ensuring development and elimi-
nating obstacles to development”95 and “to take steps, individually and collect-
vatively, to formulate international development policies with a view to facilitating
the full realization of the right to development.”96 Moreover, “[a]s a complement
to the efforts of developing countries, effective international co-operation is
essential in providing these countries with appropriate means and facilities to fos-
ter their comprehensive development.”97 The shared responsibility for develop-
ment from a human rights perspective has been taken up by the Open-Ended
Working Group on the Right to Development as the main focus of its work.98

In these documents, it has not been clarified as such what this responsibility
for Northern states exactly entails. It may be premature to argue that there exists
a third state obligation to contribute to the fulfilment of economic, social and
cultural rights in countries in the South through the provision of assistance.99
However, as a minimum, if the recognition of a shared responsibility for develop-
ment is not to be deprived of any meaning, it requires from Northern states

90) UN General Assembly resolution of 8 September 2000, UN Doc. A/RES/55/2, para. 2.
91) Ibid., para. 6.
92) UN General Assembly resolution of 16 September 2005, UN Doc. A/RES/60/1, para. 4.
93) Resolution 1–Monterrey Consensus of the International Conference on Financing for Development,
UN Doc. A/Conf.198/11, para. 4.
94) See also Coomans, supra note 66, pp. 190–192, for a number of other relevant documents.
95) UN General Assembly resolution of 4 December 1986, UN Doc. A/RES/41/128, para. 3.3.
96) Ibid., para. 4.1.
97) Ibid., para. 4.2.
98) The Working Group on the Right to Development has decided to work on the assessment of
global partnerships for development from the perspective of the right to development (for a confirma-
tion, see Report of the Working Group on the Right to Development on its seventh session (Geneva,
Development Debate Seen Through the Lens of the Millennium Development Goals’, 27 Human Rights
to refrain from violating economic, social and cultural rights in Southern countries. This third state obligation to respect, i.e. to refrain from interfering with the realisation of economic, social, and cultural rights in other countries, corresponds to the traditional understanding of human rights (mainly civil and political rights) as entailing a negative obligation on behalf of the state. In that sense, it is a minimum or basic obligation.\textsuperscript{100} This negative obligation is, moreover, easy to identify and well-documented, and relates to the direct conduct of the third states concerned.\textsuperscript{101}

The International Court of Justice has recently created some space for the extraterritorial application of the ICESCR, albeit in a restrictive way. It held:

"The International Covenant on Economic, Social and Cultural Rights contains no provision on its scope of application. This may be explicable by the fact that this Covenant guarantees rights which are essentially territorial. However, it is not to be excluded that it applies both to territories over which a State party has sovereignty and to those over which that State exercises territorial jurisdiction. Thus Article 14 makes provision for transitional measures in the case of any State which "at the time of becoming a Party, has not been able to secure in its metropolitan territory or other territories under its jurisdiction compulsory primary education, free of charge."\textsuperscript{102}

The third state obligation to respect has received particular emphasis in the context of sanctions, but there are no compelling reasons for limiting the third state obligation to respect to that particular context. The International Law Commission has adopted the basic principle that countermeasures should not affect obligations for the protection of fundamental human rights.\textsuperscript{103} In the view of the ICESCR Committee, states are to refrain at all times from embargoes or similar measures: food, medicines and medical equipment and water should never be used as an instrument of political and economic pressure.\textsuperscript{104}

In some of its general comments, the ICESCR Committee has stressed states’ so-called 'international obligations’. Here, only the third state obligation to respect will be dealt with. The Committee has thus pointed out that states “should take steps to respect the enjoyment of the right to food in other countries”,\textsuperscript{105} and “have to respect the enjoyment of the right to health in other countries.”\textsuperscript{106}

\begin{footnotesize}
\begin{itemize}
  \item \textsuperscript{100} Ziegler, supra note 66, para. 48; Coomans, supra note 66, p. 190.
  \item \textsuperscript{101} Coomans, supra note 66, p. 193.
  \item \textsuperscript{102} Wall in the Occupied Palestinian Territory, supra note 84, para. 112.
  \item \textsuperscript{103} International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, Article 50(1)(b), <untreaty.un.org/ilc/texts/instruments/english/draftper cent20articles/9_6_2001.pdf>, visited on 20 December 2006. For the sources of evidence for this proposition, see Craven, supra note 86, p. 254.
  \item \textsuperscript{104} General Comment No. 12 (1999), supra note 73, para. 37. A similar argument has been made with regard to the right to health (General Comment No. 14 (2000), supra note 73, para. 41) and the right to water (General Comment No. 15 (2002), supra note 73, para. 32).
  \item \textsuperscript{105} General Comment No. 12 (1999), supra note 73, para. 36.
  \item \textsuperscript{106} General Comment No. 14 (2000), supra note 73, para. 39.
\end{itemize}
\end{footnotesize}
International co-operation requires states to refrain from actions that interfere, directly or indirectly, with the enjoyment of the right to water in other countries. Any activities undertaken within a state’s jurisdiction should not deprive another country of the ability to realise the right to water for persons in its jurisdiction.\textsuperscript{107} International agencies should scrupulously avoid involvement in projects that, for example, involve the use of forced labour in contravention of international standards; promote or reinforce discrimination against individuals or groups contrary to the provisions of the Covenant; or involve large-scale evictions or displacement of persons without the provision of all appropriate protection and compensation.\textsuperscript{108} In relation to the right to adequate housing, international financial institutions promoting measures of structural adjustment should ensure that such measures do not compromise the enjoyment of the right to adequate housing.\textsuperscript{109} The World Bank and other agencies are, moreover, required to fully respect the World Bank and Organisation for Economic Co-operation and Development (OECD) guidelines on relocation and/or resettlement, insofar as these guidelines reflect the obligations contained in the Covenant.\textsuperscript{110}

In sum, the ICESCR imposes on Northern states an obligation at least to abstain from hampering the enjoyment of economic, social and cultural rights in the South. In what follows, the EU sugar regime is scrutinised in light of this third state obligation of respect under the ICESCR.

4. The Compatibility of the EU Sugar Regime with the ICESCR

It is argued that in light of the third state obligation of the European states parties to the ICESCR to respect economic, social and cultural rights in the South, the EU sugar regime is in violation of the ICESCR.

In light of the third state obligation to respect (i.e. to abstain from interference with the realisation of economic, social, and cultural rights in Southern countries), some of the sugar subsidies can be argued to be in violation of the right to an adequate standard of living (Article 11 of the ICESCR). The argument will be construed as much as possible in accordance with the usual lines of judicial reasoning, as exemplified most clearly in the judgments of the European Court of Human Rights.

Although several provisions of the ICESCR could be invoked, the argument will focus on Article 11(1) of the ICESCR, which guarantees the right to an

\begin{itemize}
\item \textsuperscript{107} General Comment No. 15 (2002), \textit{supra} note 73, para. 31.
\item \textsuperscript{108} General Comment No. 2 (1990), \textit{International Technical Assistance Measures (art. 22 of the Covenant)}, UN Doc. HRI/GEN/1/Rev.7, para. 6.
\item \textsuperscript{109} General Comment No. 4 (1991), \textit{supra} note 73, para. 19.
\item \textsuperscript{110} General Comment No. 7 (1997), \textit{The Right to Adequate Housing (art. 11(1) of the Covenant): Forced Evictions}, UN Doc. HRJ/GEN/1/Rev.7, para. 18.
\end{itemize}
adequate standard of living, and explicitly refers to the importance of international co-operation for the realisation thereof. It reads:

“The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.”

The first question to be answered is whether the EU sugar regime constitutes an interference—not yet a violation—with the right of individuals in the South to an adequate standard of living. The detrimental impact of EU subsidies for production and export of surplus sugar production in particular on local farmers in the South has been amply demonstrated. These production and export subsidies allow EU producers to ‘dump’ sugar in countries in the South (i.e. to export below production cost) to the detriment of local producers and to compete directly with developing country exports in third markets. Because of these subsidies, local producers, who are in principle often relatively cheap producers but who are now unfairly pushed out of the market by subsidised EU sugar, are unable to make a decent living out of their sugar production. EU subsidies that lead to export dumping therefore clearly interfere with the right of individuals in the South to an adequate standard of living.

Moreover, in the absence of EU subsidies for surplus production and subsequent dumping in the South, local demand for sugar and sugar exports by the more efficient producers in developing countries would increase. As was pointed out before, increased export is believed to have more potential to accelerate growth than the expansion of domestic market demand has. Growth would, in turn, have a hugely positive effect on poverty alleviation for agriculture is important to generate income and more than 50 per cent of the population in the South lives in rural areas, where poverty is highest. Summarising, subsidies for surplus production and export dumping interfere with the right to an adequate standard of living of these individuals in the South who would otherwise be able to make a living from sugar production.

Once interference has been established, the question arises whether this interference can be justified under the ICESCR. Limitations or interferences are permissible, in accordance with Article 4 of the ICESCR, if they are determined by law, compatible with the nature of the rights guaranteed in the Covenant and only for the purpose of promoting the general welfare in a democratic society. In what follows, the requirements of a legitimate aim and of proportionality will be examined.

111) See supra note 33.
112) See supra note 35.
Much in line with the European Court of Human Rights’ approach of the limitation clauses, the ICESCR Committee has interpreted this limitation provision as including not only a legality and legitimacy test but also a proportionality test. Under the limitation clauses in Articles 8–11 of the European Convention on Human Rights (ECHR), the European Court of Human Rights not only requires interferences with a right to be provided for by law and in the pursuit of a specified legitimate aim but also weighs the proportionality between the interference and the legitimate aim. The proportionality test stems from the requirement that limitations are to be ‘necessary in a democratic society’. So even in case of a legitimate aim, an inference may be judged unacceptable if that aim could have been achieved with other and less severe means. Limitations of rights guaranteed by the ICESCR are therefore to be ‘strictly necessary’ for the promotion of the general welfare in a democratic society, and the least restrictive alternative must be adopted where several types of limitations are available.

Among the reasons frequently invoked for the maintenance of production and export subsidies for the surplus dumping of sugar are European food self-sufficiency and the protection of the small farmers in Europe. A justification in terms of self-sufficiency as a way of promoting the general welfare is per definition not tenable for subsidies for surplus production. The aim of protection of the small farmers cannot be invoked legitimately either as production and export subsidies have been shown to predominantly benefit large producers and processors and not the small farmers in Europe. EU consumers do not benefit from lower prices as a result either. On the contrary, they pay much more than they would in the absence of these subsidies.

Even if it was accepted, for the sake of the argument, that the protection of European small farmers is a legitimate aim (i.e. in the words of the Covenant, “promoting the general welfare in a democratic society”), the EU production and export subsidies for surplus dumping of sugar would inevitably fail to pass the proportionality test. It is obvious that the same aim could be attained by less detrimental means, e.g. by a guaranteed minimum income regardless of the level of production. Such decoupled payments already existed in much of the Common Agricultural Policy, and have also been introduced for sugar under the 2006 reform. The interference that EU sugar production and export subsidies represent with the right of individuals in the South to an adequate standard of living can therefore not be justified on any ground.

In conclusion, given the harmful effects of subsidies for surplus dumping on the right of farmers in the South to an adequate living and the lack of acceptable

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114 See General Comment No. 14 (2000), supra note 73, paras. 28, 29.
justification for these subsidies, it can be concluded that the EU sugar production and export subsidies that lead to surplus dumping in the South are in violation of the ICESCR. The EU itself seems to acknowledge that its agricultural subsidies have a detrimental impact on development in the South for, in the current WTO Doha Development Round of negotiations, it has offered to abolish its export subsidies, albeit on the condition of reciprocity. At the WTO Ministerial Conference in Hong Kong in 2005, all WTO members, including the EU member states, decided to eliminate ‘parallelly’ all agricultural export subsidies by 2013. In light of this acknowledgement, the third state obligation to respect the right of individuals in the South, such as small sugar producers or labourers in the sugar industry, to an adequate standard of living can hardly be considered excessively demanding or unrealistic for it does not lead to a blanket rejection of all subsidies but only of those that relate to surplus dumping in the South. The consequences of this obligation are, moreover, in full accordance with sound economic analysis as the current regime leads to unfair competition with more efficient producers in the South and higher prices for consumers in the North.

Oxfam’s counter-proposal for reform, which it qualified as a “pro-development reform strategy for EU sugar policies”, would have been much more in line with the EU member states’ third state obligations under the ICESCR. Its proposal to eliminate export dumping amounts to observance of the third state obligation to respect.

5. The Imputability of ICESCR Violations to EU Member States and Institutions

In the previous section, it has been concluded that EU sugar production and export subsidies that lead to surplus dumping in the South amount to a violation of the right to an adequate standard of living. The question arises whether this violation can be imputed to specific subjects of international law, such as the European Community itself or its member states, individually or collectively. It is submitted that the ICESCR is binding upon the states parties to the ICESCR, also when acting in the context of the European Community, e.g. when voting in the European Council on agricultural issues. Although the European

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115) The EU had expressed its willingness to phase out its agricultural export subsidies on condition that its trading partners also eliminate their export subsidy programmes.
117) Watkins, supra note 9, pp. 46, 47.
118) Fowler, supra note 17, pp. 5, 6.
119) Cf. Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, UN Doc. E/C.1/2000/13, para. 19: “The obligations of States to protect economic, social and cultural rights extend also to their participation in international organizations, where they act collectively.”
Community has a separate legal personality, a member state cannot ignore its third state obligations under the ICESCR when participating in European Council decision-making. A state voting in favour of a decision of the European Council of which the state knows or ought to have known that it will negatively affect the economic, social and cultural rights of individuals in the South can be said to be in violation of its third state obligation to respect.

Support for this position can be found in the European Court of Human Rights’ views on a state’s human rights responsibility for decisions taken in the European Council. In the Matthews v. United Kingdom case, the Court held that, as a matter of principle, a state cannot absolve itself from its responsibility under the European Convention on Human Rights by attributing certain competences to international organisations. It held more specifically in that same case that a European Council decision constituted an international instrument that had been freely entered into by the United Kingdom, and that the United Kingdom therefore retained responsibility under the European Convention. At stake was the question whether the United Kingdom was responsible for securing the rights in Article 3 of Protocol No. 1 (right to free elections at regular intervals) in respect of elections to the European Parliament in Gibraltar, which was a dependent territory but not part of the United Kingdom. The suggestion that the United Kingdom did not have effective control over the state of affairs complained of was rejected by the Court as the United Kingdom’s responsibility derived from its having entered into treaty commitments subsequent to the applicability of Article 3 of Protocol No. 1 to Gibraltar. Reference was again made to this issue, although not taken up, in the Grand Chamber judgment in the Bosphorus v. Ireland case.

Moreover, the European Court for Human Rights has accepted that “a State would be fully responsible under the Convention for all acts falling outside its strict international legal obligations.” For example, discretion is allowed for by EC law for the implementation of an EC directive. A directive is only binding in its result but leaves a margin of discretion to member states as to the means by which to achieve the result. It can be argued that, a fortiori, when a European Council decision is adopted, in relation to which a state per definition enjoys

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120 See ECtHR, Matthews v. United Kingdom, 18 February 1999, No. 24833/94, Reports 1999-I, para. 32.
121 Ibid., para. 33.
123 Ibid., para. 157.
absolute discretion under EC law as to whether it votes in favour or against the proposed decision, a state remains fully responsible under its international human rights obligations. The individual EU member states, which are all also states parties to the ICESCR, can therefore be held responsible for their support to EU policy that is decided upon by the European Council, in light of their third state obligation to respect (i.e. the obligation to abstain from any unjustifiable interference with the right to an adequate standard of living).

An *a contrario* argument in support of our position could be derived from the European Commission for Human Rights’ position that the United Kingdom’s participation in the Spandau prison administration in post World War II Germany did not bring this matter within the UK’s jurisdiction for all decisions required unanimity of the four Powers involved.125 *A contrario*, if no unanimity is required, as is the case with the European Council decision-making process in agricultural matters, it can be assumed that Council legislation in this area comes within the jurisdiction of every state involved.

A second question is to what extent ICESCR violations may be imputable to international organisations themselves. Could ICESCR violations originating, for example, from the European Commission’s yearly decision on the sugar production quota be imputed directly to the EC as such (failure to respect), or indirectly to the member states as a collectivity (failure to protect)? Commentators generally seem to assume that a state’s third state obligation to protect is at stake in the context of decision-making of international organisations.126 The domestic obligation to protect is usually understood as an obligation to protect again violations of economic, social or cultural rights by third parties under a state’s *control or jurisdiction*.127 The General Comment on the Right to Water specifies, for example, that the third state obligation to protect pertains to states’ own citizens and companies.128 Along this line of argument, member states as a collectivity might be held responsible for failing to protect, to the extent that it can be argued that the European Commission or any other institution of the EC is under the control of the member states as a collectivity. As the European Community is a supranational organisation, to which part of the member states’ sovereignty has been transferred, this might be more difficult to sustain than with regard to ‘ordinary’ international organisations.

126) See *Maastricht Guidelines*, supra note 119, para. 19; *Craven*, supra note 73, p. 148.
127) The third state obligation to protect has been understood by the ICESCR Committee as to require from states that they prevent third parties from violating economic, social and cultural rights in other countries, *if they are able to influence these third parties by way of legal or political means, in accordance with the Charter of the UN and applicable international law* (see *General Comment No. 14* (2000), supra note 73, para. 39; *General Comment No. 15* (2002), supra note 73, para. 33).
128) *General Comment No. 15* (2002), supra note 73, para. 33.
In addition to this indirect responsibility through the member states, if an international organisation enjoys legal personality, direct responsibility should also be considered since international organisations with legal personality are bound by international law. With regard to the EC, the Strasbourg Court has, so far, refrained from taking a position on the merits by rejecting complaints against the European Community as inadmissible \textit{ratione personae}. This inadmissibility is rather obvious for the European Community is not (yet)\textsuperscript{129} a state party to the European Convention on Human Rights.\textsuperscript{130} The European Court of Justice (ECJ), too, has made it clear that the European Community is not directly bound by the provisions of the European Convention on Human Rights, although its members are party to the Convention.\textsuperscript{131} The same argument has been invoked \textit{mutatis mutandis} with regard to other human rights treaties and other international organisations, such as the International Monetary Fund (IMF) or the World Bank. As they are not a state party to any human rights treaty, they are not bound directly by any of them.

The Maastricht Guidelines do not really take a position on the human rights responsibility of international organisations as such. On the other hand, scholars have argued that international organisations, such as the international financial institutions, minimally have an obligation to \textit{respect} human rights.\textsuperscript{132} It could be argued, for example, that human rights treaties that a majority or all member states are a party to are binding on the international organisation as general principles of law. The European Court of Justice considers human rights to form an integral part of the general principles of Community law. Inspiration is drawn “from the constitutional traditions common to the member states and from the guidelines supplied by international treaties for the protection of human rights on which the member states have collaborated and to which they are signatories.”\textsuperscript{133}


\textsuperscript{130} \textit{See} Matthews \textit{v. United Kingdom}, supra note 120, para. 32.


The Court of First Instance (CFI) has also submitted that the European Community, although not directly bound, is nevertheless to be considered to be bound by the obligations under the UN Charter in the same way as its member states by virtue of the EC Treaty. By conferring the powers necessary for the performance of the member states’ obligations under the Charter to the Community, the member states have been said to have demonstrated their will to bind the EC by the obligations entered into under the UN Charter.134

In conclusion, as a minimum, individual member states to the EC, which all happen to be states parties to the ICESCR, can be held accountable under the ICESCR for their voting behaviour in the European Council. They should abstain from taking decisions within the European Agricultural Council that establish or continue the production of export subsidies that lead to export dumping to the South. As the Special Rapporteur on the right to food has submitted more intuitively: “[g]overnments should not subsidize agricultural production that will be exported to primarily agrarian developing countries, as it can be seen in advance that the right to food of people living in those countries will be seriously negatively affected.”135

6. Enforcing Accountability

Establishing violations and imputability is one thing and enforcing accountability is another. The most appropriate forum to complain about violations of the ICESCR is the UN Committee for Economic, Social and Cultural Rights. This Committee supervises the implementation of the ICESCR. Unfortunately, no complaints procedure has as yet been established. Even if current negotiations on the Optional Protocol to the ICESCR, providing an individual complaints procedure and less likely an inquiry procedure, were to be concluded soon, it will most probably be impossible to complain about violations of third state obligations under that Optional Protocol. Strategically, it may be wise to keep discussions on a complaints mechanism for violations of economic, social and cultural rights and on third state obligations well separated. Raising the issue of third state obligations in the negotiations on the complaints procedure will most likely only complicate the discussion on the latter. Opponents to the Protocol might even find an easy reason in the connection of third state obligations with the complaints procedure for rejecting both.136

135 Ziegler, supra note 66, para. 51. Cf. Coomans, supra note 66, p. 193. See also Watkins, supra note 9, p. 6, “to ensure that its policies do not undermine the efforts of poor people to improve their lives.”
136 Contra Sepúlveda 2006, supra note 72, pp. 296–298.
Violations of third state obligations can nevertheless be brought to the attention of the ICESCR Committee in parallel or shadow reports. The Committee has shown itself very much in favour of such parallel reports of civil society.137 The international non-governmental organisation FoodFirst Information and Action Network (FIAN) has encouraged the submission of parallel reports on third state obligations in a number of European countries.138 An extensive and detailed report on the third state obligations of Belgium was also prepared.139 The Committee has taken a very cautious approach and refrained, so far, in its concluding observations from issuing any recommendations on the observance of third state obligations.140 The more parallel reports focus on third state obligations the more difficult it may become for the Committee not to address these obligations more explicitly in its concluding observations. While parallel reports on third state obligations may not lead to redress for victims of the violations, they do help to raise awareness and to put the issue higher on the political agenda. In light of the WTO rulings on EC subsidies for sugar and the commitment of EU member states at the 2005 WTO Ministerial Conference in Hong Kong to eliminate all export subsidies by 2013, it might be politically more feasible for the Committee to qualify EU production and export subsidies for sugar that lead to dumping in the South as violations of the right to an adequate standard of living as guaranteed by Article 11 of the ICESCR.

Another avenue available at the international level is to submit a complaint to the Special Rapporteur on the Right to Food.141 Given the attention devoted to the issue of third state obligations in the 2005 and 2006 reports, he might well be interested in taking up complaints about clear-cut violations.

Finally, domestic legal forums should not be ignored. A few years ago, an attempt was undertaken in the Netherlands to have a judge prohibit the Dutch government to vote in favour of a particular decision at the European Council.142 Although that particular attempt eventually failed, others might prove successful.

138 Inter alia Germany and Norway.
140 Cf. the absence of references to third state obligations in the concluding observations on Germany and Norway, two states with respect to which a parallel report on third state obligations had been submitted (Concluding Observations Germany, UN Doc. E/C.12/1/Add. 68; Concluding Observations Norway, UN Doc. E/C.12/1/Add.109).
141 See <www.ohchr.org/english/issues/food/complaints.htm>, visited on 20 December 2006.
142 In the interim injunction proceedings, the Dutch judge had forbidden the Dutch minister to vote in favour of a particular decision at the European Council, as long as the European Court of Justice had not given a preliminary ruling on the issue, for he had his doubts on the substance of the regulation. The Supreme Court of the Netherlands (Hoge Raad), however, found that the judge in the interim injunction proceedings lacked the competence for imposing such a prohibition (Hoge Raad, 10 September 1999, No. C98/013HR, Nederlandse Jurisprudentie (2003) p. 94). The question is whether the outcome would have been different had a violation of human rights been the reason for the judge to intervene.
7. Concluding Remarks

The argument developed in this article is a careful and moderate one. Rather than rejecting EU agricultural subsidies for sugar in general, it has been submitted that only subsidies—both direct ones and cross-subsidies—for structural overproduction of sugar that is then exported to the South at dumping prices to the detriment of local farmers are in violation of the third state obligation to respect the right to an adequate standard of living. The 2006 reform of the sugar regime remains problematic from a human rights perspective for it fails to recognise the third state obligation to respect the right to an adequate standard of living of farmers in the South, to which subsidised EU sugar surplus production is exported at dumping prices. EU member states that voted in favour of the new sugar regime at the European Council in February 2006 thereby violated their third state obligation to respect human rights under the ICESCR.

The above does not entail that all responsibility is shifted to the North. More thought is to be given on the division of responsibility under the ICESCR. In any event, as was pointed out before, third state obligations do not lower or obliterate domestic state responsibility in any respect. Domestic state obligations to respect, protect and fulfil economic, social and cultural rights as guaranteed by the ICESCR remain fully in place. The transformation of the EU sugar regime into a regime that is conducive to human rights through the abolition of subsidies for surplus production and export dumping may not automatically improve the living conditions of poor farmers in the South. Domestic states simultaneously have the responsibility for the adoption of policies that “can make sugar trade work for poor people.” Opportunities to increase sugar production and export are to be translated into genuine poverty reduction benefits. Such national policies may include land and asset redistribution; respect for international standards on labour rights; and prioritisation of smallholder agriculture.

The issue of EU sugar subsidies (and, by extension, agricultural subsidies more generally) is one of the rare instances in which international trade law and human rights law converge. The above human rights analysis based on the concept of third state obligations will hopefully be further supported by developments in international trade law, such as implementation of the decision of the 6th WTO Ministerial Conference in Hong Kong in 2005 to eliminate all agricultural export subsidies by 2013.

143 Watkins, supra note 9, p. 6.
144 Fowler, supra note 17, p. 6.