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IS THERE A LEGAL DUTY TO ADDRESS WORLD POVERTY?

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# *Is There a Legal Duty to Address World Poverty?\**

MARGOT E. SALOMON\*\*

## **Abstract**

States are reticent to support the idea that they have human rights obligations to people other than their own. However decades of United Nations consideration and human rights standard-setting in the area of international cooperation have advanced interpretations of the obligation whereby economic and other policies should be designed in such a way as to avoid causing injury to the interests of developing States and to the rights of their people, and, moreover, should actively seek to address existing deprivations. This latter obligation to fulfil socio-economic rights elsewhere gives rise to a host of important legal issues that provide the focus for this article. Should we understand the obligations to be those of individual States or can we speak of collective legal obligations in this area? Is the extraterritorial obligation to fulfil socio-economic rights limited to the transfer of financial resources, and if not what else might it entail? Are they best framed as secondary obligations triggered only if the rights-holder's own State is unable or unwilling to fulfil them or as simultaneous obligations? If, as per the International Covenant on Economic, Social and Cultural Rights and its monitoring Committee we recognise capacity as a basis to assist, how might the obligations among all those States with capacity be divided? In complying with these positive obligations of international assistance and cooperation what would constitute an unreasonable cost on the part of a State acting extraterritorially? In exploring these questions, this paper offers insights from the author's membership in the Drafting Committee of the 2011 Maastricht Principles on the Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights and presents the current state of legal play.

## **Keywords**

Socio-economic rights, globalisation, extraterritorial obligations, international cooperation, Maastricht Principles 2011.

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## Bringing in the law

Decent people everywhere would recognise the existence of a duty to help those in need. Indeed, many States regularly take the high ground, emphasising their moral obligation of international assistance motivated by a sense of solidarity to the deprived of the world. This philanthropic intuition notwithstanding, there are good reasons to suggest that the duties certain States owe to the world's poor go beyond the realm of charity to include obligations as a matter of international law.

There exists a general obligation for States to take action, separately, and jointly through international cooperation, to fulfil the economic, social and cultural rights of persons outside of their respective territories. This obligation is found in the United Nations (UN) Charter which requires cooperation among Member States in the achievement of human rights by all, higher standards of living, and economic and social progress and development.<sup>1</sup> This wide-ranging obligation to cooperate internationally in the realisation of human rights that States owe to each other is reinforced by the obligations of 'international assistance and cooperation' explicitly to realise economic, social and cultural rights provided for in the 1966 UN International Covenant on Economic, Social and Cultural Rights (ICESCR),<sup>2</sup> as well as the obligation of international cooperation to secure the socio-economic rights of children, as found in the UN Convention on the Right of the Child (CRC).<sup>3</sup> From the assertion in the Universal Declaration of Human Rights in 1948 of an entitlement to an international order in which human rights can be realised, to the 1970s call by the General Assembly for a New International Economic Order, to the 1986 Declaration on the Right to Development, and the Millennium Declaration affirmation of a shared responsibility to address poverty, it should be uncontroversial that international cooperation aimed at ensuring the exercise in the first instance of basic human rights, can be found among the traditional sources of international law.<sup>4</sup>

Before moving on it may be helpful to highlight that human rights are protected in 'living instruments'. The interpretation of the treaties that codify rights should be dynamic; in order to be compatible with their object and purpose they must be interpreted in light of present-day conditions. Today, under the European Convention on Human Rights for example, the concept of degrading treatment may be interpreted to include racial discrimination; the right to respect for private life requires the legal recognition of the new identity of post-operative transsexuals; and environmental pollution may result in a breach of the same article. Nowadays under the African Charter on Human and Peoples' Rights, the 'peoples' to which the collective rights provisions apply include indigenous peoples, just as an 'evolutionary interpretation' by the Inter-American Court of Human Rights of the right to property under the American Convention on Human Rights applies also to the communal property rights of indigenous peoples to the lands they currently inhabit. Indeed, the Inter-American

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<sup>1</sup> Charter arts 55, 56.

<sup>2</sup> ICESCR art 2(1); see also, 11(1), 11(2), 15(4), and arts 22 and 23. This article uses 'economic, social and cultural rights' and 'socio-economic rights' interchangeably.

<sup>3</sup> CRC arts 4, 23(4), 24(4), 28(3).

<sup>4</sup> In this article we focus on treaties, drawing particularly on developments pertaining to article 2(1) of ICESCR. For consideration of a general obligation to cooperate in the respect and observance of human rights, including socio-economic rights, see ME Salomon, *Global Responsibility for Human Rights: World Poverty and the Development of International Law* (Oxford: Oxford University Press, 2007) Ch 4. On the matter of basic human rights there is widespread acceptance among States parties of the approach adopted by the UN Committee on Economic, Social and Cultural Rights (CESCR) recognising an immediate obligation to realise the 'minimum essential levels of each of the [Covenant] rights' and of the corresponding 'core obligations'. CESCR, General Comment No 3, *The Nature of States Parties' Obligations (art. 2, para. 1, of the Covenant)* (5th session, 1990) UN Doc E/1991/23 annex III, para. 10 (1991); see also, CESCR, *General Comment No 15, The Right to Water (arts. 11 and 12 of the Covenant)* (29<sup>th</sup> session, 2002) UN Doc E/C.12/2002/11, para 37.

Court has stated that when taking into account applicable norms of interpretation, including as provided in the Convention itself, a restrictive interpretation of rights is precluded.<sup>5</sup> That varied interpretations were unlikely to have been in the minds of the drafters represent no bar to what the remit of a right protects today nor what the corresponding obligations might entail.

When it comes to obligations in the realm of world poverty even less judicial activism is required since the relevant provisions explicitly anticipate not only territorial obligations, but also extraterritorial obligations among States parties to see realised socio-economic rights outside their own borders. These include, for example, rights to an adequate standard of living, to food, and to healthcare. The provisions providing for obligations of international cooperation in the area of economic, social and cultural rights, such as article 2(1) of ICESCR the main human rights treaty on the subject, are shaped most notably by economic globalisation and what it might now demand of them. ICESCR Article 2(1) provides that 'Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant ...'. Today, what is required of many States under this and related provisions include obligations of positive action to fulfil the rights of people in far off places. This is because they can and because under conditions of economic interdependence some States simply may not be able to ensure even the minimum essential rights of their people on their own.

Extraterritorial obligations apply to all three levels of the tripartite model of obligations employed in this area. International human rights law imposes obligations on States acting separately and jointly to refrain from doing harm to people beyond their own borders ('obligation to respect' human rights), as well as obligations, under certain conditions, to protect people outside of their territory from harms at the hands of non-State actors, including corporate entities ('obligation to protect' human rights). As will have become clear, another area of extraterritorial international human rights law that is giving rise both to important legal developments as well as unresolved legal questions is that of positive obligations of States to fulfil economic, social and cultural rights beyond their borders. The 'obligation to fulfil' human rights elsewhere, which forms the basis of this paper, forces a re-examination of a number of central human rights tenets, most recently brought together in the *Maastricht Principles on the Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights*. The Maastricht Principles were adopted in September 2011 by forty leading human rights experts and reflect a consolidation of jurisprudence on the topic and a clarification of the legal parameters of the subject to date.<sup>6</sup> Drawing on the Principles themselves and from insights gleaned as a member of the six-person Drafting Committee, this paper focuses on the legal duty to address world poverty and what international law might require of States today.

## The scope of extraterritorial obligations

When it comes to human rights obligations beyond borders there are two quite clearly defined legal dimensions. On the hand, there are obligations that relate to the acts and omissions of a State, within

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<sup>5</sup> IACtHR, *Mayagna (Sumo) Awas Tingni Community Case*, 31 August 2001, Series C No. 79, para 148.

<sup>6</sup> Signatories include current and former members of UN international human rights treaty bodies, former and current Special Rapporteurs of the UN Human Rights Council, along with scholars and legal advisers of leading non-governmental organizations. The Principles can be found at:

<http://www.maastrichtuniversity.nl/web/Institutes/MaastrichtCentreForHumanRights.htm>. See further, O De Schutter, A Eide, A Khalfan, M Orellana, ME Salomon and I Seiderman, 'Commentary to the Maastricht Principles on the Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights' 34 *Human Rights Quarterly* 4 (forthcoming, 2012).

or beyond its territory, that have effects on the enjoyment of human rights outside of that State's territory.<sup>7</sup> A State, (or group of States acting collectively), that adopts agricultural subsidies undercutting farmers elsewhere and negatively impacting on their right to an adequate standard of living, may be in breach of its extraterritorial obligation to respect the rights of developing world farmers as a result of a law or policy taken within its territory that has external effects. As for conduct undertaken beyond a State's territory that may amount to a breach of its extraterritorial obligation, the situation of belligerent occupation offers one example whereby the occupying power is required to respect, protect and fulfil the rights to work, to health, to education and to an adequate standard of living.<sup>8</sup> The requirement to avoid negative effects on the exercise of economic, social and cultural rights beyond borders makes prior assessments by the State of the extraterritorial impacts of its laws, policies and practices of paramount importance.<sup>9</sup> The responsibility of each State is engaged where nullification or impairment is a foreseeable result of its conduct<sup>10</sup> and the international responsibility for a breach of its obligation will be assessed on the basis of what the authorities knew or should have known.

The second legal dimension, and that which forms the focus of this paper, applies to States' positive obligation of international cooperation to fulfil socio-economic rights universally. That human rights obligations apply to relations among States is not alien to the international law of human rights, notwithstanding that classically international human rights obligations focus primarily on the regulation of the State in its conduct towards the people within its territory.<sup>11</sup> These 'obligations of a global character'<sup>12</sup> have a strong inter-state component, but under international human rights law people remain the rights-holders and are the ultimate beneficiaries of any endeavour among States to give rights effect.

Thus a State has obligations to respect, protect and fulfil economic, social and cultural rights in certain situations that occur outside its national territory. As such, the scope of jurisdiction covers situations where a State exercises effective control outside of its own territory and over which its conduct brings about foreseeable effects on the enjoyment of these rights, whether undertaken within or outside its territory. Where human rights treaties impose obligations *requiring* extraterritorial action to fulfil socio-economic rights, the Maastricht Principles determine that jurisdiction will also attach when a State, acting separately or jointly, is in a position to exercise decisive influence or to take measures to *realise* economic, social and cultural rights beyond its borders.<sup>13</sup> Whereas jurisdiction has traditionally served as a doctrinal bar to the recognition and discharge of human rights obligations extraterritorially,<sup>14</sup> not least as a result of the outcomes engendered by an integrated global economy, the recognition under international law of a State's prescriptive authority to act beyond its borders is based on its obligation to advance human rights in the world.

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<sup>7</sup> Maastricht Principle 8(a).

<sup>8</sup> See for example, CESCR *Concluding Observations on Israel*, UN Doc E/C.12/ISR/CO/3 (2011) para. 8. For a concise overview and analysis of the Principles generally see, M Salomon and I Seiderman, 'The Maastricht Principles on the Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights', Special Section: International Law, Human Rights, and the Global Economy, Guest Editor: M Salomon, 4 *Global Policy* 3 (forthcoming, November 2012). <http://www.globalpolicyjournal.com/>

<sup>9</sup> Maastricht Principle 14.

<sup>10</sup> *Ibid.*, 13.

<sup>11</sup> See, ME Salomon, 'Legal Cosmopolitanism and the Normative Contribution of the Right to Development' in SP Marks (ed), *Implementing the Right to Development: The Role of International Law* (Harvard School of Public Health/Friedrich Ebert Stiftung, 2008) p 17.

<sup>12</sup> Maastricht Principle 8(b).

<sup>13</sup> *Ibid.*, 9(c).

<sup>14</sup> See, De Schutter et al, 'Commentary to the Maastricht Principles'.

## Obligations of international cooperation to fulfil socio-economic rights universally

Economic globalisation has revealed that socio-economic rights cannot be properly secured in the world today exclusively through the ad hoc, unilateral or bilateral effort of States. Instead, the global structural environment must be conducive to their realisation. As noted above in our consideration of the legal sources of international cooperation obligations, decades of international law-making have reaffirmed the importance of international *arrangements* that address poverty and underdevelopment and support the realisation of economic, social and cultural rights universally. Giving effect to these obligations would require the appropriate management of the international regulatory spheres of trade, investment, taxation, finance, as well as environmental and development cooperation. The elaboration, interpretation, application and regular review of treaties and standards by States, including as members of international organisations, would play an important role in addressing the structural impediments to securing human rights for all.<sup>15</sup> In sum, the very design of existing global arrangements at worst causes the deprivation that exists today and at best has failed adequately to remedy it.<sup>16</sup> Through the elaboration of obligations of international cooperation international human rights law has offered a response.

By fleshing out the content of obligations of international cooperation (including obligations of ‘international assistance and cooperation’ as expressed in article 2(1) ICESCR), we see, significantly, that international assistance and cooperation is not limited to the transfer of financial resources, as is often argued by industrialised States. High-income States tend to equate the obligation with resource transfer and then to take the position that they have no *legal* obligation to transfer resources abroad in order to address need, only a moral duty. The requirement to ensure that a whole host of international regulatory spheres contribute to an international environment enabling of human rights militates against that narrow interpretation of the norm.

Moreover, States may in fact have legal obligations to transfer money in order to address world poverty. Since the 1970s, high-income States have repeatedly committed to transferring 0.7% gross national income (GNI) in official development assistance, which four decades later may be binding upon each of them despite their original intent merely to issue political declarations. True, we would be hard-pressed to defend the position that there exists a legally binding obligation for a given State to provide any particular form of material assistance to any other specific State(s), however this current limitation does not preclude the existence of the obligation to make funds available, along with a joint obligation among States collectively to secure adequate funds to address poverty globally. This latter requirement is all the more stringent given that some aspects of the obligation to cooperate internationally in fulfilling economic, social and cultural rights globally cannot be achieved by any one State on its own. It may be worth emphasizing that a State in need may not refuse to discharge its own (territorial) obligations by invoking the failed conduct of other States in assisting.

Importantly, obligations of international cooperation are not limited to industrialised States but to all those with capacity and/or resources: in the words of the UN Committee on Economic, Social and Cultural Rights (CESCR) ‘those States in position to assist’. Any State possessing capacity and any variety of resources – economic, technical, technological, influence in decision-making – must harness those assets also towards fulfilling economic, social and cultural rights elsewhere in the world.<sup>17</sup> Taking account of varied forms of capacity and influence signals that there is a wide range of States with potential obligations. It is also uncontroversial that any State in a position to assist retains its

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<sup>15</sup> Maastricht Principle 29. See also, CESCR, *Statement on the World Food Crisis* (40th session, 2008), UN Doc E/C.12/2008/1, para 9 (2008).

<sup>16</sup> Salomon, *Global Responsibility for Human Rights*, Ch. 5.

<sup>17</sup> Maastricht Principle 31.

obligations to fulfil rights within its own territory to the ‘maximum of its available resources’.<sup>18</sup> Finally, it should be noted that there are important procedural components of a State’s obligation to cooperate, including devising a system of international coordination and allocation that would facilitate the discharging of these obligations of a global character<sup>19</sup> and the requirement to cooperate in the mobilisation of resources necessary for the universal fulfilment of economic, social and cultural rights where existing resources are inadequate.<sup>20</sup> Thus, a State is not relieved of its obligation in this area because it lacks resources: it could be held internationally responsible for not having worked towards the creation of a practical system of cooperation and for failing to have sought to mobilise the necessary resources globally.<sup>21</sup> International human rights law distinguishes obligations of conduct from obligations of result.

### **(Un)resolved issues of the legal duty to address world poverty**

The answer to the question as to whether there is a legal duty to address world poverty is: yes. However this fact takes us only half the way there. Giving meaning to the duty requires clarity as regards at least five central issues and only some move beyond containing anything more than emergent doctrinal content.

#### ***Issue 1: Should we understand these obligations to be those of individual States or can we speak of truly collective legal obligations in this area?***

In addition to obligations best given effect in our contemporary world through international assistance and cooperation, there may be obligations that can *only* be fulfilled collectively, for example meeting global need that requires resources beyond that of any one State. Securing the estimated 1 per cent of the combined GNIs of high-income countries necessary to meet financial shortfalls in redressing poverty is a truly collective endeavour. That said, the international legal responsibility of each relevant State is determined individually, on the basis of its own conduct and by reference to its own international obligations.<sup>22</sup>

#### ***Issue 2: Is the obligation to fulfil socio-economic rights limited to the transfer of resources, and if not what else might it entail?***

The transfer of financial resources is only one possible aspect of giving effect to this obligation. There exists an obligation for States to contribute to the creation of an international environment conducive to the realisation of human rights and those requirements relate to the legal and policy arenas of international trade, investment and finance, among other areas.

Three further matters are central to the proper execution of obligations of international cooperation. Their clarification would serve to determine the parameters of these obligations including for the

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<sup>18</sup> ICESCR, art 2(1).

<sup>19</sup> Maastricht Principle 30.

<sup>20</sup> *Ibid.*, 31.

<sup>21</sup> ‘The Committee notes that the phrase “to the maximum of its available resources” was intended by the drafters of the Covenant to refer to both the resources existing within a State and those available from the international community through international cooperation and assistance.’ CESCR, General Comment No 3, *The Nature of States Parties’ Obligations*, para 13.

<sup>22</sup> UN International Law Commission, ‘Draft Articles on the Responsibility of States for Internationally Wrongful Acts, with Commentaries’, *Report of the International Law Commission on the Work of its Fifty-third Session* (53<sup>rd</sup> session, 2001), UN GAOR, Supp No 10 at 43, UN Doc A/56/10 (2001) Commentary to art 47, p 125

purposes of determining what constitutes a breach, as well as address areas of recurrent diplomatic apprehension.

***Issue 3: Is the obligation of States to contribute to fulfilling economic, social and cultural rights elsewhere best framed as secondary (subsidiary), triggered only if the rights-holder's own State is unable or unwilling to fulfil them? Or should obligations of the external States be understood as simultaneous obligations?***

While it is uncontroversial that the extraterritorial obligations to 'respect' and 'protect' economic, social and cultural rights elsewhere exist alongside those of other States, international action to *fulfil* socio-economic rights by States other than the rights-holders own, it has been argued, is but a secondary duty where the 'primary' duty-bearer is unable or unwilling to fulfil its obligations to ensure a right to an adequate living or the right to food etc. This approach has clear limitations under current realities. For one, socio-economic rights remain so dramatically unmet globally that *complementary* duties among external States to give effect to obligations that will serve, in the first instance, to *remedy* the state of affairs must be said to exist.<sup>23</sup> Similarly, the restructuring and constant monitoring of systemic and structural deficiencies of the global economic order so that it supports socio-economic rights cannot be understood as constituting conditional duties. Next, where they exist, the assignment of secondary duties to external States in the area of *human rights* should reasonably be determined on the basis of the failure of the *rights-holders* to exercise their rights, and not based on the reason their own *State* has failed to meet its obligations. Put differently, the significance of distinguishing between whether the rights-holder's own State is *unable or unwilling* to comply with its obligations is important in determining that State's *own* responsibility for failure to meet its human rights obligations – inability giving rise to possible defences that might preclude wrongfulness. However, the distinction bears no relevance as regards assigning the duty to act to other States that can help: that is rightfully determined exclusively on the basis of the failure of the rights-holders to exercise their rights.<sup>24</sup> It is that failure that gives rise to obligations on States in a position to assist.

***Issue 4: Where capacity determines the existence of a duty-bearer (unlike, for instance, where causation or historical responsibility might point to the duty-bearing State), how are the obligations among all those States with capacity to be divided?***

This is a complex topic that has recently begun to receive the attention of legal scholars. In short, in the absence of any precise systems of international coordination and allocation under international human rights law that would facilitate the discharging of obligations of a global character, the current minimum requirement is that States have an obligation to devise a suitable international division of responsibilities necessary to give effect to the obligation to cooperate in fulfilling economic, social and cultural rights throughout the world. As has been noted, the aspect of the obligation that can clearly be ascertained at present is a procedural one: the establishment of a system of negotiated burden-sharing that could allow for this obligation to be meaningfully discharged.<sup>25</sup>

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<sup>23</sup> See, Salomon, *Global Responsibility for Human Rights*, Ch 5.

<sup>24</sup> See, L Wenar, 'Responsibility and Severe Poverty' in TW Pogge (ed), *Freedom from Poverty as a Human Right: Who owes what to the very poor?* (OUP/UNESCO, 2007) p 255, at 265.

<sup>25</sup> See, De Schutter et al, 'Commentary to the Maastricht Principles'.

***Issue 5: In complying with these positive obligations of international assistance and cooperation what would constitute an unreasonable cost on the part of a State acting extraterritorially?***

For immediate purposes the important point to highlight is that while the relevant State in a position to assist retains the obligation to fulfil economic, social and cultural rights within its territory, irrespective of whether socio-economic rights have been fully realised for persons located on a State's own territory it could still be said to have positive obligations to fulfil the human rights of people outside of its borders. The determination as to what constitutes the 'adequate and reasonable' use of its capacity and available resources towards the immediate and/or progressive realisation of rights at home as well as abroad should be formed on the basis of an objective determination.<sup>26</sup>

While we have come some way in making international human rights law responsive to global deprivation, we have further to go in refining the content of extraterritorial obligations when it comes to socio-economic rights. Conceptual challenges and doctrinal gaps notwithstanding, there are undoubtedly legal obligations to the world's poor. To see justice served however, there is considerable work yet to do.

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<sup>26</sup> For detailed consideration of options as to how it can be determined that a State has met its domestic obligations so as to give rise to extraterritorial obligations, see ME Salomon, 'Deprivation, Causation, and the Law of International Cooperation' in M Langford, W Vandenhole, M Scheinin and W van Genugten (eds), *Global Justice, State Duties: The Extra-Territorial Scope of Economic, Social and Cultural Rights in International Law* (forthcoming, Cambridge University Press, 2013); G Ooms and R Hammonds, 'Taking up Daniels' Challenge: The Case for Global Health Justice', 12 *Health and Human Rights* 1 (2010) p 29, at 36 ; and A Khalfan, 'Division of Responsibility between States' in M Langford, et al (eds), *Global Justice, State Duties*.

